Citation: The City of Winnipeg v 3177751 Manitoba Ltd, 2023 MBCA 100
Date: 20231212
Docket: AI22-30-09806, AI22-30-09807

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

B E T W E E N:

	)	***A. F. Hacault** and*
	)	***M. L. Grande***
THE CITY OF WINNIPEG	)	*for the Appellant*
	)	
(Applicant) Respondent	)	
	)	***L. W. Bowles** and*
	)	***K. T. Williams, K.C.***
- and -	)	*for the Respondent*
	)	
	)	
3177751 MANITOBA LTD.	)	*Appeal heard:*
	)	***March 15, 2023***
(Respondent) Appellant	)	
	)	
	)	*Judgment delivered:*
	)	***December 12, 2023***

On appeal from 2022 MBQB 85

LEMAISTRE JA

Introduction

[1] 3177751 Manitoba Ltd. (317) appeals the judge's order dismissing its motion to remove Taylor McCaffrey LLP (TM) as counsel for the City of Winnipeg (the City) in the expropriation proceedings regarding 1780 Taylor Avenue (the land) (the motion). 317 sought the disqualification order based

on what it asserted was a conflict of interest on the part of TM. 317 also appeals the judge's order for costs.

[2] For the reasons that follow, I would dismiss the appeal of the judge's order refusing the motion and I would allow the appeal of the award of costs in part.

Background

[3] The background to this litigation involves the City's expropriation of the land, which was owned by 317. The City entered into an agreement with and paid Shindico Realty Inc. to build a fire hall on the land—which was built. However, the City was unable to finalize an agreement with 317 for the transfer of the land. As such, the City expropriated the land and brought an application for an order requiring 317 to set a hearing before the Land Value Appraisal Commission (LVAC) to determine the compensation due pursuant to *The Expropriation Act*, CCSM c E190 [the *Act*].

[4] The City says the main issue regarding the compensation due to 317 on the expropriation proceedings is whether 317 is entitled to compensation for the fire hall and the land or just the land. The City says that it owns the fire hall because it paid for the construction of the fire hall. There is also an issue of valuation of the land.

[5] Initially, the City was represented by in-house counsel on the expropriation proceedings. In late 2019, the City retained Kevin Williams (Williams), counsel at TM.

[6] On the motion, 317 argued that TM possesses confidential information that is relevant to the expropriation proceedings as a result of its previous representation of various Shindico companies, including information regarding the structure of the Shindico companies. Its position was that this put TM in a conflict warranting disqualification. 317 also argued that TM breached the bright line rule, which prohibits a lawyer from acting for and against the interests of the same client at the same time, because TM had an open file with another Shindico company (69356 Manitoba Ltd. (693)) when it was retained by the City (see *R v Neil*, 2002 SCC 70 at para 29 [*Neil*]). 317's position was that the breach of the bright line rule also warranted disqualification.

[7] The City's position on the motion was that the information it intends to rely on in support of its assertion that it has already paid for the fire hall is information that is publicly available. It asserted that it is public knowledge that Shindico Realty Inc. and 317 are both owned and controlled by the Shindleman brothers, Sandy and Robert. It also asserted that it does not intend to use any confidential information TM may have in its possession as a result of its prior representation of Shindico companies. Therefore, the City argued that there was no basis for an order disqualifying TM from representing it.

[8] The City also argued that the bright line rule did not apply in this case because TM did not have a meaningful solicitor and client relationship with 317 and 693 at the same time.

[9] The judge agreed with 317 that the Shindico companies should be treated as a single client for the purpose of deciding the motion. He reviewed the various files on which TM was counsel (both for and opposite the Shindico

companies) and, applying the test from *MacDonald Estate v Martin*, [1990] 3 SCR 1235 [*MacDonald Estate*], he concluded that the matters were all unrelated to the expropriation proceedings.

[10] In his analysis, the judge focussed on whether TM received confidential information "attributable to a solicitor and client relationship [with the Shindico Companies] relevant to [the expropriation proceedings]" (at para 71). He concluded that "[t]here is simply no evidence that [TM] has any relevant confidential information which could be used against the Shindico Companies in 'some tangible manner' at the expropriation hearing" (at para 78).

[11] The judge did find that TM breached the bright line rule by accepting the City's retainer while it was still acting for 693 (see para 80). However, the judge concluded that this breach of the duty of loyalty owed to Shindico did not warrant disqualification.

[12] Finally, the judge awarded elevated costs on the motion to the City, which included fees for Williams who acted as both second counsel and a witness during the motion.

Issues on the Appeal

[13] 317 raises the following grounds of appeal:

1. The judge erred by failing to find that TM was in a conflict of interest warranting disqualification by misconstruing the issues on the expropriation proceedings and by failing to apply the correct legal test.

2. The judge erred by failing to disqualify TM after finding it breached the bright line rule by failing to apply the correct legal test.

3. The judge erred in awarding costs by improperly including fees for a lawyer who acted as both counsel and a witness and by awarding costs that are inordinately high.

Standard of Review

[14] Applying the wrong legal test is an error of law reviewed on the standard of correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at para 8 [*Housen*]). The judge's application of the correct test is subject to the palpable and overriding error standard of review (see *Housen* at paras 26-28).

[15] Whether retainers are sufficiently related giving rise to the presumption that a lawyer possesses relevant confidential information is a question of fact (see *Brookville Carriers Flatbed GP Inc v Blackjack Transport Ltd*, 2008 NSCA 22 at para 57).

[16] The judge's decisions regarding the remedies for the breach of the duty of loyalty and the award of costs are discretionary decisions entitled to significant deference on appeal absent a misdirection or a result so clearly wrong as to amount to an injustice (see *Nash v Nash*, 2019 MBCA 31 at para 42; and *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at paras 24-28).

The Law on Conflicts of Interest

[17] Lawyers owe a broad duty of loyalty to their clients. This includes a duty to avoid conflicting interests, a duty of commitment to the client's cause (or a duty of effective representation) and a duty of candour (see *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 at para 19 [*McKercher*]).

[18] The law on conflicts of interest is concerned with the potential harm to clients and the risks to the legal system as a whole (David Layton, "The Pre-Trial Removal of Counsel for Conflict of Interest: Appealability and Remedies on Appeal" (1999) 4:25 Can Crim L Rev). A client's right to counsel of choice is not absolute; it is subject to reasonable limits.

[19] The Supreme Court of Canada decision in *MacDonald Estate* provides the foundation for the modern tests for conflicts of interest. As explained by Sopinka J, there are three competing policy considerations when determining whether a disqualifying conflict of interest exists. He stated (at p 1243):

> . . .
> In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession. The review of the cases which follows will show that different standards have been adopted from time to time to resolve the issue. This reflects the different emphasis placed at different times and by different judges on the basic values outlined above.
> . . .

[20] These values "frame the policy discussion and mitigate the harshness of the remedy of disqualification on the lawyer or law firm" (M Deborah MacNair, *Conflicts of Interest: Principles for the Legal Profession*, ed by Eugene AG Cipparone & Ted Tjaden (Toronto: Thomson Reuters, 2023) vol 1 (loose-leaf updated 2021, release 2) at 4-18).

[21] In *McKercher*, McLachlin CJ explained that the duty to avoid conflicts of interest is concerned with two potential prejudices: 1) the misuse of confidential information, and 2) jeopardy to effective representation. She stated (at para 23):

> The law of conflicts is mainly concerned with two types of prejudice: prejudice as a result of the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer "soft peddles" his representation of a client in order to serve his own interests, those of another client, or those of a third person. As regards these concerns, the law distinguishes between former clients and current clients. The lawyer's main duty to a former client is to refrain from misusing confidential information. With respect to a current client, for whom representation is ongoing, the lawyer must neither misuse confidential information, nor place himself in a situation that jeopardizes effective representation. . . .

Misuse of Confidential Information

[22] In *MacDonald Estate*, the Supreme Court established a two-part test that addresses conflicts between current and former clients and the use of confidential information where the client objects to the retainer giving rise to the alleged conflict.

[23] Recognizing that "the question of the use of confidential information . . . is usually not susceptible of proof" (*MacDonald Estate* at

p 1259), Sopinka J stated that the test is whether "the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur" (at p 1260). He set out two questions relevant to this analysis: "(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?" (at p 1260).

[24] Whether the lawyer received confidential information engages a rebuttable presumption. As explained by Sopinka J (at pp 1260-61):

> . . . In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not 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. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden. . . .
>
> [emphasis added]

[25] Thus, the onus is first on the party alleging the conflict of interest to demonstrate a previous solicitor and client relationship and that the two retainers are sufficiently related.

[26] In *Skii km Lax Ha v Malii*, 2021 BCCA 140 [*Skii km Lax Ha*], Abrioux JA warned that the sufficiently related standard should not be applied too broadly. He stated (at para 37):

> The sufficient relation standard is at the heart of this appeal. Courts have frequently cautioned against an overbroad application of this aspect of the test given the "draconian effect of the remedy sought", namely disqualification of a party's chosen representation: *Stewart v. Stewart,* 2016 BCSC 2256 [*Stewart*] at para. 50; *Le Soleil* [*Hospitality Inc v Louie,* 2010 BCSC 1954 [*Le Soleil*]] at para. 32; *Sandhu v. Mangat,* 2018 BCCA 454 [*Sandhu*] at paras. 39 and 43. However, a party's freedom to be represented by the counsel of their choice must also be balanced against the public interest in protecting the high standards of the legal profession and the "integrity of our system of justice", both of which are threatened when potential conflicts of interest arise: *MacDonald Estate* at 1243.

[27] The party alleging a conflict of interest must demonstrate that the retainers are sufficiently related on the basis of "clear and cogent evidence" (*Chapters Inc v Davies, Ward & Beck LLP*, 2001 CanLII 24189 (ONCA) at para 29 [*Chapters*]); bald assertions will not suffice. And, it must do so without breaching confidentiality. In *Chapters*, Goudge JA explained the inquiry in the following way (at para 30):

> In my opinion this inquiry must be guided by the need to avoid the evil addressed in MacDonald Estate, namely, the possible misuse by the lawyer of information acquired in confidence. Moreover, it is clear that the inquiry must be conducted in a way that preserves that confidence. There may be cases in which a simple description of the two retainers shows them to be so closely connected that the court will infer the possible misuse of confidential information and hence find the retainers to be sufficiently related. More commonly, as in this case, an outline of the nature of the confidential information passed to the lawyer pursuant to the first retainer will be needed. In the end, the client must demonstrate that the possibility of relevant confidential information having been acquired is realistic, not just theoretical. For 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.

[28] It is not enough to show "that the legal issues in the two retainers 'intersect and overlap'" (*Skii km Lax Ha* at para 39), that the lawyer acquired "legal knowledge and skills" (*Greater Vancouver Regional District v Melville*, 2007 BCCA 410 at para 30) or that the law firm acquired "an understanding of the corporate philosophy" (*McKercher* at para 54). The test does not apply to information that was "already notorious or was received for the purpose of being used publicly or otherwise disclosed in the conduct of the client's affairs" (*Skii km Lax Ha* at para 40).

[29] In *McKercher*, CN sought to disqualify McKercher LLP from representing the plaintiff in a class action due to an alleged conflict of interest. Chief Justice McLachlin concluded that McKercher's retainers with CN were entirely unrelated to the class action and that CN had failed to show how McKercher's representation of CN could have yielded relevant confidential information that could be used against it. In order to establish a risk of misuse of confidential information sufficient to meet the standard required for a conflict of interest, "[t]he information must be capable of being used against the client in some tangible manner" (*McKercher* at para 54).

[30] Matters may be found to be sufficiently related where there are "[s]pecific 'points of connection' or insight acquired into the former client's strengths and weaknesses, character and personality traits, or litigation strategy in the present matter" (*Skii km Lax Ha* at para 39). As Cromwell JA (as he then was) put it in *Brookville*, "[t]he issue is not so much whether the subject-matter of the two retainers is the same, but whether confidential information learned in one would be relevant to the other" (at para 50).

[31] Once it has been established that a prior solicitor and client relationship existed and that the retainers are sufficiently related, the court will presume that confidential information was passed between the client and lawyer unless the lawyer establishes that no confidential information relevant to the present matter was received.

[32] The second question set out by Sopinka J in *MacDonald Estate*—"[i]s there a risk that [the confidential information] will be used to the prejudice of the client?" (at p 1260)—addresses the risk of misuse of the confidential information received.

[33] In circumstances where it reasonably appears that disclosure of confidential information might occur, the test for disqualification on the basis of a conflict of interest is satisfied and disqualification is automatic (see *MacDonald Estate* at pp 1246, 1261). As Sopinka J explained (at p 1261):

> . . . A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship. . . .

[34] Whether lawyers at the same firm should also be disqualified depends on whether there is "clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur

by the ‘tainted’ lawyer to the member or members of the firm who are engaged against the former client” (*MacDonald Estate* at p 1262).

[35] Prioritizing the preservation of the confidentiality of information received by a lawyer from a client maintains and strengthens public confidence in the integrity of the profession and in the administration of justice. It also protects the public’s interest in retaining counsel of choice and the profession’s mobility interests. Thus, a lawyer is permitted to act against a former client only when “a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur” (*ibid* at p 1263).

[36] To summarize, a lawyer can act against a former client without risking the misuse of confidential information when: the former client consents to the retainer giving rise to the alleged conflict; the prior retainer and the new retainer are not sufficiently related; or the lawyer establishes that no confidential information passed from the client to the lawyer.

[37] When a lawyer with confidential information transfers to a different law firm, which is acting against the lawyer’s former client, the law firm may be permitted to continue to act against the lawyer’s former client if all reasonable measures to protect the misuse of confidential information have been taken.

[38] Where there exists a risk of misuse of confidential information, disqualification is automatic.

Effective Representation and the Bright Line Rule

[39] A trilogy of cases, which were decided after *MacDonald Estate* addresses the second component of the duty to avoid conflicting interests—effective representation (see *McKercher*; *Strother v 3464920 Canada Inc*, 2007 SCC 24 [*Strother*]; and *Neil*).

[40] Fundamentally, lawyers must be effective representatives for their clients, "serv[ing] as a zealous advocate for the interests of [their] client[s]" (*McKercher* at para 25). The requirement to effectively represent a client's interests "may be threatened in situations where the lawyer is tempted to prefer other interests over those of his client" (*ibid* at para 26). To address this concern, the Supreme Court created the bright line rule.

[41] The bright line rule "prevents the concurrent representation of clients whose immediate legal interests are directly adverse" (*McKercher* at para 50) without consent. It is concerned with "a lawyer's 'duty of loyalty' to a current client in a case where the lawyer did not receive any confidential information that was (or is) relevant to the matter in which he proposes to act against the current client's interest" (*Neil* at para 1).

[42] In *McKercher*, McLachlin CJ clarified the bright line rule. She stated (at para 31):

> The bright line rule holds that a law firm cannot act for a client whose interests are adverse to those of another existing client, unless both clients consent. It applies regardless of whether the client matters are related or unrelated. The rule is based on "the inescapable conflict of interest which is inherent" in some situations of concurrent representation: *Bolkiah v. KPMG*, [1999] 2 A.C. 222 (H.L.) [*Bolkiah*], at p 235, cited in *Neil*, at para. 27. It reflects the essence of the fiduciary's duty of loyalty: ". . . a fiduciary cannot act at the same time

> both for and against the same client, and his firm is in no better position": *Bolkiah*, at p. 234.

[43] The scope of the bright line rule is limited in four respects. First, it applies only "where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting" (*McKercher* at para 33) (emphasis in original). Second, the rule applies only where the clients are "adverse in *legal* interest" (*McKercher* at para 35). Third, the rule applies only in legitimate circumstances and cannot be used for tactical purposes (see *McKercher* at para 36).

[44] Finally, the rule does not apply "in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters" (*McKercher* at para 37). As McLachlin CJ explained (at para 37):

> . . . Factors such as the nature of the relationship between the law firm and the client, the terms of the retainer, as well as the types of matters involved, may be relevant to consider when determining whether there was a reasonable expectation that the law firm would not act against the client in unrelated matters. Ultimately, courts must conduct a case-by-case assessment, and set aside the bright line rule when it appears that a client could not reasonably expect its application.

[45] The practical implications of the bright line rule are that "[i]n most cases, simultaneously acting for and against a client in legal matters will result in a breach of the bright line rule, with the result that the law firm cannot accept the new retainer unless the clients involved grant their informed consent" (*McKercher* at para 39).

[46] In circumstances where the bright line rule is inapplicable, the court must consider whether there exists a substantial risk of impaired representation warranting disqualification (the substantial risk principle) (see *McKercher* at para 8). The substantial risk principle engages a separate analysis. It is concerned with conflicts that arise when there is a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person" (*Neil* at para 31).

Determining the Appropriate Remedy

[47] As stated earlier, when the court determines that the duty of loyalty has been breached by a failure to avoid a conflict of interest, in order to prevent the improper use of confidential information, "disqualification is generally the only appropriate remedy, subject to the use of mechanisms that alleviate this risk" (*McKercher* at para 62). Similarly, to avoid the risk of impaired representation, if the law firm continues to act for both clients, "disqualification will normally be required" (*ibid*).

[48] Disqualification may also be required to maintain the repute of the administration of justice. However, determining whether counsel ought to be disqualified for this third purpose engages a more contextual analysis than automatic disqualification in which all relevant circumstances are considered (see *McKercher* at paras 61-64). Where there is no ongoing lawyer and client relationship and no risk of misuse of confidential information, "there is generally no longer a concern of ongoing prejudice to the complaining party" (*McKercher* at para 65).

[49] As explained in *McKercher*, relevant factors which may support dismissal of the disqualification motion include (at para 65):

> . . . (i) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification; (ii) significant prejudice to the new client's interest in retaining its counsel of choice, and that party's ability to retain new counsel; and (iii) the fact that the law firm accepted the conflicting retainer in good faith, reasonably believing that the concurrent representation fell beyond the scope of the bright line rule and applicable law society restrictions.

[50] Finally, it is important to note that courts retain the discretion to refuse to disqualify counsel. In *Le Soleil*, Dickson J stated (at para 37):

> Even if the questions posed by Sopinka J. in *MacDonald Estate* are answered in the affirmative the court retains a discretion not to disqualify a solicitor from acting, depending on all of the circumstances under consideration. This discretion exists because the remedy sought on a disqualification application is equitable in nature. It will be exercised if the prejudice to the solicitor's current client outweighs the prejudice to the former client or for other proper reasons such as delay in bringing the application, waiver or estoppel [citations omitted].

Analysis and Decision

Did the Judge Err by Failing to Find That TM Was in a Conflict Warranting Disqualification?

[51] 317 argues that the judge applied the wrong legal test to determine whether TM was in a conflict. 317 asserts that TM holds confidential information regarding the corporate and business structure and ownership of the Shindico companies as a result of its prior representation of various Shindico companies which is relevant to the expropriation proceedings and

that the judge erred by finding otherwise. 317 also argues that the judge erred in his analysis of the issues to be addressed by the LVAC, which is a necessary part of the examination of relevance.

[52] I am not persuaded that the judge erred by applying the wrong test.

[53] To begin, judges are presumed to know the law and their reasons must be read in the context of the issues raised. Any ambiguities in a judge's reasons should be resolved on the basis of presumed knowledge. Judges are not required "to set out every finding or conclusion" in arriving at their decision (*R v REM*, 2008 SCC 51 at para 18; see also *Interlake Reserves Tribal Council Inc et al v Government of Manitoba*, 2021 MBCA 17 at para 17).

[54] In his reasons, the judge began by framing the parties' arguments. Next, he reviewed the law regarding a lawyer's duty to avoid conflicts and the broader duty of loyalty outlined in the Supreme Court decisions of *MacDonald Estate*, *Neil*, *Strother* and *McKercher*. He also reviewed r 3.4 of the Law Society of Manitoba, *Code of Professional Conduct* (Winnipeg: the Law Society of Manitoba, 2011) ch 3 [the *Code*], dealing with a lawyer's duty to avoid conflicts of interest. The judge recognized the purpose of the common law and the *Code* rule. He stated "they aim to promote public confidence in the legal system by holding lawyers to a high standard of competence, skill and integrity, and to protect every client's right not to be deprived of counsel of their choice without good cause" (at para 20).

[55] Moreover, the question the judge answered in his analysis was: "Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?" (at para 71). This question addresses the underlying purpose of the sufficiently-related inquiry: the

protection of the client's confidential information (see *MacDonald Estate* at pp 1259-60). As explained by Cromwell JA in *Brookville* (at para 50):

> . . . two matters will be sufficiently related … if, as Goudge, J.A. put it in **Chapters** at para. 30, "… it is reasonably possible that the lawyer acquired confidential information pursuant to the first retainer that could be relevant to the current matter." The issue is not so much whether the subject-matter of the two retainers is the same, but whether confidential information learned in one would be relevant to the other.

[56] In my view, the judge's reasons demonstrate that he was aware of and understood the relevant legal test and principles.

[57] I am also not convinced that the judge erred in his application of the test or in his analysis of the issues to be addressed in the expropriation proceedings.

[58] 317 argues that the judge misconstrued the issues to be addressed in the expropriation proceedings and that led him to error in the application of the legal test by making the erroneous decision that the retainers were not sufficiently related.

[59] After reviewing the circumstances that led to the City's expropriation of the land, the judge concluded that the main issue to be determined on the expropriation proceedings is whether the compensation should include the value of the fire hall. He stated (at para 34):

> . . . a significant issue for determination by the [LVAC], is whether the compensation to which [317] is entitled on the expropriation of [the land] should include the value of the fire hall constructed by Shindico Realty at the City's expense. [317] says the value of that building should be included as part of the value of the land; the City disputes this.

[60] The judge also concluded that 317's use of the term "structure" in its evidence "is vague and undefined" (at para 44) and that "[t]he structure of the Shindico Companies is . . . irrelevant to the expropriation" (at para 74).

[61] 317 contends that its corporate and business structure and its ownership will be issues on the expropriation proceedings. Specifically, it says that the City will argue that it should not have to pay 317 for the fire hall because it has already paid another Shindico company (Shindico Realty Inc.) to build it and that the judge erred by finding otherwise.

[62] The City maintains its position that who it paid to build the fire hall is irrelevant to the expropriation proceedings. It says that, while it may come up that Shindico Realty Inc. and 317 have a common ownership, the key facts it intends to rely on at the expropriation proceedings do not include the corporate and business structure and ownership of 317. It intends to argue that it paid a construction company to build the fire hall and that it should not have to pay 317 for the fire hall that it built.

[63] As I will explain, in my view, the evidence supports the judge's conclusion that the main issue in dispute is whether 317 is entitled to compensation for the fire hall.

[64] The *Act* provides that the power to expropriate must be done by a declaration of expropriation (see section 3). Once the declaration has been confirmed by order of the confirming authority—in this case the City—the declaration and the order must be registered in the land titles office. Although the declaration issued by the City and the land titles registration are not in evidence, the Offer of Compensation provided by the City to 317 states that the City expropriated "the lands, together with any buildings thereon".

However, the decision of council reflected in the City's Minute No. 285[1] and by-law No. 22/2014[2], make clear that the City's intention was "to acquire the land interests owned by [317]" "for the purpose of acquiring the land occupied by the Winnipeg Fire Paramedic Station No. 12 at 1780 Taylor Avenue, in the City of Winnipeg, in Manitoba."

[65] Moreover, the City points to the evidence in the record that it intends to rely on, without the need to reference any confidential information. This evidence includes the affidavit of Sandy Shindleman in which he attests that he is the president of 317, that 317 is part of a group of companies owned and controlled by him and Robert Shindleman and that the Shindico companies include Shindico Realty Inc. (see also the construction contract between the City and Shindico Realty Inc. signed by Sandy Shindleman, "president" of Shindico Realty Inc.).

[66] When considered in the context of the evidence, I see no reviewable error in the judge's conclusion regarding the main issue in dispute on the expropriation proceedings.

[67] As for the judge's application of the law, the judge carefully considered the files on which TM was counsel for the Shindico companies and whether TM received confidential information attributable to the solicitor and client relationship relevant to the expropriation proceedings.

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[1] Manitoba, City of Winnipeg, *Minute No. 285: Report – Standing Policy Committee on Property and Development – February 18, 2014*, (Council Minutes), (Winnipeg: City Council, 2014); online: http://clkapps.winnipeg.ca/DMIS/permalink.asp?id=M20140226(RM)C-69.

[2] City of Winnipeg, by-law No. 22/2014: *A By-law of THE CITY OF WINNIPEG to acquire land for the purpose of the Winnipeg Fire Paramedic Station No. 12 at 1780 Taylor Avenue, in the City of Winnipeg, in Manitoba* (30 April 2014).

[68] The judge first considered the extent of the solicitor and client relationship between TM and the Shindico companies. After examining five files in which TM represented a Shindico company, he concluded that the relationship was "more limited" (at para 42) than attested to by Sandy Shindelman.

[69] These five files involved: 1) the corporate structure of the Shindico companies, 2) the Pembina Crossing litigation, 3) the Thunder Bay transaction, 4) a parcel of land that included the land at issue in the expropriation proceedings, and 5) a lawyer from TM acting as bare trustee on behalf of the Shindico companies (the bare trustee file).

[70] The judge was not satisfied that the structure of the Shindico companies "is, or could be, relevant to any of the issues for determination by the [LVAC] on the expropriation proceeding" (at para 74). Nor was he satisfied that the Pembina Crossing litigation was at all related or that TM received any confidential information pertaining to the expropriation proceedings on the Thunder Bay transaction.

[71] As for TM's prior involvement in transactions involving a parcel of land that included the land, the judge concluded that TM's retainers "have nothing in common with the expropriation hearing except that they happen to involve the same property" (at para 73). Similarly, he concluded that the bare trustee file "did not relate in any way to the matters at issue on the expropriation of [the land]" (at para 51).

[72] The judge concluded that "[t]he expropriation matter is a fresh and independent matter unrelated to any work [TM] has previously done for the Shindico Companies" (at para 94).

[73] To summarize, the judge determined that these files were either unrelated to the expropriation proceedings or that it is not reasonably possible that TM acquired confidential information pursuant to the prior retainer that could be relevant to the current matter (see *Chapters* at para 30). He stated, "[317] has not established that [TM] received any confidential information from any of the Shindico Companies relevant to the issues before the [LVAC]" (at para 72).

[74] Key to the judge's conclusion that the prior retainers are not sufficiently related is his finding that the structure of the Shindico companies is irrelevant to the expropriation proceedings and that "despite ample opportunity, [317] has never adequately explained . . . how the structure of the Shindico Companies is, or could be, relevant to any of the issues for determination by the [LVAC] on the expropriation proceeding" (at para 74).

[75] In reaching this conclusion, in my view, the judge properly focussed on the relevance of any confidential information that TM might possess and the overriding policy that the reasonably informed person would be satisfied that no use of confidential information would occur (see *Brookville* at para 50).

[76] Moreover, I see no error in the judge's findings that "[317] has never adequately explained . . . how the structure of the Shindico companies is, or could be, relevant" (at para 74) and that "[a]side from its irrelevance, the relationship between [317] and Shindico Realty is not confidential" (at para 75). Nor do I see any error in the judge's conclusion citing *McKercher* (at para 54) that, "[t]here is simply no evidence that [TM] has any relevant

confidential information which could be used against the Shindico Companies in ‘some tangible manner’ at the expropriation hearing” (at para 78).

[77] In my view, the record amply supports the judge’s findings that the prior retainers are not sufficiently related.

[78] Having found that the prior retainers are not sufficiently related and that there was no risk of misuse of confidential information, there was no basis for the judge to conclude that TM was in a conflict.

[79] Despite not engaging in a formulaic analysis, the judge’s reasons, read as a whole, establish that he understood the *Macdonald Estate* two-part test and that he made no error in its application.

[80] I would dismiss this ground of appeal.

Did the Judge Err by Failing to Disqualify TM After Finding It Breached the Bright Line Rule?

[81] 317 says that the judge was right to find that TM breached the bright line rule because it breached its duty of loyalty when it accepted the City’s retainer to act against 317 while it was still acting for another Shindico company. However, it argues that the judge erred by failing to disqualify TM. It asserts that the judge failed to apply the correct legal test to determine the appropriate remedy for the breach and that he failed to address or appropriately weigh the relevant factors.

[82] I am not satisfied that the judge used the wrong legal test by erroneously focussing on whether 317 demonstrated that there would be a material or adverse effect on 317 if TM was not disqualified. Nor am I satisfied that the judge failed to appropriately weigh the relevant factors in concluding that disqualification was not required in this case.

[83] The City retained TM to represent it on the expropriation proceedings on October 17, 2019. At that time, TM was acting for a Shindico company on a commercial transaction in Thunder Bay. The judge explained TM's involvement as follows (at para 47):

> In 2019, [TM] acted for a Shindico Company, 693 Manitoba, on the Harbour Crossing deal. The deal, which involved the sale of three commercial buildings in Thunder Bay, closed on November 15, 2019. [TM] provided a brief reporting letter and final statement of account to [general counsel to the Shindico companies] on January 20, 2020. A small dispute about the fee followed and was quickly resolved.

[84] The judge determined that there was a "brief period" during which TM was "unwittingly acting for one Shindico Company and against another" (at para 93) because its conflict search had been "too narrow" (at para 92). During this period, according to the judge, TM "violated the bright line rule and therefore breached its duty of loyalty to the Shindico Companies" (at para 87).

[85] As I have explained, the bright line rule is engaged when a law firm represents clients whose immediate legal interests are directly adverse. Justice Binnie explained the rule this way in *Neil* (at para 29):

> . . . The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse

> to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.
>
> [emphasis in original]

[86] Disqualification may be required to address a breach of the bright line rule in three circumstances: "1) to avoid the risk of improper use of confidential information; 2) to avoid the risk of impaired representation; and/or 3) to maintain the repute of the administration of justice" (*McKercher* at para 61). While disqualification is generally necessary to address the first two concerns, the analysis is contextual for the third concern; all relevant circumstances should be considered (*ibid* at paras 63-65). Although disqualification is generally required for conflicts, courts still retain a discretion not to disqualify (see *Le Soleil* at para 37).

[87] Here, the judge determined that there was no risk of improper use of confidential information because TM did not receive any relevant confidential information. He also determined that 317's interests would not be materially and adversely affected; in other words, there was no risk of impaired representation.

[88] The judge concluded that the integrity of the expropriation proceedings would not be brought into disrepute if TM was permitted to continue to represent the City. In doing so, he considered contextual factors relevant to whether disqualification was necessary to protect the integrity and repute of the administration of justice generally. These factors included whether there was evidence of deliberate acts, bad faith, preferred interests or

other breaches of TM's duty of loyalty. He also considered the fact that disqualification would result in the City losing its counsel of choice.

[89] In my view, a fair reading of the judge's reasons demonstrates that he applied the correct test and appropriately weighed the factors relevant to his determination of remedy in the context of the breach he found. Moreover, I have not been persuaded that his decision is clearly wrong or resulted in an injustice.

[90] Accordingly, I would dismiss this ground of appeal.

Did the Judge Err in Awarding Costs?

[91] 317 argues that the judge erred by awarding costs for the services of counsel who also acted as a witness because a lawyer is prohibited from acting as both advocate and witness. It also argues that the costs awarded are inordinately high and points to a number of factors that resulted in an award that it says was unreasonable in the circumstances.

[92] After rejecting the City's request for solicitor and client costs, the judge ordered costs in the amount of $110,000 plus tax and disbursements set at $6,447.29. In doing so, he considered a number of factors. First, he determined that, although the issues raised by 317 on the motion were "serious and complicated", they were "largely without merit". Next, he considered 317's approach to the litigation, which he found "was, in some instances, overly cautious, misguided, ill-conceived, and unreasonable".

[93] The judge also considered the disparity between the applicable tariff and the actual cost to the City to defend the motion, as well as a notice to the

profession regarding an amendment to the tariff. The notice stated: "The existing party and party costs scale is intended to equate to approximately 60% of the reasonable counsel fee in a typical case" (Court of Queen's Bench of Manitoba, Notice, "Re: Amendments to the Court of Queen's Bench Rules" (16 June 2022), online: <manitobacourts.mb.ca/site/assets/files/2044/notice_-_june_16_2022.pdf> at 2). The judge considered the benchmark of 60% of a party's actual legal fees to be an "indicator of reasonableness" and found that "the tariff falls well short of that mark"

[94] Finally, the judge determined that the City was entitled to costs for the involvement of two lawyers: independent counsel retained to argue the motion and counsel from TM retained on the expropriation proceedings (Williams). The lawyers' fees were $95,000 each, for a total of $190,000.

[95] As I will explain, I agree that the judge erred in principle by awarding costs for Williams's fees.

[96] Although exceptions are permitted in certain rare circumstances, the practice of counsel giving evidence as a witness for their client is highly discouraged (see *R v Deslauriers*, 1992 CanLII 4022 (MBCA) at 8-9 [*Deslauriers*]; and *Stanley v Douglas*, [1952] 1 SCR 260 at 272-74 [*Stanley*]; see also the *Code* at rr 5.2-1, 5.2-2). In *Deslauriers*, Twaddle JA stated: "It is a long-established rule that a lawyer should not be both counsel and a witness in a case" (at p 8). He reiterated the principle that "[a] barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as counsel and witness in the same case" (*ibid*).

[97] This principle may be "relaxed where the facts deposed to by counsel are non-controversial or where the interests of justice demand it" (*ibid*

at p 9). However, relaxation is "a concession to expediency, ordinarily permitted only where the lawyer's credibility will not be impeached and where neither his conduct nor judgment is questioned" (*ibid*).

[98] In *Stanley*, the Supreme Court reviewed the existing jurisprudence on counsel acting as a witness and concluded that, while the evidence is legally admissible, the practice is highly discouraged (see p 274).

[99] As explained by Peter J Sankoff, *Law of Witnesses and Evidence in Canada* (Toronto: Thomson Reuters, 2023) (loose-leaf updated 2023, release 4), ch 6 at section 6:33 [*Sankoff*], the practice of counsel giving evidence as a witness raises an ethical issue rather than a legal issue.

[100] Issues that may arise when a lawyer testifies for their client include a potential conflict of interest, and the court being placed "in the untenable position of having to assess the credibility of a counsel who has given evidence" (Sidney N Lederman, Michelle K Fuerst & Hamish C Stewart, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at para 13:47 [*Sopinka*]). The concerns apply equally to a lawyer appearing as both counsel and a witness on a motion (see *Deslauriers* at p 9; and *Sopinka* at para 13:47).

[101] In my view, the judge erred in principle by allowing counsel fees for Williams's work on the motion.

[102] 317 raised the concern that the costs awarded should not indemnify the City for the costs of its counsel giving evidence. However, it is not apparent from the judge's reasons that he considered the principle that a lawyer should not appear as both counsel and a witness in determining whether the City was entitled to costs for his legal services.

[103] After reviewing the relevant factors for determining costs in this case, the judge concluded that the City was entitled to costs for Williams's legal services. This is because both parties were represented by more than one lawyer and Williams's primary involvement was as second counsel. He stated:

> In addition, in my view, the City of Winnipeg ought to be entitled to costs based on the involvement of two counsel, inasmuch as both parties were represented by at least two counsel throughout these proceedings. While [Williams] was a deponent on the motion, I find his primary involvement was as second counsel to Mr. Bowles. According to the City of Winnipeg, their time each accounted for fees of approximately $95,000 for a total of approximately $190,000.

[104] The judge concluded that Williams's involvement was primarily as second counsel. This conclusion is entitled to deference. However, in my view, it was an error in principle in the circumstances of this case to award the City costs for second counsel who was also a witness on the motion. In my view, this practice ought to be "bemoan[ed]" (*Sankoff* at section 6:33).

[105] Williams's involvement as a witness on the motion was necessary. He filed two affidavits (affirmed on December 22, 2020 and December 13, 2021) and a supplemental affidavit (affirmed on August 17, 2021). He was also cross-examined twice (October 6, 2021 and December 1, 2021). Williams's evidence included information regarding the expropriation proceedings, TM's involvement with the Shindico companies and the land, file management practices and systems at TM, Williams's retainer by the City and the conflict search he conducted.

[106] Other members of Williams's law firm were also involved as witnesses; they provided evidence about their involvement in prior retainers involving Shindico companies. Those costs and the costs of junior lawyers were excluded from the award.

[107] Williams's conduct was at issue on the motion; the judge's examination of the circumstances included whether Williams was in a conflict by accepting the City's retainer and whether he had breached his duty of loyalty. The motion to disqualify was brought because TM conducted a conflict search that was "too narrow" (at para 92), which did not provide TM with the opportunity to avoid or resolve the conflict before accepting the City's retainer. The motion to disqualify was, by necessity, conducted by outside counsel. There was no suggestion, nor did the judge conclude, that Williams's ongoing representation at the motion was necessary for reasons of expediency.

[108] In my view, in this case, given Williams's role as both counsel and a witness on the motion, the award of costs should not have included his legal fees. The judge erred in principle by not considering this.

[109] As for 317's argument that the costs are otherwise inordinate, the judge's decision to depart from the applicable tariff is entitled to deference, provided he exercised his discretion judicially (see *Ducharme v Borden*, 2014 MBCA 5 at para 24; see also *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417, where the amount of work required of the respondent's counsel justified increased costs).

[110] In my view, the judge was entitled to conclude on the record that the proceeding was exceptional due to its seriousness, complexity and 317's

approach, which he described as being "in some instances, overly cautious, misguided, ill-conceived and unreasonable".

[111] I am not convinced that the judge misconstrued the notice to the profession regarding the tariff amendment or based the award on matters to be addressed at the LVAC hearing.

[112] The judge was not required to explain in his reasons why the time claimed for each step in the litigation was reasonable nor whether any of the time claimed was unnecessary. It was 317 who drove the motion and the City was required to respond (see *Tregobov v Paradis et al*, 2017 MBCA 60 at para 28, leave to appeal to SCC refused, 37727 (1 February 2018)).

[113] In my view, the judge's reasons demonstrate that he considered the relevant factors, including why tariff costs were not appropriate. Apart from the award for Williams's fees, the costs award is fair and reasonable. Accordingly, I would disallow Williams's fees and reduce the costs award to $55,000.

Conclusion

[114] In the result, I would dismiss the appeal of the judge's order refusing to disqualify TM. However, I would allow the appeal of the award of costs. As success is divided, the parties will bear their own costs of the appeal.

[115] For the purposes of clarity, the judge's order sealing the supplemental affidavits of Kevin Williams, affirmed August 17, 2021 and Kevin Nenka, affirmed August 18, 2021 is not before us and, therefore, continues until further order of the Court.

leMaistre JA

I agree: Cameron JA

I agree: Mainella JA