IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *HMTQ v. Imperial Tobacco Canada Limited,* 2013 BCSC 1963

Date: 20131029
Docket: S010421
Registry: Vancouver

Between:

Her Majesty the Queen in Right of British Columbia

Plaintiff

And

Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., Canadian Tobacco Manufacturers' Council, B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. (formerly Philip Morris Incorporated), Philip Morris International, Inc., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., Rothmans International Research Division and Ryesekks p.l.c.

Defendants

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. July 29, 2013
Place and Date of Judgment:	Vancouver, B.C. October 29, 2013

I. Introduction

[1] The defendant tobacco companies apply to disqualify the law firm of Camp Fiorante Matthews Mogerman ("CFMM") from representing the Province of British Columbia in its action to recover tobacco-related health care costs. A partner in that firm was involved in the defence of the action until about eight years ago.

[2] This litigation began in 1998. Until earlier this year, the firm of Bull Housser acted as counsel for the Province. In April, the Province appointed new counsel, retaining a consortium comprised of Bennett Jones LLP and Siskinds LLP. It appears that those firms will also be acting for five other provincial governments in similar litigation in their respective provinces.

[3] In May 2013, the defendants were advised that the national consortium intended to retain CFMM as "local counsel." One of the partners in CFMM is Reidar Mogerman, who joined the firm in 2005. Between 1998 and 2000 and again between 2003 and 2005, Mr. Mogerman had worked under contract with firms representing some of the defendants in this litigation and was directly involved in preparing the defence.

II. Legislative and Procedural History

[4] The *Tobacco Damages Recovery Act*, S.B.C. 1996, c. 41 (the "1997 *Act*"), was enacted on July 28, 1997, creating a new statutory cause of action in favour of the Province against tobacco manufacturers for health care costs. In 1998, the 1997 *Act* was amended and renamed the *Tobacco Damages and Health Care Costs Recovery Act*. The 1997 *Act* was brought into force on November 12, 1998, and the Province commenced action the same day.

[5] Three of the present defendants – JTI-Macdonald Corp. ("JTI"), Imperial Tobacco Limited (now Imperial Tobacco Canada Limited) ("ITL") and Rothmans, Benson & Hedges Inc. – challenged the constitutionality of the 1997 *Act* and, on February 21, 2000, R. Holmes J. declared it to be unconstitutional and dismissed the Province's action: *JTI-Macdonald Corp. v. AGBC*, 2000 BCSC 312.

[6] The Province then repealed the 1997 *Act* and enacted revised legislation: the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (the "2000 *Act*"), which was brought into force on January 24, 2001. The Province then commenced this action under the 2000 *Act*.

[7] On June 5, 2003, R. Holmes J. declared that the 2000 *Act* was also unconstitutional: *HMTQ v. Imperial Tobacco Canada Limited et al.*, 2003 BCSC 877. That judgment was reversed by the Court of Appeal on May 20, 2004: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2004 BCCA 269. The constitutional validity of the 2000 *Act* was confirmed by the Supreme Court of Canada on September 29, 2005: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49.

[8] Since September 2005, there have been interlocutory proceedings, including applications by some of the non-Canadian defendants on issues of this Court's jurisdiction, an application by the federal government to strike third party claims made against it (which was itself the subject of an appeal to the Supreme Court of Canada) and an application by some of the defendants to compel the Province's production of damages-related documents. Counsel advise that large-scale documentary discovery has also been ongoing. No examinations for discovery have been scheduled, no expert reports have been exchanged and no trial date is set.

[9] The governing legislation contains a number of what the defendants call "novel features," including provisions relating to retroactivity, evidentiary presumptions and use of statistical methods to prove loss. Although the constitutional validity of the governing legislation has now been established, the defendants say these novel features still require judicial interpretation and they must determine how best to defend this litigation in light of them. They say they have been considering that issue, essentially unchanged, since 1998.

III. Mr. Mogerman's Past Involvement

[10] Mr. Mogerman was called to the bar in 1997. From September 1998 until October 2000, he worked under contract with Farris, Vaughan, Wills and Murphy

("Farris"), counsel for JTI and R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc. (collectively, "RJR"). While under contract with Farris, Mr. Mogerman billed 671 hours of time for his legal services to JTI and RJR.

[11] Jeffrey Kay, Q.C. says in an affidavit that much of Mr. Mogerman's work remains "highly relevant" to the defence of this action. Mr. Kay says this work included:

- reviewing the 2000 *Act*, comparing it to the 1997 *Act;*
- preparing a memo on the strategy for defending this litigation and reviewing similar material prepared by others for the purpose of developing strategy;
- preparing memos to be shared with co-defendants' counsel concerning statistical evidence;
- producing memos of law with respect to various legal issues;
- reviewing memos in regard to the development of expert evidence;
- attending meetings with counsel for all defendants;
- reviewing draft defences and a draft opening statement.

[12] After leaving Farris in 2000, Mr. Mogerman was not involved in this matter until April 2003, when he began working on a contract basis for Berardino & Harris, counsel for ITL in this litigation. Between April 2003 and June 2005, Mr. Mogerman billed 1,207.4 hours of time for legal services to ITL. This work included analyzing issues concerning the interpretation of the 2000 *Act*, participation in teleconferences with ITL's legal team, research and work on ITL's factum in the Supreme Court of Canada.

[13] Mr. Mogerman joined CFMM in August 2005 and became a partner in 2008. He says in an affidavit that he has never discussed his work on the tobacco litigation with anyone at CFMM and specifically did not discuss any confidential information.

[14] However, Mr. Mogerman retained some paper files and backup discs relating to this litigation. These were kept in boxes with other files from his work as a contract lawyer and sole practitioner and which he understood he was obliged to keep for a time. He agrees this material included confidential information relating to the defendants and says that, on June 3, 2013, he reviewed the material in the boxes, removed files related to this matter and returned them to defence counsel.

[15] Between 2005 and earlier this year, these boxes were kept first in Mr. Mogerman's office at CFMM, then in on-site storage and finally in off-site storage. The defendants say that during that time lawyers and staff at CFMM had access to those files and that Mr. Mogerman instructed staff members to look through them.

[16] Mr. Mogerman says he only asked staff to look in the boxes on one occasion for the purpose of finding material in a file unrelated to this matter. Mr. Mogerman's partner, J. J. Camp, Q.C., says he has determined that the only staff members to have accessed the boxes on that occasion were a paralegal, a receptionist and a summer student, none of whom recall seeing any material related to this matter or paying attention to the contents of the boxes except for the purpose of identifying the file they were looking for.

IV. CFFM's Proposed Involvement and Confidentiality Measures

[17] Michael J. Peerless, a partner in Siskinds LLP, says it is of critical importance to the national consortium that it has local counsel highly experienced in complex multi-party mass tort litigation. CFMM is well known as counsel in mass tort, products liability and class actions. He says that Siskinds and the other members of the consortium have worked closely with CFMM on other matters in the past and that "other firms in British Columbia that may have been available to the Consortium and the client (in other words, those firms that were not already acting for the tobacco manufacturers in this litigation) were not at the same level of experience."

[18] Mr. Camp says discussions about CFMM being retained to act for the Province began in January and February 2013. He states the firm has still not been retained but, beginning in February 2013, a number of steps were taken to create an

information barrier or firewall between Mr. Mogerman and the rest of the firm with regard to this litigation. The immediate steps included:

- Creation of password protected electronic files and modified email access so that Mr. Mogerman has no access to any files or emails relating to this litigation;

- Establishment of a dedicated, password protected server for this litigation, which Mr. Mogerman cannot access;

- Conversion of CFMM's old server room to a dedicated room for this litigation that Mr. Mogerman cannot access, with a separate printer, scanner, etc.;

- Agreeing to arrange separate premises for the work on this litigation if the firm is retained.

[19] CFMM retained a retired judge of this Court, Hon. Mary-Ellen Boyd, to advise on the design and implementation of a confidentiality protocol and to monitor compliance with that protocol on ongoing basis. The protocol requires that:

- Mr. Mogerman file a sworn declaration that he has not disclosed any non-public information about this litigation to anyone associated with CFMM, that he will not disclose such information in the future, that he will not participate in any tobacco related legal services and will not attend at any locations in CFMM offices where material related to the litigation is stored;

- All other staff and lawyers at CFMM file reciprocal declarations that Mr. Mogerman has disclosed no confidential information to them and they will neither solicit any information regarding this litigation from him nor provide him with information concerning this litigation;

- Mr. Camp file a further declaration that Mr. Mogerman would not work on this litigation or provide any legal services related to this litigation;

- Mr. Mogerman will be excluded from partnership discussions concerning this litigation but will share in fees and expenses in relation to the retainer;

- Mr. Mogerman will destroy, or if requested, return all and any confidential information to the Applicants;

- A legal team for the retainer is defined and includes a legal assistant who has not worked with Mr. Mogerman since the potential retainer arose and will not work with him in the future

- When separate premises for the litigation are leased, Mr. Mogerman will not have access to them;

- The new premises will have dedicated printer, scanner and fax capabilities;

- Separate password protected electronic systems will be used for this litigation, for which Mr. Mogerman will not have the password;

- To the extent that any discussions relating to this litigation take place in the current offices of CFMM, the members of the litigation team will ensure Mr. Mogerman is not present and that the matter is discussed behind closed doors;

- All members of the litigation team will take the greatest care to ensure that no material is left open to view at CFMM's regular office and any hard copy material at that office will be stored in color-coded files clearly labelled as "firewalled from RMM."

- All staff and lawyers must confirm they are familiar with the protocol and understand that any violation of it will result in sanctions up to dismissal.

[20] All of the individual declarations and confirmations required by the protocol have been provided. Ms. Boyd states in an affidavit that she plans to visit both the CFMM offices and the separate off-site premises from time to time, without notice, to ensure that that the confidentiality protocol is being complied with.

V. The Law

[21] Every lawyer owes a professional duty of confidentiality to his or her clients. When the professional relationship ends "the lawyer's main duty to a former client is to refrain from misusing confidential information." (*Canadian National Railway v. McKercher*, 2013 SCC 39, at para 23.)

[22] A lawyer who has obtained relevant confidential information relating to a former client can never act against that client. As the Supreme Court of Canada said in *Macdonald (Estate) v. Martin*, [1990] 3 S.C.R. 1235, at 1261:

> No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out has been gleaned from the client and what was acquired elsewhere.

[23] However, when a lawyer changes firms, the prohibition does not automatically extend to other lawyers in the new firm who have never acted for his or her former client. It is common ground that the leading case is *Martin*, which, at 1260, established a two-part test:

- Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand?

- Is there a risk that the confidential information will be used to the prejudice of the client?

[24] Where other members of a lawyer's firm are acting against his or her former client, the court said "a reasonable member of the public" would not necessarily conclude that confidences are likely to be disclosed in every case, but there is a "strong inference" that lawyers working together share confidences. That inference can be rebutted by "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." (*Martin*, at 1262)

[25] The court in *Martin* was concerned with balancing three competing values: (1) the need to maintain the high standards of the legal profession and the integrity of the justice system; (2) the right of litigants not to be deprived of their choice of counsel without good cause; and, (3) permitting reasonable mobility in the legal profession. The balancing of those interests requires standards that are:

> … sufficiently flexible to permit a solicitor to act against a former client provided that 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. (at 1263)

[26] More recently, in *McKercher*, the court referred again at para. 22 to the need to balance the conflicting values and not rely on "broad rules that are not context-sensitive."

[27] The balancing of interests required by *Martin* also includes discouraging the tactical use of disqualification motions. In *Manville Canada Inc. v. Ladner Downs* (1992) 88 D.L.R. (4th) 208, Esson C.J.S.C as he then was, said at 224:

> … if the rules for disqualification invite applications of this kind wherever the ingenuity of the legal mind can conjure up a possibility of an appearance of impropriety, the result will be to damage the profession's reputation and the integrity of the system by adding to the already intolerable length and cost of litigation.
>
> … No doubt, some of those applications are brought to prevent a risk of real mischief. But can there be any doubt that many are brought simply because an application to disqualify has become a weapon which can be used, amongst many others, to discomfit the opposite party by adding to the length, cost and agony of litigation.

[28] In *Robertson v. Slater Vecchio*, 2008 BCCA 306, the Court of Appeal, at para. 16, approved the following statement by the chambers judge:

> … the courts must also consider the plaintiff's basic right to counsel, and whether the consequences of disclosure, the mischief, is actual and not speculative. If there is no prejudice, no mischief, the courts may deny injunctive relief. The court must analyze all relevant factors.

[29] Following the *Martin* decision, the legal profession developed more detailed conflict rules, as the court in *Martin* explicitly invited it to do. Those professional rules do not bind the court, which must examine "the fundamental principles in any given

case to obtain a just and fair result," but they "may be persuasive in a proper case." (*Dow Chemicals Canada Inc. v. Nova Chemicals Corp.,* 2011 ABQB 509, at para. 70.)

[30] Both sides refer to the *Code of Professional Conduct for British Columbia* (the "BC Code"), the professional code of ethics of the Law Society of British Columbia (the "Law Society"). The defendants rely on Rule 3.4-11 of the BC Code, which reads:

> 3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's firm may act against the former client in the new matter, if the firm establishes, in accordance with rule 3.4-20, that it is reasonable that it act in the new matter, having regard to all relevant circumstances, including:
>
> > (a) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;
> >
> > (b) the extent of prejudice to any party; and
> >
> > (c) the good faith of the parties.

[31] Appendix D to the code BC Code includes specific guidelines that primarily address the steps a law firm must take at the time a lawyer with a potential conflict joints the firm. They include specific steps to screen the lawyer from any involvement in or discussion of the case involving his or her former client.

[32] Counsel for CFMM refers to rules Rules 3.4-17 to 3.4-26, which are stated in rule 3-4.18 to apply:

> … when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:
>
> > (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client");
> >
> > (b) the interests of those clients in that matter conflict; and
> >
> > (c) the transferring lawyer actually possesses relevant information respecting that matter.

[33] Rule 3.4-20 says:

> 3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter referred to in rule 3.4-18 (a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:
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> (a) the former client consents to the new law firm's continued representation of its client; or
>
> (b) the new law firm can establish, in accordance with rule 3.4-25, when called upon to do so by a party adverse in interest, that
>
> (i) it is reasonable that its representation of its client in the matter continue, having regard to all relevant circumstances, including:
>
> (A) the adequacy and timing of the measures taken under clause (ii);
>
> (B) the extent of prejudice to the affected clients; and
>
> (C) the good faith of the former client and the client of the new law firm; and
>
> (ii) it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm.

[34] The effect of those rules is to confirm, following *Martin*, that there is no absolute ban on a law firm acting against a former client of one its members, but the onus is on the firm to show that appropriate steps are taken to prevent the misuse of confidential information.

VI. Analysis

[35] On the first branch of the *Martin* test, there is no dispute about the fact Mr. Mogerman received confidential information while working with counsel for the defendants. Although he has not been involved in the matter for eight years, I assume for the purpose of this application that he has a reliable memory of at least some of that confidential information. On the second branch of the test, it is also clear that insofar as Mr. Mogerman himself is concerned, he can have nothing to do with the case against the defendants.

[36] The question is whether CFMM as a firm can act in the matter. It can do so only if there is no risk of the defendants' confidential information being used against them. I stress that the mere presence of confidential information through Mr. Mogerman is not determinative. The mischief the court must guard against is the use of that information.

[37] Obviously, the information could only be used if it is disclosed to other members of the firm. Therefore, the second branch of the *Martin* test requires the firm to show that it has taken adequate, concrete steps to isolate Mr. Mogerman from all matters relating to its conduct of this litigation in order to prevent that disclosure.

[38] The evidence shows that when CFMM was approached about the possibility of this retainer, it took immediate steps to establish a confidentiality protocol that appears to have explicitly followed and adopted most of the guidelines in Appendix D of the BC Code. The implementation of that protocol and the firm's compliance with it is to be monitored by outside counsel. I am satisfied that the protocol does everything reasonably possible to isolate Mr. Mogerman from this file and effectively prevent any future disclosure or use of confidential information.

[39] The defendants say that even if the confidentiality protocol is adequate, it comes too late because Mr. Mogerman has been a member of the firm for eight years when no confidentiality measures were in place. Of course, there was no need for any such measures because CFMM was not involved in this litigation and there was no conflict. In the absence of those measures, the defendants say CFMM is left with unverifiable statements in affidavits that no disclosure has occurred. This is the kind of evidence that the court in *Martin* said will be insufficient to rebut the "strong inference" that disclosure has occurred.

[40] *Martin* involved a lawyer who formerly acted for a defendant, then joined a firm that was already acting for the plaintiff. The conflict arose immediately upon the lawyer joining the firm. That is the context in which this issue most frequently arises and which is the focus of the guidelines in the BC Code.

[41] In *Martin*, the firm had taken no specific measures to deal with the conflict and relied on affidavits and undertakings that no disclosure had or would occur. It was in that context that the court, in passages relied upon by the defendants, said at 1263, 1264:

> A *fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement with the statement of Posner J. in *Analytica, supra*, to which I have referred above, that affidavits of lawyers difficult to verify objectively will fail to assure the public.
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> …
>
> With respect to the second question, there is nothing beyond the sworn statements of Sweatman and Dangerfield that no discussions of the case have occurred and undertaking that none will occur. In my opinion, while, as stated by the courts below, there is no reason not to accept the affidavits of apparently reputable counsel, this is not sufficient to demonstrate that all reasonable measures have been taken to rebut the strong inference of disclosure. Indeed, there is nothing in the affidavits to indicate that any independently verifiable steps were taken by the firm to implement any kind of screening. There is nothing to indicate that when Ms. Dangerfield joined the firm, instructions were issued that there were to be no communications directly or indirectly between Ms. Dangerfield and the four members of the firm working on the case. While these measures would not necessarily have been sufficient, I refer to them in order to illustrate the kinds of independently verifiable steps which, along with other measures, are indispensable if the firm intends to continue to act.

[42] When a lawyer joins a firm that is already acting against his or her former client, as happened in *Martin*, the lawyer is entering an environment where the case against the former client is a matter of immediate, ongoing interest and discussion. There is a high risk of at least inadvertent disclosure as the matter is discussed within the firm. As seen by the public, there is an immediate incentive for the new lawyer to disclose confidential information and an immediate benefit to the firm in obtaining it. That is why there is, in effect, a presumption against the lawyer and the firm that can only be rebutted if sufficient confidentiality measures are put in place immediately.

[43] The Court in *Martin* said at 1262 courts should draw an inference of confidences being shared "unless satisfied … 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."* (Emphasis added)

[44] I am not persuaded that same presumption is called for when the conflict only arises many years after the lawyer joins the firm. When Mr. Mogerman joined CFMM, and for almost eight years thereafter, there were no other lawyers in the firm who were "engaged against the former client." He was under the general duty, applicable to all lawyers, to maintain the confidence of his former client's information.

[45] As long as no one at CFMM was involved in litigation against Mr. Mogerman's former clients, the firm had no interest in or possible benefit from receiving confidential information. There was no reason for this litigation to be the subject of the kind of conversation in which intentional or inadvertent disclosure was likely to occur. The circumstances giving rise to the heightened risk of disclosure or public perception of conflict referred to in *Martin* simply did not exist until CFMM was approached about acting for the Province, at which point immediate steps were taken to put in place the measures called for by *Martin* and Law Society.

[46] The effect of the defendants' argument would be to make the inference of disclosure created by *Martin* irrebuttable when the conflict only comes into existence after the lawyer joins the firm. If affidavits and undertakings are not sufficient, the burden on the firm to show concrete steps to protect confidentiality would be impossible to meet because there had been no need for them in the absence of a conflict. In my view, nothing in *Martin* goes that far. It would be anomalous to have a presumption that is rebuttable in the face of an actual conflict, but irrebuttable before the conflict exists.

[47] However, the applicants argue that there is evidence of actual disclosure of confidential information because of the confidential information contained in the

boxes Mr. Mogerman brought with him to CFMM and Mr. Mogerman's instruction to staff to look at the material in the boxes.

[48] Once again, this search took place at a time when CFMM was not involved in this matter and no conflict existed. Even if the staff members searching the boxes for unrelated material had happened to notice files on this matter, they had no reason to read them, to discuss them with other members of the firm, or to remember any information in them. Other than that search, there is no evidence of anyone having occasion to look in the boxes and I do not consider it reasonable to assume lawyers or staff at CFMM would randomly search Mr. Mogerman's old, non-CFMM files without his knowledge and for no particular reason, merely because they were there.

[49] I stress again that the issue is whether there is a risk of confidential information being used to the prejudice of the defendants. I do not accept that the mere presence of the material in boxes Mr. Mogerman's office or staff accessing the boxes on one occasion for an unrelated purpose amounts to a sharing of confidential information or creates a risk of misuse of that information. I agree with counsel for CFMM that the court is concerned about the possibility of real mischief, not mischief that is speculative or theoretical. In these circumstances, I do not see any realistic risk of the defendants being prejudiced by the use of confidential information.

[50] The defendants say that it is apparent that Mr. Mogerman "overlooked his general professional responsibilities concerning protection of client confidentiality, and in some respects that oversight seems to shade into conscious disregard." I will say only that I see nothing in the evidence that supports such an allegation of professional misconduct.

[51] The defendants also rely on the fact that the national consortium and CFMM have agreed to act on a contingency fee basis. Mr. Mogerman, as a partner, will ultimately benefit from any large fees the firm receives and this, the defendants say, creates a powerful inducement to disclose confidential information.

[52] The commentary in the BC Code on Rule 3.4-11 says that the "tainted" lawyer should not participate in the fees generated by the current client matter unless to do so would be unfair, insignificant, or impractical.

[53] CFMM says that each of the firm's partners, including Mr. Mogerman, has guaranteed the firm's line of credit and, to the extent that the firm is required to use its line of credit in relation to this litigation, Mr. Mogerman must share in that obligation. Mr. Camp deposes that it would be impossible to determine at any given time which file caused the firm to use its line of credit and that it would be unfair and impractical to set up a separate financial structure to exclude Mr. Mogerman.

[54] During argument, I jokingly suggested that, given the pace of this litigation so far, the issue of fees could only be relevant to Mr. Mogerman's grandchildren. The real answer, however, is that even if the ultimate prospect of fees creates an incentive for Mr. Mogerman to disclose information – and I agree that it could – I am satisfied that the confidentiality protocol that has been put in place, including the involvement of an independent monitor, will effectively deny him any opportunity to do so.

VII. Conclusion

[55] The ultimate question is whether the public, represented by the reasonably informed person, would be satisfied that no use of confidential information would occur. In my view, such a reasonably informed person, knowing the measures that were put in place when they became necessary, would be so satisfied in this case.

[56] The defendants' application is dismissed.

"N. Smith J."