

THE GR COURT DOCKET

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Court upholds removal of lawyers from the record because they will be witnesses

By Stephen Thiele, Lauren Rakowski and Anna Husa

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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Lawyers are obligated to avoid acting on matters where they have a conflict of interest. A lawyer cannot act against a current client and must follow certain ethical rules and practices when acting for someone against a former client. Where there is a conflict of interest in either of these circumstances, a lawyer can be removed from the record. Lawyers can also be removed from the record where they will be a witness at trial in a matter. A lawyer cannot be an advocate and a witness.

In the recent decision of *Elkay Management Inc. Law Studio*, 2021 ONSC 7880 (not available on CanLII), Justice Black upheld the ruling of Associate Justice Jolley that lawyers acting for the plaintiff in a professional liability claim against the defendants be removed from the record because they would be witnesses at trial.

The plaintiff had sought recovery from two indemnifiers in connection with a commercial lease and brought a claim

against them in April 2014. However each indemnifier filed assignments in bankruptcy a month later. The plaintiff became involved in the bankruptcy proceedings and were initially represented by their current lawyers in the professional liability action.

The defendant lawyer was hired by the plaintiff to provide legal services in the bankruptcy proceedings beginning in July 2015. The plaintiff's current lawyers maintained that from the time that the defendant lawyer was retained to the time that his services were terminated, he had exclusive carriage of the issues in the bankruptcy proceedings. Following the defendant lawyer's termination, the plaintiff contended that it simply re-hired its current lawyers. However, the defendants submitted that before, during and after their retainer the plaintiff's current lawyers had continued to provide advice to the plaintiff about the bankruptcy proceedings, which the plaintiff had relied upon. These circumstances made the plaintiff's

lawyers potential witnesses at the trial in the professional liability action because those lawyers had “provided advice to Elkay on the same issues over which Elkay is now suing [the defendants]” such that “[the plaintiff’s lawyers] may be a party in its own right.” It was contended that the plaintiff’s current lawyers had relevant evidence about the claim and that the plaintiff’s action resulted in a waiver of privilege.

Although it is a fundamental principle of law that parties should not be deprived of their lawyer of choice absent good cause, the Associate Judge reviewed the principles set out in [Mazinani v. Bindoo, 2013 ONSC 4744](#) to assess whether the plaintiff’s lawyer should be removed from the record on the grounds that they would be witnesses at trial. Ultimately, the Associate Judge concluded that the plaintiff’s lawyers would likely be witnesses called by the defendants during the professional liability trial and that there was no evidence to suggest that the motion to remove the plaintiff’s lawyers from the record was brought for lack of good faith. The evidence of the plaintiff’s lawyers was seen as being significant in determining the defendants’ professional liability and the plaintiff’s mitigation efforts.

Justice Black found that the Associate Judge’s decision was careful and even-handed and that the evidence was thoroughly reviewed.

As well, Justice Black considered the decision in [8657181 Canada Inc. v. Medhi Au LLP, 2021 ONSC 1295](#) wherein the following was stated at [paragraph 16](#):

“...[I]n cases such as this one, where a lawyer assumes carriage of a matter, completes the proceeding,

and subsequently initiates a solicitor’s negligence action against a former lawyer, courts routinely disqualify the lawyer that assumed carriage from acting against the former lawyer. In my view this is just common sense.”

The plaintiff’s lawyers sought to argue that should not be removed because neither the defendants or their own client has brought any claim against them and that they were statute-barred from doing so. This argument was rejected by Justice Black who explained that the defendants argued, with some force, that this proposition was both legally incorrect and telling in that it underscored the conflict of interest of the plaintiff’s current lawyers.

Representation by Gardiner Roberts LLP

The defendants were represented at the hearing of the motion by Lauren Rakowski, a senior associate in the dispute resolution group of Gardiner Roberts LLP (“GR”).

She was assisted throughout the motion to remove the plaintiff’s lawyers of record and the appeal by Anna Husa, a partner in GR’s dispute resolution group, and Stephen Thiele, a partner and the firm’s Director of Legal Research.

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