

CITATION: Vergeer v. Kontrol Energy et al, 2022 ONSC 6387
COURT FILE NO.: 158/20
DATE: 20221114

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Vergeer Family Trust, Plaintiff

AND:

Kontrol Energy Corp. and CEM Specialties Inc., Defendants

Cross-Motion:

Kontrol Energy Corp. and CEM Specialties Inc, Plaintiffs in Counterclaim

AND

Vergeer Family Trust and Henry Vergeer, Defendants to Counterclaim

BEFORE: P.J. Moore

COUNSEL: Michael Polvere and Cole Vegso for Vergeer Family Trust and Henry Vergeer

Tanya Walker for Kontrol Energy Corp. and CEM Specialties Inc.

HEARD: July 21, 2022

ENDORSEMENT

Introduction

[1] The Vergeer Family Trust (“Vergeer Trust”) and Henry Vergeer (“Vergeer”) (collectively, the “Vergeer Parties”) brought a motion for a declaration that there is no conflict of interest with Siskinds LLP (“Siskinds”) acting for the Vergeer Parties in this matter. They also seek a timetable for the litigation.

[2] The defendants and plaintiffs in the counterclaim, Kontrol Energy Corp. (“Kontrol”) and CEM Specialties Inc. (“CEM”) brought a cross-motion for a declaration that Siskinds is in a conflict of interest and is disqualified from acting as litigation counsel for the Vergeer Parties. They seek an order removing Siskinds as counsel of record for the Vergeer Parties.

Background

[3] On September 20th, 2018, the Vergeer Trust sold CEM to Kontrol pursuant to a share purchase agreement (“SPA”).

[4] Henry Vergeer was the sole director, officer and shareholder of CEM.

[5] Siskinds acted for the Vergeer Parties on the SPA and Weir Foulds LLP was counsel for Kontrol. Paul Ghezzi was the CEO for Kontrol at the time of the sale. He became the CEO for CEM on September 20, 2018.

[6] The sale price was \$3.35 million. The following payments schedule was agreed upon:

- a. \$2.265 million was paid on closing.
- b. \$502,500 holdback was due on September 20, 2019.
- c. \$502,500 holdback was due on December 20, 2019.
- d. \$80,000 Nexus litigation holdback.

[7] Ghezzi signed a guarantee and general security agreement on behalf of CEM to Vergeer Trust for the \$502,500, holdback owed by Kontrol to Vergeer Trust.

[8] In relation to the September 20, 2019, holdback, Kontrol requested to pay via a payment plan. Vergeer Trust refused and Kontrol paid the \$502,500.

[9] In relation to the December 20, 2019, holdback, Kontrol advised Vergeer on that date that it would not pay the holdback as it alleged a \$1.5 million indemnity claim against the Vergeer Parties for breach of the warranties and representations under the SPA.

[10] There is now a claim by Vergeer Trust for the \$502,500 December 2019 holdback and for the \$80,000 Nexus litigation holdback. There is a counterclaim by Kontrol and CEM for approximately \$1.5 million for two claims.

[11] Kontrol and CEM claim that the Vergeer Trust misrepresented that ABB would supply product to CEM. They also claim that since 2015, Henry Vergeer breached his duties to CEM by approving CEM's use of ABB products when he knew or should have known they were defective.

Positions of the Parties

[12] The Vergeer Parties claim that the conflict-of-interest issue was alleged by the defendants two years into the dispute, on the eve of the rescheduled examinations for discovery, and that the allegation is tactical, without merit and a means for Kontrol to further delay paying its debt to Vergeer Trust. When the defendants did not bring a motion in a timely manner, the Vergeer Parties moved first to settle the issue.

[13] The Vergeer Parties deny any conflict of interest. Specifically, they deny that they acted contrary to the bright line rule in the fall of 2019 after the conflict crystallized. They submit that they do not have any confidential information vis-a-vis CEM. They indicate that other than the guarantee and general security agreement CEM was not a party to the SPA and has no rights or obligations under the sale.

[14] Further, they submit that Craig Clarke, a Siskinds lawyer who was cross-examined for this motion, does not have any relevant evidence and is not a material witness in the action.

[15] Kontrol submits that they only became aware of the conflict when preparing for discovery. They sent Siskinds a letter on October 21, 2021, alerting them to the conflict and requesting that Siskinds remove itself as counsel, failing which a motion would be brought. This was only two weeks after the close of pleadings which closed upon the delivery of the Reply to the Defence to the Counterclaim. They emailed Siskinds on December 8, 2021, and January 4, 2022, requesting counsel availability to schedule a conflict-of-interest motion. Without responding and without notice, Siskinds brought this motion originally returnable on March 18, 2022.

[16] Kontrol and CEM take the position that CEM was a client of Siskinds for over 21 years and continues to be a client. Siskinds represented CEM during the SPA negotiations. During the negotiations, Siskinds obtained relevant confidential information regarding the matters directly at issue in this action, including the termination of the ABB partnership agreement, the customer list, and the holdback clauses contained in the SPA.

[17] Kontrol and CEM allege that Siskinds violated the bright line rule by acting adversely to their former client. In the alternative, if the Court finds that Siskinds did not violate the bright line rule, they received confidential information related to this action and are breaching a duty of loyalty. Craig Clarke will be a necessary and material witness at trial.

Issues

[18] In determining whether Siskinds is in a conflict of interest and should be disqualified, I have to consider the following issues:

- (i) Did Siskinds violate the bright line rule by continuing to represent both CEM and the Vergeer Parties after they were adverse in interest?
- (ii) Did the delay in raising the issue of conflict amount to a waiver in this case?
- (iii) As a result of representing CEM, including possibly on the SPA, does Siskinds have confidential information, or should it be presumed to have such information and is there a risk that the information will be used to prejudice the client.
- (iv) Does the possibility of Mr. Clarke, a lawyer at Siskinds and former CEM corporate counsel, being a witness create a conflict such that Siskinds should be removed?
- (v) Even if the Court is satisfied that no confidential information was imparted or would be misused, are the matters so closely related that Siskinds would be breaching its duty of loyalty to CEM by continuing to act for the Vergeer Parties?

Discussion

(i) *Did Siskinds violate the Bright Line Rule?*

[19] Generally, disqualification and removal of a law firm from pending litigation may be required 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 administrations of justice. See *C.N. Railway Co. v McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, at para. 61 (“*McKercher*”).

[20] The Supreme Court of Canada in *McKercher* at para. 13 set out the court's role when issues arise as to whether a lawyer may act for a particular client in litigation. The Court indicated that a court's purpose in exercising its supervisory powers over lawyers has traditionally been to protect clients from prejudice and to preserve the repute of the administration of justice, not to discipline or punish lawyers.

[21] The bright line rule developed by the Supreme Court of Canada in *McKercher* is set out at paras. 8 and 27-28. The Court quotes from *R. v. Neil*, 2002 SCC 39, [2002] 3 S.C.R. 631, at para. 29, restating the rule as follows:

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.

[22] The bright line rule reflects the fact that the lawyer-client relationship is a relationship built on trust. The Court found that a breach of the bright line rule normally results in removal, even if the lawyer-client relationship is terminated subsequent to the breach: *McKercher*, at para. 10. However, disqualification is not absolute and other factors must be taken into account.

[23] Kontrol alleges that Siskinds represented CEM for over 21 years and continued to represent CEM after the adversity between the two clients "crystallized" on December 20, 2019 when Kontrol refused to pay the holdback that was due, alleging misrepresentation by Vergeer Trust and breach of a fiduciary duty by Henry Vergeer. On that date, Kontrol sent a notice of indemnification to the Vergeer Parties.

[24] It is admitted that after the SPA agreement, Siskinds provided advice to CEM on an unrelated insurance matter. After the SPA, Siskinds took instructions from Gary Saunders on behalf of CEM. They continued to use the same client number, 7348, on the invoices to CEM following the SPA.

[25] Kontrol relies on the fact that CEM was invoiced after December 20, 2019, and the invoice included .2 hours of work after that date. They allege based on the affidavit of Gary Saunders, that Siskinds continued to represent CEM on the insurance matter between September 2019 and February 2020. Saunders also attested that the employees of CEM believed Siskinds to be its lawyers and would continue to be its counsel of choice.

[26] Kontrol alleges that Siskinds continued to represent CEM after December 2019, that the corporate retainer was never extinguished. They state that at no time did Siskinds inform CEM that they would no longer represent CEM and that the retainer was ended. They also did not request CEM to consent to the conflict of interest. Kontrol argues that there is no evidence of a termination letter, that CEM would be entitled to reasonable notice of any termination and that the burden is on Siskinds to show that any retainer was limited: See *Rules of Professional Conduct*, Rule 3.7-1;

051766 N.B. Ltd. v. Wilbur, 2010 NBBR 34, at para. 33; *Fitzpatrick v. Hefferman*, 2019 NLCA 77, at para 32.

[27] Vergeer takes the position that the insurance matter was completed prior to December 2019 and argues that the advice sought had already been provided prior to that date. Although, the matter was not invoiced until February 2020, the advice had been provided, and Siskinds was no longer acting for CEM.

[28] Vergeer takes the position that after the indemnification letter, CEM was using other counsel, Weir Foulds, so there was no need to advise CEM that the retainer with Siskinds had ended. The CEM minute book was transferred to Weir Foulds LLP before December 2019.

[29] I conclude that the timing of when Siskinds ceased to represent CEM is unclear at best. I would therefore not disqualify Siskinds on that basis alone.

(ii) *Is CEM using the rule tactically and did the delay in raising the conflict result in waiver?*

[30] A court can consider if one party is attempting to use the bright line rule ‘tactically’. One example of a tactic was set out in *McKercher* at para. 52 is a large enterprise spreading out its legal representation to prevent the other litigant from retaining counsel. There is no evidence that Kontrol is attempting to use the rule tactically.

[31] The court must also consider the length of delay in raising the issue. A significant delay in raising the issue after a party is aware or should have been aware of the issue, can amount to waiver: See *Robbins & Myers Canada Ltd. v. Torque Control Systems Ltd.*, 2007 FC 957, at para. 33-35; *McKercher*, at para. 36; *Yellow Cedar v. Di Torio*, 2020 ONSC 5915, at paras. 30, 37; *Paylove v. Paylove* (2001), 110 A.C.W.S. (3d) 558 (Ont. S.C.).

[32] The case of *Bortnak v. Bortnak*, 2011 SKQB 226, at paras. 17, 20 stands for the proposition that the delay must be significant. In that case, the delay was three months. In the cases cited by the Vergeer Parties, *Paylove* and *Yellow Cedar*, the issue was raised very close to trial.

[33] In this case, the litigation was commenced by Vergeer Trust as an application on December 17, 2020, with service on Kontrol and CEM on February 26, 2021. The matter was converted to an action on June 2, 2021. The pleadings closed on October 6, 2021, when Kontrol delivered the Reply to the Defence of the Counterclaim. Kontrol alerted the Vergeer Parties to the alleged conflict of interest on October 27, 2021. In their letter, they indicated they had only become aware of the conflict issue while preparing for discoveries.

[34] The Vergeer Parties urge the court to follow *Yellow Cedar* at para. 40 where the removal of counsel was a factor that significantly favored dismissal of the conflict motion both because counsel of choice is important, especially when there is a long-standing solicitor-client relationship, and also because the timing of the motion would waste considerable work done by the lawyer and would delay the trial.

[35] It would seem that the conflict issue vis-a-vis Siskinds’ prior representation of CEM was always a live issue, but I am prepared to accept that it only crystalized as an issue when counsel

for Kontrol and CEM were preparing for discoveries and followed up to schedule a motion. I do not find that the delay in this case on the facts of this motion amount to waiver.

[36] Whether the bright line rule has been violated and a firm's actual or apparent possession of a former client's confidential information are separate tests. I will now turn to the issue of confidential information.

(iii) *Did Siskinds represent CEM – including on the SPA – and as a result does Siskinds have confidential information, or should it be presumed to have such information and is there a risk that the information will be used to prejudice the client.*

[37] The Supreme Court in *MacDonald Estate v. Martin*, 1990 SCC 233, [1990] 3 S.C.R. 1235 (“*Martin*”) set out the governing principles for when counsel should be removed from acting when either counsel or their firm have received confidential information from a former client. The Court's two-part test to be applied: (1) Did the lawyer receive confidential information attributable to a solicitor client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to prejudice the client?": *Martin*, at para. 48.

[38] The confidential information must be more than a general understanding of a company's corporate litigation philosophy. The information must be sufficiently related that it is capable of being used against the client in some tangible way: *McKercher*, at para. 54.

[39] The ultimate test in order to deprive a litigant of their counsel of choice is whether a fair-minded and reasonably informed member of the public would conclude that counsel's removal was necessary for the proper administration of justice: *Martin*, at para. 16.

[40] If the lawyer's new retainer is “sufficiently related” to the matters on which he or she worked for the former client, a rebuttable presumption arises that the lawyer possesses confidential information that raises a risk of prejudice: See *McKercher*, at para. 24; *Martin*, at para. 48. The burden is on the lawyer to demonstrate that no information was imparted that could be relevant: *Martin*, at para. 49.

[41] For two retainers to be sufficiently related, the court must find it reasonably possible that the lawyer acquired confidential information pursuant to the first retainer that could be relevant to the current matter: *Chapters Inc. v Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 30 (Ont. C.A.).

[42] In considering whether confidential information will be misused, the court must remember that a lawyer who has confidential information cannot act against his former client. To do so would result in automatic disqualification: *Martin*, at para. 50.

[43] The Vergeer Parties' position is that CEM was not a party to the SPA and that Siskinds did not represent CEM on the SPA. The only role CEM had was as a guarantor.

[44] The Vergeer Parties argue that there is no “confidential information” that passed to Siskinds from CEM. Further, it was submitted by the Vergeer Parties that Henry Vergeer was CEM. Up to and including the SPA, he provided all instructions involving CEM to Siskinds. The

argument is that CEM did not have an independent operating mind but was simply a vessel for whomever was in control of it.

[45] The Vergeer Parties further submit CEM has access to the information in Siskinds' files as Henry Vergeer used his CEM email to seek advice from Siskinds' and CEM has access to these emails.

[46] Kontrol counters that CEM was a party to the SPA and that is why they are named as a defendant to the original action. Further, Siskinds received information and provided advice to CEM in areas that are directly related to the action before the court.

[47] One of the issues on the lawsuit is the alleged misrepresentation of ABB continuing to supply CEM. ABB notified CEM that effective October 1, 2018, the channel partnership agreement between them which has allowed CEM an exclusive right to supply ABB products in Canada would be terminated. Henry Vergeer consulted with Mr. Clarke on this issue. Clarke was also asked to review a contract between Lafarge Holcim and CEM regarding potential liability following the SPA with respect to ABB and the channel partnership agreement. He provided that advice to Henry Vergeer on Oct. 1, 2018. That invoice was paid by CEM.

[48] Further, the Vergeer Parties provided a protected customer list to Kontrol, which was to represent all the customers that required ABB products. It is alleged that Vergeer provided that there was 75% certainty for obtaining seven projects on the customer list. However, following the termination of the channel partnership agreement, CEM was unable to obtain quotes from ABB and the projects did not materialize.

[49] Employees of CEM, Mr. Timmers and Mr. Saunders, have provided affidavits on this motion attesting that they attended meetings with Mr. Clarke of Siskinds, in which Siskinds provided legal advice to CEM about the SPA. The areas of discussion included 1) terms of the share purchase agreement and the negotiation of the purchase price and the amount of the holdback; 2) CEM's business generally including financial information, reports, analysis and its competitive position in the industry; and 3) details regarding letters of intent and competing offers for the sale of CEM.

[50] The *Law Society of Upper Canada v. James*, 2015 ONLSTH 83, at para. 34, held that the test to determine the existence of a solicitor-client relationship is whether the alleged client had a reasonable expectation, in all the circumstances, that the lawyer was protecting their interests.

[51] Kontrol also drew the Court's attention to the LSO *Rules of Professional Conduct*, 1.1-1 which defines the word "client" and, which include in the commentary to the definition, that "when an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization or other legal entity that the individual is representing."

[52] Kontrol takes the position that in this case the test for whether CEM was client has been met as 1) Siskinds billed CEM; 2) Siskinds represented CEM for decades; and 3) CEM deposed that Siskinds represented its legal interests with the SPA.

[53] The Vergeer Parties assert that Siskinds only represented them on the sale of the shares of CEM to Kontrol and that CEM was only invoiced as a tax saving measure.

[54] Kontrol contests this assertion. They say it is not supported on the evidence as the Vergeer Parties paid for representation separately and were invoiced separately. Also, the employees of CEM certainly believed that Siskinds was representing CEM on the SPA.

[55] Mr. Clarke did not provide an affidavit but was cross-examined by Kontrol pursuant to Rule 39.03, and the transcript of that examination was provided on the motion. Kontrol points to the portions in the transcript where Mr. Clarke, when being asked about representing CEM on the SPA, stated “I do remember advising CEM”. He changed his testimony on re-examination to say that Siskinds did not represent CEM with the SPA but was only invoiced for tax reasons. Kontrol asks that I give no weight to Mr. Clarke’s evidence in re-direct and expressed concerns that it changed after a recess and alleges that there may have been discussion with counsel contrary to the *Rules of Professional Conduct*. This is a bald-faced assertion, and I am not prepared to make any such finding.

[56] I find on a balance of probabilities that even if Siskinds did not believe they were representing CEM on the SPA, that in relation to the factors set in *James*, a reasonable person including the employees of CEM could believe that CEM was being represented by Siskinds at the relevant time.

[57] Given the long-standing relationship of Siskinds as corporate counsel for CEM including during the relevant time period and the likelihood that information relevant to the issues on the lawsuit were discussed, I find that Siskinds does have relevant confidential information, or should be presumed to have such information, and that there is a risk that such information will be used to the prejudice of CEM.

[58] Having come to this conclusion, I am of the view that Siskinds should be removed as counsel of record on this ground. However, in the event I am wrong, I will answer the other issues raised on this motion.

(iv) *Does the possibility of Mr. Clarke, lawyer at Siskinds and former CEM corporate counsel, being a witness create a conflict such that Siskinds should be removed?*

[59] The Vergeer Parties referred the court to the decision of *Talisman Resort v. Keyser, Usling et al.* 2013 ONSC 1901, at para. 18 and *Yellow Cedar*, at para 13 for the proposition that lawyers from the same firm can act as representative and witness. They also note that the *Rules of Professional Conduct* do not prohibit a lawyer from acting as counsel for a client when another lawyer in the same firm is a witness in the matter.

[60] The Vergeer Parties submit that Mr. Clarke is not a necessary witness and has no material evidence to provide. They submit that even if he had evidence to give about the negotiations, such evidence is irrelevant as it is the contract itself that is at issue, and not the negotiations that led up to the contract. To hold otherwise would be contrary to the law of contract interpretation.

[61] Both parties agree that the factors for whether Siskinds should be prevented from continuing to act if Craig Clarke is a witness are set out in the case of *Andersson v. Aquino*, 2018 ONSC 852, at para. 19 (“*Andersson*”). They go on to list the factors with their proposed responses to each factor. To summarize their respective lists, the Vergeer Parties take the position that there

is a nil to low chance of Mr. Clarke testifying, the application is made in bad faith and there is little likelihood of a real conflict. Kontrol says exactly the opposite.

[62] Kontrol points to the Nexus holdback clause as an area where Mr. Clarke of Siskinds was involved in negotiating the timing and wording of the holdback clause and the amount of the holdback. The original amount of the holdback requested by Kontrol was \$150,000 but the final amount was \$80,000. Mr. Clarke testified that the timing, amount and conditions would be standard for him to negotiate in the SPA. The Nexus holdback and its interpretation is one of the issues on the lawsuit. Kontrol indicates that Mr. Clarke is a probable witness and Siskinds should be removed.

[63] The Vergeer Parties take the position that the Nexus holdback is not contested. They also rely on Mr. Clarke's responses during his cross-examination that he simply does not have a recollection of receiving any information about the December holdback or the Nexus holdback, confidential or otherwise. Similarly, with respect to the termination of the ABB supplier contract and the protected customer lists, Mr. Clarke testified that he did not recall the particulars.

[64] The Vergeer Parties go on to argue that Mr. Clarke is not a material witness as it is in relation to the SPA, as it is what Mr. Vergeer said to others that matters not what he told Mr. Clarke. Even if Siskinds is removed because it has confidential information about CEM, it will not change the situation as it is Mr. Vergeer that has any such information, and he will continue to have that information.

[65] The Vergeer Parties further submit that any concerns of confidential information are diluted because of the evidence that has been produced which includes detailed pleadings, a voluminous affidavit of documents and extensive motion materials.

[66] Kontrol relies on the cases of *Andersson* at para. 30, a case where Siskinds was removed as counsel of record when the court found that there was an actual conflict of interest arising from joint representation of majority shareholders and the corporation. The Court found that there is a conflict of interest when disputes as to what the lawyer, or law firm, may or may not have done or witnessed lies at the substantive heart of a litigation dispute between parties and/or where the evidence of that lawyer or firm realistically may be relevant, necessary and/or decisive in resolving a critical or contentious factual issue.

[67] They also bring the case of *Manzinani v. Bindoo*, 2013 ONSC 4744 to the Court's attention. In that case the lawyer who created a share purchase agreement and a shareholder agreement and was in the room when the SPA was explained to the claimant was removed as lawyer of record.

[68] In considering the potential of Mr. Clarke being a witness, and upon weighing the factors from *Anderson*, I am of the view that there is a real possibility in Mr. Clarke being called as a witness. I have found that he provided advice, or a reasonable person could believe that he provided advice to CEM, in relation to the SPA. He has provided contradictory evidence as to whether he was acting for CEM at the time. He has testified that if he possessed confidential information, he has no recollection of it. Despite this, I see it as more likely than not that he will be a witness on this trial, and that he may have relevant information concerning either the original

claim or the counterclaim. For this reason, I would disqualify Siskinds LLP from continuing to act on this litigation.

(v) *Even if the Court is satisfied that no confidential information was imparted or would be misused, are the matters so closely related that Siskinds would be breaching its duty of loyalty to CEM by continuing to act for the Vergeer Parties and must be disqualified to maintain the repute of the administration of justice?*

[69] Kontrol asks that even if the Court finds that there was no confidential information imparted or there was no risk of misuse of such information, Siskinds should still be disqualified on the basis of the duty of loyalty. This is also tied to the third ground for disqualification of a lawyer: the need to maintain the repute of the administration of justice: See: *McKercher*, at para. 63; *Dhaliwal v. Hunjan*, 2019 ONSC 5464, at para. 74 (“*Dhaliwal*”).

[70] When a party relies on the ground that removal is needed to maintain the repute in the administration of justice, the Supreme Court of Canada in *McKercher* at para. 65 indicated that a court is to consider certain factors that may point the other way including:

- 1) behavior disentiing the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification;
- 2) significant prejudice to the new clients’ interest in retaining its counsel of choice, and that party’s ability to retain new counsel; and
- 3) 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

[71] Where matters are closely related, a law firm has a duty to abstain from acting against a former client in the same or related matter, even where no relevant confidential information has been shared: see *Dhaliwal*, at para. 74. Where a lawyer attacks a former client’s honour in closely related matters, the public interest justifies disqualifying a lawyer on the duty of loyalty: *Dhaliwal*, at para. 76.

[72] Kontrol submits that several of the terms of the SPA and issues surrounding the negotiations are now at issue between the parties in this lawsuit. Mr. Clarke admitted during his cross-examinations that he was involved in the negotiation of the holdback clause and may have received confidential information about the holdback and Nexus lawsuit even though he swears to have no present memory.

[73] One of the claims in the counter suit is the assertion that the Vergeer Parties provided representations to Kontrol during the negotiations for the SPA in regard to the protected customer list. They allege that CEM’s retainer with Siskinds for the negotiation of the SPA is sufficiently related to the issues raised in the current lawsuit that being adverse to CEM would breach the duty of loyalty owed to CEM.

[74] The Vergeer Parties suggest that Siskinds does not owe a duty of loyalty to CEM, they only represented CEM as they represented Henry Vergeer. They indicate that CEM never tried to use

Siskinds for this litigation, they used Kontrol lawyers. It disagrees with the contention in Mr. Saunders' affidavit that Siskinds was CEM's counsel of choice and that it would like to use Siskinds, indicating that CEM's conduct says otherwise. They state that Siskinds does not want to, and will not, act for CEM.

[75] The Vergeer Parties also submit that Siskinds' removal would add a new layer of cost, complexity and delay, which would prejudice the Vergeer Parties and would impede the timely and efficient resolution of this action.

Conclusion

[76] I appreciate the fact that the Vergeer Parties have had a long-standing relationship with Siskinds and want them to remain their lawyers. A party's counsel of choice is something the courts should not set aside lightly, especially where the relationship is long-standing. A litigant should not be deprived of his counsel of choice without clear and good cause. Such removal remains an extreme remedy of last resort in those rare case is where it is necessary: See *Smith et al. v. Muir*, 2020 ONSC 8030. Secondly, I acknowledge that removing Siskinds as counsel will cause some additional expense and delay in the on-going litigation.

[77] I do not however accept the Vergeer Parties' position which includes that Siskinds does not owe a duty of loyalty to CEM, and that there is not a real potential for the appearance of conflict, if not actual conflict if they were permitted to continue to act for the Vergeer Parties.

[78] Their position that they represented Henry Vergeer and CEM was essentially a tag-along does not accord with the evidence before this Court. While Mr. Vergeer was the directing force of CEM until the sale of its assets, it was its own legal entity. Siskinds did not cease to act for CEM immediately after the sale, and they continued to advise CEM until at least December of 2019. Siskinds billed CEM separately for services rendered. The employees of CEM felt that Siskinds was their corporate lawyer.

[79] Mr. Clarke provided advice to CEM on the SPA and he either received or it should be inferred that he received relevant confidential information that related to the current litigation.

[80] After representing CEM for almost 20 years through its representative Henry Vergeer, they were not provided notice that Siskinds was terminating the on-going retainer. Mr. Clarke was their long-time counsel and although he testified that he has no recollection of many of their dealings that does not extinguish the duty of loyalty and the trust relationship that was in place.

[81] The test is not whether there was an actual conflict of interest, but whether there is an appearance of conflict of interest: *Martin*, at para. 45.

[82] For the reasons above, and after balancing the right to counsel of choice against the interests of fairness, public interest in the proper administration of justice, and the need to promote public confidence in both the legal profession and the justice system, I conclude that a fair-minded and reasonably informed member of the public would readily conclude that the plaintiff's counsel is in conflict of interest and removal is necessary for the proper administration of justice.

[83] I therefore order that the law firm of Siskinds be removed from representing the Vergeer Parties in this litigation.

Costs

[84] I would encourage the parties to come to an agreement as to costs. If they cannot agree, I will accept cost submissions from Kontrol and CEM within 15 days of the release of this decision and from the Vergeer Parties within 20 days. All submissions are to be a maximum of 3 pages in length (excluding style of cause), double spaced, and with any Detailed Bill of Costs and Offer to Settle attached.

A handwritten signature in blue ink that reads "Patricia Moore". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Justice P.J. Moore

Date: November 14, 2022