

Irving Paper Ltd. et al. v. Atofina Chemicals Inc. et al.

[Indexed as: Irving Paper Ltd. v. Atofina Chemicals Inc.]

89 O.R. (3d) 578

Ontario Superior Court of Justice,

Rady J.

April 15, 2008

Civil procedure -- Class proceedings -- Evidence -- Expert evidence -- Plaintiffs in intended class proceeding retaining expert to provide report in support of certification motion -- Expert having had access to confidential information in parallel actions in United States involving same subject matter -- Expert not directly using that information in preparing Canadian report -- Conclusions in Canadian report being sourced and supported by evidence which was either publicly available or provided by plaintiffs -- Expert not being privy to defendants' litigation strategy or planning and not having been involved in prior professional relationship with defendants -- Motion by defendants for order striking expert's affidavit filed in support of certification motion and prohibiting expert's continued involvement in Canadian action being dismissed.

The plaintiffs brought a proposed class proceeding alleging that the defendants engaged in a conspiracy to fix the price of hydrogen peroxide. There were parallel actions in the United States. B was retained to provide an expert opinion in the U.S. proceedings, and had access to information in those proceedings which was [page579] subject to a confidentiality order. The plaintiffs retained B to provide an expert report in support of their motion for certification. B prepared a report (the "Canadian report"), and deposed that the conclusions in the

report were sourced and supported by evidence that was either publicly available or provided by the plaintiffs. The defendants brought a motion for an order striking B's affidavit filed in support of the certification motion and an order prohibiting B's continued involvement as an expert in the Canadian proceeding.

Held, the motion should be dismissed.

Even assuming that B's analysis in the Canadian report had been influenced by his access to confidential information in the U.S. proceedings, this did not constitute grounds for disqualifying him in the circumstances. All of the conclusions in the Canadian report were sourced and supported by admissible evidence, either publicly available or provided by the plaintiffs. The plaintiffs sought to use the Canadian report in connection with their motion for certification, which was strictly procedural in nature. It was not clear how the defendants' ability to defend the motion was impaired or compromised. B had not been privy to the defendants' litigation strategy or planning; nor had he been involved in a prior professional relationship with the defendants.

#### Cases referred to

Breda v. Breda, [1997] O.J. No. 1442, 29 O.T.C. 223, 10 C.P.C. (4th) 133, 70 A.C.W.S. (3d) 362 (Gen. Div.); Burgess (Litigation Guardian of) v. Wu (2003), 68 O.R. (3d) 710, [2003] O.J. No. 4826, 235 D.L.R. (4th) 341, [2003] O.T.C. 1047, 127 A.C.W.S. (3d) 558 (S.C.J.); Edmonton (City) v. Lovat Tunnel Equipment Inc., [2000] A.J. No. 214, 2000 ABQB 111, 79 Alta. L.R. (3d) 246, 260 A.R. 126, 94 A.C.W.S. (3d) 1096, 96 A.C.W.S. (3d) 798; Rumley v. British Columbia, 2002 CarswellB.C. 591 (S.C.); Spectratek Industries Inc. v. Dyke & Howard, [2006] B.C.J. No. 1565, 2006 BCSC 1053, 57 B.C.L.R. (4th) 356 (S.C.), consd

MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235, [1990] S.C.J. No. 41, 77 D.L.R. (4th) 249, 121 N.R. 1, [1991] 1 W.W.R. 705,

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562 (F.C.); Arends v. Lockhart, [1999] B.C.J. No. 3181, 110  
A.C.W.S. (3d) 487 (S.C.); Cardillo v. NN Life Insurance Co.  
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C.P.C. (6th) 80, 144 A.C.W.S. (3d) 630 (Q.B.); Children's Aid  
Society of Toronto v. M. (D.), [2001] O.J. No. 4425, 88  
C.R.R. (2d) 177, 109 A.C.W.S. (3d) 744 (Ct. J.); Cousineau v.  
St. Joseph's Health Centre, 1990 CarswellOnt. 439 (H.C.); Di-  
Anna Aqua Inc. v. Ocean Spar Technologies L.L.C., [2005]  
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A.C.W.S. (3d) 91 (S.C.); Harmony Shipping Co. S.A. v. Davis,  
[1979] 3 All E.R. 177, [1979] 1 W.L.R. 1380 (C.A.); Labbee  
v. Peters, [1996] A.J. No. 809, 10 C.P.C. (5th) 312 (Q.B.);  
R. v. Darji, [2004] B.C.J. No. 1367, 2004 BCPC 190, 120  
C.R.R. (2d) 158 (Prov. Ct.); R. v. McGowan, [2005] O.J. No.  
3813, 26 M.V.R. (5th) 152, 66 W.C.B. (2d) 532 (S.C.J.);  
Thomas v. The Queen, [1972] N.Z.L.R. 34 (C.A.); Trilea  
Centres Inc. v. Cumming Cockburn Ltd. (1991), 5 O.R. (3d)  
598, [1991] O.J. No. 1812, 29 A.C.W.S. (3d) 621 (Gen. Div.);  
United States Mineral Products Co. v. Pinchin Harris Holland  
Associates Ltd., [1992] B.C.J. No. 1460, 43 C.P.R. (3d) 497  
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Rules and Regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194 [page580]

MOTION by defendants for an order striking the affidavit of  
an expert filed in support of a motion for certification of  
action as a class proceeding and for an order prohibiting an  
expert's continued involvement in the proceeding.

Charles Wright, Andrea Dekay and Linda Visser, for 3969410  
Canada Inc.

D. Martin Low and Lisa Parliament, for Degussa Corporation,  
Degussa Canada Inc. and Degussa AG.

Sandra Forbes and Kirsten L. Mercer, for Kemira OYJ and  
Kemira Chemicals Canada Inc.

Donald B. Houston and Jeanne Pratt, for EKA Chemicals, Inc.,  
EKA Chemicals Canada Inc., and Akzo Nobel Chemicals  
International B.V.

Paul J. Martin and Laura Cooper, for FMC Corporation, FMC of  
Canada, Ltd.

RADY J.: --  
Introduction

[1] All of the defendants, except the Solvay defendants, move for an order striking in its entirety the affidavit of Dr. John C. Beyer sworn July 27, 2007, filed in support of the plaintiffs' motion for certification (which can conveniently be called the Canadian Beyer report) and an order prohibiting Dr. Beyer's continued involvement as an expert in this proceeding.

[2] This is a class action proceeding in which the plaintiffs, who are direct and indirect purchasers in Canada of hydrogen peroxide, allege that the defendants engaged in a conspiracy to fix, increase, maintain or stabilize the price of hydrogen peroxide between 1994 and 2005. There are pending claims in British Columbia and Qubec as well.

[3] Dr. Beyer was retained by the plaintiffs to provide an expert report in support of its motion for certification.

[4] There are parallel actions in the United States commenced by indirect and direct purchasers of hydrogen peroxide (and two other related products) which are being heard as a consolidated proceeding in the United States District Court for the Eastern

District of Pennsylvania. Seven of the United States defendants are defendants in the Canadian litigation. A number of orders have been made in those proceedings, which have an impact on the Canadian actions and which will be elaborated below.

[5] Dr. Beyer has been retained to provide an expert opinion in the United States proceedings as well. At the heart of this motion is a consideration of whether Dr. Beyer has been tainted as an [page581] expert in the Canadian (Ontario) proceeding because he has had access to certain information available only in the United States proceeding.

#### Chronology

[6] This action was commenced by statement of claim issued in May 2005 and which was amended in July 2006. In September 2007, the plaintiffs delivered their motion seeking certification. As is customary in these cases, no statements of defence have been delivered and the discovery process will not occur until after the certification decision.

[7] As already noted, there are similar American proceedings. In October 2005, a production order was made in those proceedings requiring the defendants to produce three categories of documents as follows:

- (i) documents produced to the Grand Jury and/or to the United States Department of Justice relating to the investigation [into] allegedly anticompetitive conduct relating to hydrogen peroxide, and/or its downstream products sodium perborate and sodium percarbonate;
- (ii) all transactional data relating to the defendants' sales of hydrogen peroxide in the United States to unrelated entities; and
- (iii) in relation to the sale of hydrogen peroxide in the United States by defendants to unrelated entities, documents sufficient to identify the raw materials and intermediates used to produce the hydrogen peroxide and the source and cost of those raw materials and intermediates.

[8] I am advised that the second and third categories of

documents, which are the documents at issue in this motion, are documents specific to the sale of hydrogen peroxide in the United States and the related cost of producing the hydrogen peroxide sold in the United States.

[9] This court order was the result of an agreement between the parties and is consistent with American practice permitting discovery prior to the certification hearing.

[10] Similarly, following "heavy negotiations", the parties agreed to the terms of a protective order intended to keep confidential that material disclosed under the production order. The parties' agreement was captured in a court order dated November 8, 2005, signed by Judge Dalzell. [page582]

[11] The protective order allows all parties who are producing documents and information in the U.S. Direct Purchasers Action to designate any documents and information as either "confidential" or "highly confidential". The difference between the two designations relates to who is permitted to review the documents. A person who receives information designated as confidential by a producing party ("protected information") must sign a confidentiality agreement and cannot use or disclose it except as set out in the protective order. The protective order provides that protected information shall not be used by any person, other than the producing party, for any purpose other than the U.S. action, except as required by law.

[12] Certain relevant provisions of the protective order are reproduced below.

A person receiving Confidential Information or Highly Confidential Information shall not use or disclose the information except for the purposes set forth in this Order or by such orders as may be issued by the Court during the course of this litigation. The provisions of this Order extend to all designated Confidential Information and Highly Confidential Information regardless of the manner in which it is disclosed, including but not limited to documents, interrogatory answers, responses to requests for admissions,

deposition testimony and transcripts, deposition exhibits, any other discovery materials produced by a party in response to or in connection with any discovery conducted in this litigation, and any copies, notes, abstracts or summaries of the foregoing.

. . . . .

Use of Confidential Information. Confidential Information or Highly Confidential Information shall not be used by any person, other than the Producing Party, for any purpose other than prosecuting, defending or settling this litigation, In re Hydrogen Peroxide Antitrust Litigation, Civ. No. 05-666, MDL Docket No. 1682, pending in the United States District Court for the Eastern District of Pennsylvania. In no event shall Confidential Information or Highly Confidential Information be used for any business, competitive, personal, private, public or other purpose, except as required by law.

[13] Subsequently, the plaintiffs in this action retained American counsel to petition the Pennsylvania court for relief from the protective order. They sought to intervene in the American proceedings only to obtain production of the evidence produced under the production order. It is not uncommon for plaintiffs to seek such relief when there are parallel proceedings in both jurisdictions and Mr. Wright advises me that such petitions have been successful in the past. However, on July 31, 2006, Judge Dalzell denied the Canadian plaintiffs' request, in brief written reasons. As I read Judge Dalzell's reasons, he was troubled by what he perceived to be an attempt by the moving parties to bypass the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 by [page583] obtaining documentary disclosure before the certification motion has been heard and before pleadings were closed.

[14] In the fall of 2005, Dr. Beyer of Nathan Associates Inc. was separately retained by both the Canadian and United States plaintiffs to provide expert opinion in support of their respective motions for certification. I am advised that Dr. Beyer has experience in price fixing conspiracy cases with particular expertise in price fixing conspiracies in the pulp and paper industry. He has been involved in other class

proceedings.

[15] Dr. Beyer and his team, including Dr. Leng and Dr. Singh, were provided access to the protected information after having signed the required confidentiality agreement. In June 2006, Dr. Beyer finalized his report to be used in connection with the United States proceeding (the U.S. Beyer report) and which was filed with the court under seal in the form of an affidavit. A redacted copy of his affidavit formed part of the materials used on this motion. The following passages are relevant:

In preparing this report, I have examined the economic characteristics of the hydrogen peroxide, sodium perborate, and sodium percarbonate industries, purchasers, and products based on the review, both by myself and by members of my staff under my direction, of the following information:

- Specific documents produced or filed in this litigation, including the Complaint;
- Electronic databases containing hydrogen peroxide transaction data for defendants Arkema Inc., Arkema S. A., and Total S.A. (collectively referred to hereafter the the "Arkema Defendants" or "Arkema"); FMC Corporation; Solvay Chemicals, Inc., Solvay America, Inc., and Solvay S.A. (collectively referred to hereafter as the "Solvay Defendants" or "Solvay"); Degussa Corporation and Degussa A.G. (collectively referred to hereafter as the "Degussa Defendants" or "Degussa"); and Eka Chemicals, Inc., Akzo Nobel Inc., and Akzo Nobel Chemicals International B.V. (collectively referred to hereafter as the "Eka Defendants" or "Eka"); and electronic databases containing transaction data of former producer E.I. DuPont de Nemours and Company (hereinafter, "DuPont");
- Electronic databases containing sodium perborate transaction data for FMC Corporation and Solvay Defendants;



- Electronic databases containing sodium percarbonate transaction data for Solvay Defendants;
- Electronic databases containing cost data of defendants FMC Corporation and the Degussa Defendants;
- Documents produced by the Arkema Defendants, the Degussa Defendants, the Eka Defendants, FMC Corporation, and the Solvay Defendants pursuant to discovery in this case;
- Electronic purchase transaction data of one plaintiff and one other purchaser; [page584]
- Documents produced by plaintiffs Artco Chemical, Inc.; Astro Chemicals, Inc.; Atlantis Caribbean Chemical Corp.; Borden & Remington Corp; Central Marin Sanitation Agency; Chem/Serv, Inc.; Diamond Chemical; MCO Chemical Distributors, Inc.; Finch, Pruyn and Company, Inc.; Interstate Chemical Company; Lensco Products, Inc.; Lincoln Paper & Tissue, LLC; Borough of Middletown; Middletown Borough Authority; Mississippi River Corp; Northern Chemical Corporation; Ohio Chemical Services, Inc.; the City of Philadelphia; Roberts Chemical Company, Inc; Safer Textile Processing Corp.; Standard Technology Applied Resources Inc.; and Young Chemical Company; and purchasers Coyne Chemical and Eagle Chemical;
- Deposition transcripts of Artco Chemical, Inc.; Chem/Serv, Inc.; Diamond Chemical; EMCO Chemical Distributors, Inc.; Finch, Pryn and Company, Inc.; Ohio Chemical Services, Inc.; Safer Textile Processing Corp.; and Young Chemical Company; and
- Publicly available information concerning the hydrogen peroxide, sodium perborate, and sodium percarbonate industries.

A complete list of the materials reviewed is included in Appendix B. The opinions expressed in this report are based on the information that I have reviewed so far and may change if new information warrants.

For the purpose of the analysis in this report, I have assumed that the alleged violations did in fact occur and that the Defendants did enter into a conspiracy to fix, raise, stabilize or maintain at artificially high and non-competitive levels the prices of, to control and restrict output for, and to allocate markets and customers for, hydrogen peroxide, sodium perborate, and sodium percarbonate sold in the United States during the Class Period. I have not assumed that the alleged conspiracy impacted members of the Class. Instead, I have investigated whether there is common proof that could demonstrate the impact on the proposed Class assuming the conspiracy occurred as alleged.

Based on my economic analysis of all the information that I have reviewed, I have concluded that there is common proof to show that the alleged joint conduct would have impacted all purchasers of hydrogen peroxide, sodium percarbonte, and sodium percarbonate in the United States and that all these purchasers would have paid higher prices than they would have absent the alleged joint conduct. . . .

[16] It is apparent from the foregoing that Dr. Beyer relied on both protected and public information in formulating his opinion in the U.S. Beyer report. As I understand it, the protected information related to transaction and cost data in the United States. I should note that E.I. DuPont de Nemours and Company (referred to at the second bullet above) is a former producer of hydrogen peroxide and is not a party to either the Canadian or United States proceedings.

[17] Dr. Beyer did not begin work on the Canadian Beyer report until late June 2006. He was asked to provide an economic analysis of the hydrogen peroxide market in Canada (and not the [page585] markets for sodium percarbonate and sodium perborate as in the U.S. Beyer report). The Canada Beyer report is Exhibit B to Dr. Beyer's affidavit sworn July 27,

2007 and filed on the pending certification motion.

The Position of the Moving Parties

[18] The moving parties submit as follows:

- (1) In preparing the U.S. Beyer report, Dr. Beyer and his team had access to ten categories of information, nine of which are protected by court order.
- (2) The conclusions in the U.S. Beyer report are based on a use of protected information.
- (3) By the time the Canadian Beyer report was started, Dr. Beyer and his team had gained a knowledge of the hydrogen peroxide industry, again from use of protected information.
- (4) The work of the U.S. Beyer report could not help but influence the preparation of the Canadian Beyer report.
- (5) The U.S. Beyer report served as the basis for the Canadian Beyer report. There are significant and substantial similarities between the two reports and the same key personnel worked on both.
- (6) Although Dr. Beyer was instructed not to rely on protected information in connection with the Canadian Beyer report and he found non-protected sources of information to support his conclusions, those conclusions were nevertheless derived from the use of protected information.
- (7) An adverse inference should be drawn against the plaintiffs arising from their refusal to produce drafts of the Canadian Beyer report. The inference to be drawn is that earlier drafts contained reference to protected information.
- (8) Dr. Beyer cannot separate what he learned from the protected information and what he learned from private sources and there is a substantial risk that protected

information will be disclosed in the Canadian litigation.

(9) The moving defendants note that there are no cases on point but analogous authority requires the court to strike a balance between the need to protect confidential information and the right of a party to choose its expert. [page586]

(10) In assessing prejudice, the court will consider:

- (1) the degree to which the expert received confidential information;
- (2) whether its receipt ongoing or historical;
- (3) whether the information important or merely peripheral;
- (4) if the expert's skills unique;
- (5) what the expert has done to insulate the confidential information from disclosure; and
- (6) what is the risk of disclosure.

[19] It is submitted that a consideration of the foregoing leads inexorably to a conclusion fatal to Dr. Beyer's involvement, past and future, in the Canadian proceedings. If the relief is not granted, the plaintiffs will effectively receive protected information forbidden to them by Judge Dalzell's order. Any order to the contrary would not observe the spirit of the protective order. If not granted, significant prejudice would result to the moving defendants, to a non-party (E.I. Dupont) and to the court. With respect to the former, it is said that their ability to defend the certification motion is impaired because they cannot properly challenge Dr. Beyer's analysis, conclusions and their source(s) because this would involve, by necessity, the disclosure of protected information.

[20] Concern is expressed about the disclosure of non-party DuPont's protected information. Finally, the court is prejudiced because Dr. Beyer cannot properly fulfill his role as an expert because he cannot provide a fair report with attribution of all of his sources, with the attendant risk of misleading or incomplete information.

[21] The moving defendants submit that any prejudice to the plaintiffs is minimal because:

- (1) they took the risk and should bear the consequences;
- (2) Dr. Beyer did not insulate the protected information;
- (3) there are other appropriate experts available;
- (4) there is no evidence of urgency given that the plaintiffs waited two years to bring their certification motion.

#### The Plaintiffs' Position

[22] In his preliminary remarks, Mr. Wright noted that the plaintiffs are in substantial agreement with the moving parties [page587] that in determining this issue, the court is required to conduct a balancing act, weighing the interests of the parties and the prejudice that flows from granting or refusing the relief sought. He submits that this exercise leads to a conclusion opposite to that urged by the moving parties.

[23] In this regard, he asks the court to consider:

- (1) The Canadian Beyer report is being used on a purely procedural motion where the plaintiffs bear the burden to demonstrate why certification should be granted.
- (2) Although other experts are available, Dr. Beyer's expertise in the area of price fixing is unique because of his extensive work in the pulp and paper industry.
- (3) Dr. Beyer was instructed at the outset of his Canadian retainer that he probably would not be able to rely on

the protected information and he should proceed on that basis.

- (4) Dr. Beyer says that the American information is only confirmatory of conclusions he reached on the basis of public sources (something disputed by the moving parties).
- (5) It is important to note that Dr. Beyer was never retained at any time by the defendants and was never privy to litigation strategy and, therefore, the issue of confidentiality must be examined carefully. In particular, the cases relied upon by the moving parties must be read in this light.

#### Analysis

[24] The threshold issue is whether Dr. Beyer used or relied upon protected information in preparing the Canadian Beyer report. It is only if he did that the cases cited by the defendants become relevant.

[25] Dr. Beyer swore an affidavit in response to this motion in which he deposes the following:

1. On July 27, 2007, I swore an affidavit and offered an opinion regarding class certification in this matter. The conclusions I reached in that opinion were based on publicly available information and information provided to me by plaintiffs in this matter in proceedings in Ontario and in British Columbia. I studied this information in the course of preparing the July 27, 2007 affidavit and opinion. The materials that I considered while preparing that opinion were listed in an appendix, which is included here as Exhibit 1.
2. My preexisting and ongoing involvement in a direct purchaser action pending in District Court in the United States, *In re: Hydrogen Peroxide Antitrust Litigation*, also gave me occasion to study the North [page588] American hydrogen peroxide industry. The information available to me in that matter included publicly available data and research, as well as data, documents and testimony from purchasers and producers

of hydrogen peroxide that continue to be subject to protective order.

3. The preparation of my affidavit and opinion in this matter pending before the Ontario Superior Court of Justice and all conclusions drawn therein, depended on public sources of information and data provided by plaintiffs, with no reliance on other protected data, documents or testimony.

[26] Dr. Beyer was cross-examined on his affidavit. I was directed to various portions of the transcript during the course of argument by both the moving and responding parties.

[27] Two passages from the transcript which are reproduced below, are significant.

191 Q. And wouldn't it be fair to say, sir, that the work that you did for the U.S. report couldn't help but influence how you approached the Canadian report?

192 A. In part, yes, in part no.

Q. And --

A. May I finish my answer?

193 Q. Sorry. I thought you were.

A. No. It is impossible to use the brain other than as a store of information. I don't vacuum my brain -- as difficult as it is to remember things, therefore, what I learned in the process of examining as an economist the U.S. hydrogen peroxide industry served as a basis, as a starting point, for my analysis of the hydrogen peroxide industry in Canada.

. . . . .

Q. Sir, you are not saying, are you, that you would have spent significant time and space in your report referring to transactional data and what you did with it, and what it was, and why you used it if you didn't need it?

A. I did not need it. But I had it, and I used it. And it confirmed my analysis that I outlined and described in the earlier parts of my U.S. report.

[28] Dr. Beyer went on to say that his "economic analysis of the hydrogen peroxide industry, purchasers and product is not

based on the transactional data. The transactional data provide a confirmation of the analysis that I have done through other sources."

[29] As a result, as I understand Dr. Beyer's evidence, for the U.S. Beyer report, he formulated his hypothesis and tested it using both protected and public information. For the Canadian [page589] Beyer report, he tested his hypothesis using only publicly available information. The defendants' complaint is that the hypothesis was developed by using, in part, protected information and they are unable to "get at" that information in order to test Dr. Beyer's conclusions.

[30] There is some merit to the notion that Dr. Beyer could not "vacuum" his brain and there is a risk that his access to protected information might have influenced his thinking on the Canadian industry and, therefore, the Canadian Beyer report. So, assuming that Dr. Beyer's analysis in his Canadian report has been influenced by his access to the protected information, should he be disqualified? I am not persuaded that he should be, for a number of reasons.

[31] First, all of the conclusions in the Canadian Beyer report are sourced and supported by admissible evidence, either publicly available or provided by the plaintiffs. I simply do not understand how the defendants are hampered in their cross-examination of Dr. Beyer in these circumstances.

[32] Second, one of the reasons the U.S. protective order was put into place was to protect the defendants' information. This information is within the defendants' control and it seems to me that it could be used to cross-examine Dr. Beyer and to instruct the defendants' own experts. If the defendants are concerned about running afoul of the protective order, they would surely be entitled to relief if they chose to request it.

[33] Third, the plaintiffs seek to use the Canadian Beyer report in connection with their motion for certification, which is strictly procedural in nature. It is not clear to me how the defendants' ability to defend the motion is impaired or compromised.



[34] Turning to the relevant case law, the seminal case on the issue of disqualification for conflict of interest is *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, [1990] S.C.J. No. 41. This case arose in the context of whether a law firm should be disqualified from continuing to act. However, the principles articulated in it have been applied to an expert in possession of confidential information. See, for example, *Burgess (Litigation Guardian of) v. Wu* (2003), 68 O.R. (3d) 710, [2003] O.J. No. 4826 (S.C.J.); *Arends v. Lockhart*, [1999] B.C.J. No. 3181, 110 A.C.W.S. (3d) 487 (S.C.); *R. v. Darji*, [2004] B.C.J. No. 1367, 120 C.R.R. (2d) 158 (Prov. Ct.); *Spectratek Industries Inc. v. Dyke & Howard*, [2006] B.C.J. No. 1565, 57 B.C.L.R. (4th) 356 (S.C.); *Breda v. Breda*, [1997] B.C.J. No. 1442, 10 C.P.C. (4th) 133 (Gen. Div.); *Di-Anna Aqua Inc. v. Ocean Spar Technologies L.L.C.*, [2005] N.S.J. No. 532, 247 N.S.R. (2d) 11 (S.C.); *Abbott Laboratories v. Canada (Minister of Health)*, [2006] F.C.J. No. 97, 46 C.P.R. (4th) 166 (F.C.); [page590] *Cardillo v. NN Life Insurance Co. of Canada*, [2005] M.J. No. 471, 2005 MBQB; and *United States Mineral Products Co. v. Pinchin Harris Holland Associates Ltd.*, [1992] B.C.J. No. 1460, 43 C.P.R. (3d) 497 (S.C.).

[35] In reviewing the cases involving the disqualification of an expert, it is important to bear in mind the following admonition from *Rumley v. British Columbia*, 2002 CarswellBC 591 (S.C.):

The principles in *MacDonald Estate*, should be applied cautiously when the circumstances are outside the particular issue with which that cases was concerned -- the unique and fiercely protected confidentiality which adheres to the solicitor/client relationship. The role of an expert witness who does not participate in litigation planning or strategy does not lend itself to the type of analysis applied to the role of a solicitor.

[36] It is the latter observation that is of particular significance. An expert's access to a party's litigation planning or strategy is unquestionably prejudicial. This was the basis for the disqualification of the experts in the *Abbott*

Laboratories and Cardillo decisions.

[37] In other cases, an expert was disqualified because of a prior professional relationship with the moving party, during the course of which confidential information was provided. So, for example, in the Burgess decision, a psychiatrist who had conducted an assessment of the deceased was precluded from giving an expert opinion for the defendant who was defending a claim by the deceased's family. In both the Spectratek and Breda decisions, the proposed expert had acted as the moving party's accountant. In both cases, the court expressed concern that the accountants had failed to satisfy the court that confidential information to which they had access would not be misused. I would interpret this to mean that the information would or could be used in a way detrimental to a former client. There is no suggestion of such misuse here.

[38] In this case, Dr. Beyer has not been privy to the litigation strategy or planning; nor has he been involved in a prior professional relationship with the defendants. As a result, the principles in MacDonald Estate are not readily transferred to the facts here.

[39] There is another line of pertinent authority, commencing with Harmony Shipping Co. S.A. v. Davis, [1979] 3 All E.R. 177, [1979] 1 W.L.R. 1380 (C.A.).

[40] In that case, a handwriting expert gave an opinion to the plaintiff and then, not realizing he had already given an opinion, gave an opinion to the defendant. When the expert realized his mistake, he refused to accept further instructions from the [page591] defendant. The defendant subpoenaed the expert. In holding that the expert could be called to testify, Lord Denning noted that there is no property in a witness:

So we have before us a question of principle. If an expert witness has been consulted by one side and has given his opinion to that side, can he thereafter be consulted and subpoenaed by the other side to give his opinion on the facts of the case? That is the issue which this court has to decide.

So far as witnesses of fact are concerned, the law is as plain as can be. There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena.

. . . . .

The question in this case is whether or not that principle applies to expert witnesses. They may have been told the substance of a party's case. They may have been given a great deal of confidential information. On it they may have given advice to the party. Does the rule apply to such a case?

Many of the communications between the solicitor and the expert witness will be privileged. They are protected by legal professional privilege. They cannot be communicated to the court except with the consent of the party concerned. That means that a great deal of the communications between the expert witness and the lawyer cannot be given in evidence to the court. If questions were asked about it, then it would be the duty of the judge to protect the witness (and he would) by disallowing any questions which infringed the rule about legal professional privilege or the rule protecting information given in confidence, unless, of course, it was one of those rare cases which come before the courts from time to time where in spite of privilege or confidence the court does order a witness to give further evidence.

[41] Lord Denning concluded his judgment with "a further consideration of public policy" as follows:

If an expert could have his hands tied by being instructed by one side, it would be very easy for a rich client to consult each of the acknowledged experts in the field. Each expert

might given an opinion adverse to the rich man, yet the rich man could say to each, 'Your mouth is closed and you cannot give evidence in court against me'. We were told that in the Admiralty courts where there are a very limited number of experts, one side may consult every single one of them. Does that mean that the other side is debarred from getting the help of any expert evidence because all the experts have been taken up by the other side? The answer is clearly No. It comes back to the proposition which I stated at the beginning. There is no property in a witness as to fact. There is no property in an expert witness as to the facts he has observed and his own independent opinion on them. There being no such property in a witness, it is the duty of a witness to come to court and give his evidence in so far as he is directed by the judge to do so. [page592]

[42] Following *Harmony Shipping*, Canadian courts have on occasion refused to disqualify an expert on the basis that he or she received confidential information through a previous retainer with another party to the proceeding. See, for example, *Children's Aid Society of Toronto v. M. (D.)*, [2001] O.J. No. 4425, 88 C.R.R. (2d) 177 (Ct. J.); *Trilea Centres Inc. v. Cumming Cockburn Ltd.* (1991), 5 O.R. (3d) 598, [1991] O.J. No. 1812 (Gen. Div.); *R. v. McGowan*, [2005] O.J. No. 3813, 26 M.V.R. (5th) 152 (S.C.J.); *Cousineau v. St. Joseph's Health Centre*, 1990 CarswellOnt. 439 (H.C.); and *Edmonton (City) v. Lovat Tunnel Equipment Inc.*, [2000] A.J. No. 214, 2000 ABQB 111.

[43] In *Labbee v. Peters*, [1996] A.J. No. 809, 10 C.P.C. (5th) 312 (Q.B.), the court suggested three main principles guiding the disqualification of experts [at para. 12]:

- (1) There is no property in a witness.
- (2) Even though a party has retained an expert and communicated privileged information to the expert, the expert can still provide an opinion for an opposing party and may be called as a witness at trial.
- (3) The expert may not be questioned concerning any

privileged material he or she received from the opposing solicitor or disclose any opinion given to the opposing solicitor.

[44] Applying these principles, the court permitted the expert to testify, although he had received confidential information through an earlier retainer with the plaintiff. The expert was precluded from relying on the confidential information in arriving at his conclusions or disclosing any strategic advice given to the plaintiff. The court provided the following direction [at paras. 16-17]:

Dr. Kumar may have confidential information but that should not prevent him from responding independently with an opinion on facts presented to him by the parties adverse in interest to the Plaintiff.

It seems unfair to prevent the Defendant parties from putting before the Court the opinion of this expert, particularly since the Third Party by order in fact retained Dr. Kumar first.

. . . Dr. Kumar is to be told that in arriving at this conclusion he is to have no regard to any information he has received in confidence from the Plaintiff nor is he to disclose any tactical or strategic advice he may have given to the Plaintiff.

[45] In refusing to disqualify an expert who had been previously retained by an adverse party, the court, in [page593] *Cousineau v. St. Joseph's Health Centre*, supra, dismissed the notion that the expert's opinion was "contaminated" by the receipt of privileged information. The following passage illustrates the court's thinking:

It is my ruling that just because plaintiff's counsel has consulted an expert and has provided that expert with data, including confidential data, such expert is not debarred from giving testimony in the action for the defendant. What that expert is debarred from giving is any part of the communication emanating from plaintiff's counsel to that

expert which, in itself, involves the "work product" of counsel.

In the case at Bar, there is no implication that that will be done. Indeed, if during the trial any mention is made of any communication from plaintiff's counsel to these doctors, the trial Judge would very likely prevent testimony as to that communication being received in evidence. One has to be concerned that perhaps plaintiff's counsel might have mentioned some weakness in his case in such communication; presumably, the weakness would be Dr. Mirehouse's opinion, which I infer did not denigrate the professional standard of the defendants; and that fact, the fact that plaintiff's counsel in writing Drs. Posnick and Gruss did acknowledge some weakness in his case, that certainly would be most improper to bring out during a trial of an action. What is admissible, because it is in no way in my opinion contaminated by privileged information, is the opinion evidence of Drs. Posnick and Gruss on the primary medical facts in the case on the issue of the defendant's professional standard. The Court is entitled to have such an opinion from any expert called by counsel for either side. So, in my opinion, the basic doctrine of *Harmony Shipping v. Davis* applies, and my ruling is that the testimony of these doctors, if, as, and when counsel for the plaintiff decides to call them, is not prima facie by virtue of some violation of privilege, inhibited from being given; although there may be other reasons at the time of trial that may qualify my ruling.

[46] *Rumley v. British Columbia*, supra, the court held that the plaintiffs' expert, who had been previously retained by the defendant, should not be disqualified as a witness. In refusing to disqualify the expert, the court distinguished those cases cited by the defendant on the basis that they involved situations where the expert was involved in litigation planning or strategy. There was no evidence in *Rumley* that the expert was involved in confidential discussions, decisions or planning with the defendant that might compromise her independence or the defendant's ability to defend the action.

[47] The court concluded that the expert could give evidence for the plaintiffs, but that she could not rely on any confidential information provided to her during her relationship with the defendant.

[48] In *Edmonton (City) v. Lovat Tunnel Equipment Inc.*, supra, the defendant third party sought to call an expert who had previously been retained by the defendant to assess the plaintiff's damages. The court allowed the motion, noting that the [page594] expert's opinion was based almost solely on the plaintiff's documents, over which the defendant could not assert privilege. The court held that the expert could not have regard to any information received in confidence by the defendant or disclose any tactical or strategic advice he may have given to the defendant.

[49] In my view, the confidential information made available to Dr. Beyer in the U.S. proceedings is more akin to the information available to the experts in the Rumley and Lovat Tunnel decisions. It bears noting that the information is confidential but not privileged and does not bear on the defendants' litigation planning or strategy.

[50] For all of these reasons, I would dismiss the moving parties' motion.

Motion dismissed.