

TAB J

Banque de résumés SOQUIJ**Parties**

Édouard c. Entreprises environnementales Pierrefonds inc.

Juridiction

Cour supérieure (C.S.), Montréal, 500-05-059266-005

Décision de

Juge Allan R. Hilton

Date de la décision

2001-07-20

Références

AZ-01021945

J.E. 2001-1777

Texte intégral : 7 pages (copie déposée au greffe)

Indexation

PROFESSIONS — conflit d'intérêts — avocat — déclaration d'inhabilité — conduite abusive envers un confrère — dépôt d'une plainte disciplinaire sur la base d'un document anonyme — confidentialité des renseignements — relation avocat-client.

HABILITÉ À REPRÉSENTER UN CLIENT — PROCUREUR.

La Dépêche

Un avocat qui a déposé une plainte disciplinaire contre un confrère sur la base d'un document anonyme contenant des renseignements confidentiels ne peut être déclaré inhabile pour cette raison.

Résumé

Requête en déclaration d'inhabilité d'un avocat. Rejetée.

Les requérants ainsi que 146 autres résidents de la ville de Pierrefonds sont parties à une action de plus de 1 million de dollars en dommages-intérêts contre l'intimée. L'avocat de cette dernière a jugé nécessaire de procéder à l'interrogatoire au préalable des 151 requérants. Leur avocat a convoqué une réunion avec tous ses clients dans le but de les préparer aux interrogatoires à venir et de discuter de questions relatives au litige. À cette fin, il a loué un local dans une église de Pierrefonds. Au début de la réunion, les précautions d'usage ont été prises pour que seules les personnes y ayant droit soient présentes dans la salle. Toutefois, la rigueur de l'application de ces mesures de sécurité s'est amenuisée au fur et à mesure que progressait la réunion, qui a duré trois heures. Le lendemain, un représentant de l'intimée a reçu une enveloppe contenant un document qui résumait certains sujets traités lors de cette réunion. Ce document dactylographié était anonyme et ne portait aucune date. L'intimée en a informé son avocat, qui a constaté que l'avocat des requérants n'aurait pas transmis à ses clients l'offre de règlement qu'il leur avait faite et qu'il aurait eu des remarques désobligeantes sur ses habiletés à s'exprimer en anglais et à conduire des interrogatoires dans cette langue. Sur la seule base des informations contenues dans ce document, il a alors déposé une plainte au syndic du Barreau du Québec contre l'avocat des requérants, qui a rétorqué en l'accusant d'avoir espionné sa réunion. De plus, lors de la tenue des interrogatoires au préalable, l'avocat de l'intimée aurait posé des questions en relation avec les sujets traités dans le document anonyme. Les requérants demandent de déclarer que l'avocat de l'intimée est inhabile à

occuper en l'instance en raison de son comportement inapproprié et à cause du manque de professionnalisme dans les circonstances où il a porté plainte au syndic du Barreau du Québec.

Décision

Les propos tenus lors de la réunion convoquée par l'avocat des requérants l'ont été dans le cadre de leur relation avocat-client et ils avaient un caractère confidentiel. L'avocat de l'intimée, lors de la réception du document anonyme, aurait dû dévoiler son existence à son confrère, lui en envoyer une copie et détruire toute autre copie en sa possession dans les plus brefs délais. De plus, il a agi de façon hautement répréhensible en portant plainte contre un confrère au syndic du Barreau uniquement sur la foi d'une source d'information inconnue et non vérifiable. Cela constituait une action abusive et dérogatoire aux règles de conduite entre procureurs. Toutefois, il ne peut être déclaré inhabile pour ces raisons. En effet, malgré le fait que les requérants et leur procureur ont le sentiment légitime que le secret de leur entretien a été trahi, il n'a pas été prouvé que l'avocat de l'intimé avait requis ce document ni qu'il avait pris part, de quelque manière que ce soit, à sa confection. Par ailleurs, l'information qui se trouvait dans le document anonyme n'a procuré aucun avantage à l'avocat de l'intimée et ces renseignements n'étaient d'aucune pertinence quant au fond de la cause. En effet, le document ne traitait pas des questions les plus importantes qui avaient pourtant été discutées lors de la réunion. De plus, ne sachant pas de qui provenait le document, l'avocat de l'intimée ne pouvait tenter de compléter l'information qui s'y trouvait.

Fascicule Express
J.E. 2001, no 40

Législation citée
C.P.C., art. 59

Jurisprudence citée

Applique | Explique | Distingue | Critique | N'applique pas | Mentionne | Citée(s) par les parties

Applique

Paragr. 27: *Chevrier c. Guimond*, (C.A., 1984-02-01), SOQUIJ AZ-84011038, J.E. 84-188, [1984] R.D.J. 240

Paragr. 24: *MacDonald (Succession de) c. Martin*, (C.S. Can., 1990-05-10), SOQUIJ AZ-91111018, J.E. 91-85, [1990] 3 R.C.S. 1235, 77 D.L.R. (4th) 249, [1991] 1 W.W.R. 705, 121 N.R. 1, 70 Man. R. (2d) 241, 48 C.P.C. (2d) 113

Date du versement initial
2001-10-02

Date de la dernière mise à jour
2006-07-29

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N^o : 500-05-059266-005

DATE : JULY 20, 2001

PRESENT : THE HONOURABLE MR. JUSTICE ALLAN R. HILTON

**RICHARD EDOUARD, STEPHANE RIGGI, MARIO MORELLATTO, THOMAS
VACCARO and JOE IOFFREDI**
Plaintiffs/Petitioners

v.

LES ENTREPRISES ENVIRONNEMENTALES PIERREFONDS INC.
Defendant/Respondent

JUDGMENT

[1] The Plaintiffs seek to disqualify the Defendant's counsel on a basis that does not appear to have been previously litigated in Quebec, which is not surprising in light of the unusual circumstances revealed by the evidence.

[2] The five Plaintiffs are suing in their own names and pursuant to mandates conferred on them pursuant to Article 59 *C.C.P.* by several other residents of Pierrefonds. There are a total of 151 individuals who are thus claiming damages of in excess of one million dollars against the Defendant arising out of the latter's alleged failure to adequately control odours and toxic emissions from a quarry it operates in that city.

[3] The Defendant's current attorneys, the firm of Jodoin Huppé, assumed responsibility for the management of the case in March of this year as the result of the Defendant's dissatisfaction with the diligence of its previous attorneys. Mtre Robert Jodoin was immediately faced with the necessity of advancing the progress of the matter, and in so doing he concluded that he needed to conduct examinations on discovery of all of the 151 claimants. As a result of his inability to reach agreement with

500-05-059266-005

PAGE: 2

the Plaintiffs' attorney as to the scheduling of the examinations, he issued subpoenas to all 151 claimants that were returnable beginning on May 10.

[4] The Plaintiffs' attorney, Mtre Audi Gozlan, decided to hold a meeting with his clients in order to review the proceedings, to prepare for the discoveries, and to discuss general issues relating to the conduct of the litigation. To do so, for obvious reasons, he needed to use premises that could accommodate so large a crowd, which would have been impossible in his office. He therefore rented the Church Hall of St. Thomas à Beckett Church in Pierrefonds for the evening of May 8, with an anticipated attendance of 150 persons.

[5] Prior to the meeting, Mtre Gozlan notified anyone with access to the Internet on his website that such a meeting would take place, but he did not identify the specific place, date or time of the meeting. Mtre Gozlan had been using a website to keep his clients abreast of developments in the case.

[6] Mtre Jodoin and his principal contact with the Defendant, Mr. Marc Michaud, were aware of the existence of this website, and they consulted it regularly to see what information Mtre Gozlan was providing to his clients. Neither of them knew, however, when or where the anticipated meeting would take place based on the information available on the website.

[7] In fact, Mtre Gozlan had wisely taken the precaution of having a few of the named Plaintiffs and others who he trusted telephone all of the claimants to inform them of the location and time of the meeting at the Church Hall. He also insured that everyone who came into the Church Hall would sign in and be identified, and that when the meeting began, that the door to the room would be closed. The door, however, was not locked, and during the next three hours while the meeting was taking place, participants were free to leave for whatever purpose and come back in without being checked again. There was an apparent breakdown of security as a result.

[8] At the meeting, Mtre Gozlan first began by presenting an offer of settlement that Mtre Jodoin had made. This offer was considered derisory and it was thus refused. Most of his clients are Anglophones, however, Mtre Gozlan asked those present to identify whether any of them would wish to be examined in French so that he could thus inform Mtre Jodoin for the purposes of retaining a stenographer. He also mentioned that an additional financial contribution would be required from the claimants to defray the cost of the discoveries. The claimants then reviewed what would happen at the discoveries, how to best answer anticipated questions, and matters of a similar nature. The claimants also discussed freely the nature and consequence of their various illnesses. At the end of the meeting, after Mtre Gozlan had received the list of names of those who wished to be examined in French, it seems he did make, a remark to the effect that Mtre Jodoin had a less than perfect command of English. He added that those of his clients who wished to testify in English should do so despite Mtre Jodoin's supposedly imperfect command of English.

500-05-059266-005

PAGE: 3

[9] It is apparent from the foregoing that the meeting between Mtre Gozlan and his clients was intended to be one that benefited from attorney-client privilege, and that as a result its contents were confidential. Alas, as events transpired, such was not to be the case.

[10] According to the evidence, on the morning of May 9, when Mr. Michaud arrived at his office in Pierrefonds around 6:30am, he found an envelope with his name on it awaiting him in the mailbox. He opened the envelope and found in it an unsigned, undated but typed memorandum which provided a summary of some but not all of the subjects that were discussed at the meeting between Mtre Gozlan and his clients. As previously mentioned, Mr. Michaud did not know in advance from the website when or where the meeting would take place, and thus he was surprised to receive the anonymous memorandum. He read it and two things attracted his attention : first, there was no reference to the offer of settlement he had authorised to be made having been presented, and second, he was concerned that the anonymous memorandum described Mtre Jodoin's capacity to conduct examinations in English in a rather unflattering way.

[11] Mr. Michaud decided to telephone Mtre Jodoin with a double purpose : to ensure that he had indeed conveyed the offer of settlement to Mtre Gozlan, and to verify whether he would be able to adequately examine those of the claimants who had chosen to be examined in English. Mtre Jodoin satisfied him on both counts, however, as a result, Mr. Michaud also faxed him a copy of the anonymous memorandum.

[12] It is important to note that it is apparent, at least to the undersigned, that the anonymous memorandum was not drafted by one of the claimants. There is, however, absolutely no satisfactory basis to conclude that it was solicited by either Mtre Jodoin or Mr. Michaud, both of whom, as previously mentioned, were unaware of the date, time and place of the meeting.

[13] There next occurred an event that the Court described during the hearing as being nothing short of disgusting and shameful. Despite the fact that he was unaware of the source of the anonymous memorandum and thus not in a position to verify its authenticity or accuracy, Mtre Jodoin relied on it to lodge a complaint against Mtre Gozlan with the Syndic of the Bar of Quebec on the basis that the latter had not presented a duly made offer, of settlement to his clients, and that he had inappropriately ridiculed Mtre Jodoin's lack of capacity in English.

[14] Mtre Jodoin acknowledged that he did not forward a copy of the anonymous memorandum to the Bar, which is not surprising since it could not possibly have been acted on. Rather, he simply stated in his letter that the matters he was submitting to the Bar's attention had been confirmed to him by someone who was present for the entirety of the meeting. Mtre Jodoin did not know this to be true and could not have found out whether it was true since he did not know who to speak to about it. Mtre Jodoin further acknowledged during the hearing that he decided to send the letter to the Bar more to provoke an inquiry by the Syndic than anything else. He could not have had any

500-05-059266-005

PAGE: 4

legitimate expectation that his letter would lead to disciplinary charges against Mtre Gozlan. Indeed, none were forthcoming.

[15] It is difficult to imagine a more abusive form of conduct by one lawyer against another than to file a complaint based on information from an unknown and thus unverifiable source. Despite being given the opportunity to do so at the hearing, Mtre Jodoin did not respond to the Court's invitation to extend his apologies to Mtre Gozlan. This type of conduct is something that the Syndic of the Bar might wish to inquire into to emphasise the gravity associated with the filing of a disciplinary complaint in such circumstances. Doing so cannot and should not be treated as a legitimate adjunct to the conduct of litigation.

[16] As one might expect, Mtre Gozlan did not greet Mtre Jodoin's complaint to the Bar with very much equanimity. Not knowing any of the circumstances described above, other than the fact that someone obviously had attended his meeting with his clients who ought not to have been there, he responded to Mtre Jodoin's complaint by accusing him of having arranged to have his meeting infiltrated and of "spying n my meeting". Mtre Jodoin did nothing to dissipate Mtre Gozlan's concerns, and it was only at the hearing before the undersigned that Mtre Jodoin disclosed the existence of the anonymous memorandum that he had received from Mr. Michaud as the basis on which he made his complaint to the Bar.

[17] Nevertheless, Mtre Jodoin did make use of the information he had gleaned from the anonymous memorandum to a certain extent. When the discoveries of Mtre Gozlan's clients began on May 10, he asked some of them, off the record, whether they spoke French, and if Mtre Gozlan had ridiculed him at the meeting. On the record, he also asked what type of additional financing they had to contribute to continue to prosecute the claim.

[18] Needless to say, these inquiries and the answers that may have been given were totally irrelevant to the merits of the Plaintiffs' claim, and they should not have been posed, whether off the record or on the record. In particular, the right of someone to testify in the language of his or her choice, be it French or English, is completely unrelated to whether that person also speaks the other language. It is the lawyer who must adjust to the witness' choice, and not the reverse. Similarly, the financing of the Plaintiffs' case is not even remotely a proper subject to pursue.

[19] That being said, the evidence does not show that Mtre Jodoin made any use of the information gleaned from the anonymous memorandum that could in any way influence the eventual outcome of the case. The most sensitive details of the meeting that dealt with the nature of the various medical problems of those who were present, the manner in which questions should be answered, the extent of individual damage claims, and the procedural steps soon to be undertaken, were not at all discussed in the anonymous memorandum. It follows that Mtre Jodoin did not benefit from having prior knowledge of the substance of those revelations, all the more so since he did not know

500-05-059266-005

PAGE: 5

who had prepared the anonymous memorandum and thus could not obtain further details about what else may have transpired at the meeting.

[20] It is nevertheless easy to understand that Mtre Gozlan and his clients felt that the sanctity of their discussions had been violated. Moreover, not knowing the whole story, it was reasonable for them to believe that either the Defendant or Mtre Jodoin had arranged for someone to improperly attend their meeting.

[21] The Court must base this judgment, however, on what the evidence has shown, and not on what the entirely legitimate suspicions of the Plaintiffs and Mtre Gozlan may have been when they learned of the breach of the confidentiality of their meeting. That evidence does not allow the Court to find as a matter of fact or to presume that either Mtre Jodoin or his client directed someone to attend the meeting surreptitiously and to report to them about what transpired. The Court also concludes that despite Mtre Jodoin's grossly improper use of the information in the anonymous memorandum when he complained to the Syndic of the Bar, he has not made any use of the information in a way that could possibly have a bearing on the merits of the Plaintiffs' claim.

[22] It is against this factual background that the Court must consider the Plaintiffs' motion to disqualify Mtre Jodoin and his firm.

[23] The allegations in the Plaintiffs' motion, however, have been overtaken by events. Their motion alleged, incorrectly as it turned out, that Mtre Jodoin had sent someone to spy on the meeting so as to invade its privacy, and that in so doing he had acted unlawfully. If the evidence had been to that effect, it goes without saying that the Court would have had no hesitation in intervening in an appropriate manner to protect the basic integrity of its process, and it would have issued orders accordingly.

[24] Although the parties have submitted an array of authorities on the subject of conflict of interest, they are not germane to a resolution of this case. Clearly, the general principles that emerge from the judgment of the Supreme Court of Canada in *MacDonald Estate v. Martin*,¹ continue to apply when one considers the important, value of maintaining the high standards of the legal profession and the integrity of our system of justice.

[25] Although it may be difficult for the Plaintiffs to digest, the Court cannot conclude that Mtre Jodoin should be disqualified for his improper behaviour and lack of professionalism in respect of his complaint to the Bar concerning Mtre Gozlan. That is a matter for the Bar to resolve in whatever way it determines best. If taken to its logical conclusion, the mere fact that Mtre Jodoin came into possession of the anonymous memorandum in the way he did and read its contents, without anything more, would be a sufficient ground to disqualify him. That would be far too stringent a standard to apply.

[26] Rather than make a vexatious complaint against Mtre Gozlan, however, Mtre

¹ [1990] 3 S.C.R. 1235

500-05-059266-005

PAGE: 6

Jodoin should have instead disclosed the existence of the anonymous memorandum to Mtre Gozlan, provide him with a copy and destroy his own copy, all without delay. By failing to be candid with Mtre Gozlan, and by acting as he did in submitting an unmeritorious complaint to the Bar, he more or less brought these proceedings upon himself and his firm.

[27] In any event, the anonymous memorandum and the information it contains first came into the possession of Mtre Jodoin's client in circumstances that the evidence shows were innocent insofar as the Defendant is concerned. It would be illusory to suggest that the contents of the document can be erased from Mr. Michaud's memory, even if the Court were to acquiesce to the Plaintiffs' motion and to disqualify Mtre Jodoin and his firm. In this particular case, the elegant expression adopted by Jyndale, J.A. in *Chevrier v. Guimond* to the effect that "a secret once revealed is a secret no longer"² is applicable, and ordering a change of attorneys will not alter that reality.

[28] Accordingly, the Court is bound to dismiss the Plaintiffs' motion. It will exercise its discretion and do so without costs, however, in light of Mtre Jodoin's lack of candour and failure to dissipate Mtre Gozlan's legitimate concerns, both of which rendered the presentation of the Plaintiffs' motion inevitable.

DISPOSITION

[29] The Court dismisses the Plaintiffs' motion to declare an attorney unable to act without costs.

ALLAN R. HILTON, J.S.C.

Mtre Eric Delouya
Attorney for Plaintiffs/Petitioners

Mtre Richard Arcand
Attorney for Defendant/Respondent

Date of hearing : July 16, 2001

² [1984] R.D.J. 240, at p. 242 (C.A.)