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BARRISTERS AND SOLICITORS

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Appeal from Federal Court judgment (2023 FC 1046) dismissing appellants' motion for order removing plaintiffs' counsel as counsel of record, alleging that counsel had received relevant confidential information in course of prior retainer of lawyer who was, at one point, also counsel to defendants — Appellants are defendants in proposed class action brought under *Competition Act*, R.S.C., 1985, c. C-34, s. 45 — Federal Court finding that appellants failed to establish that relevant information, let alone confidential information, was shared in course of former retainer — Also found that former, present retainers not sufficiently related to justify presumption that relevant confidential information had been imparted — Appellant Dye & Durham Limited (Dye & Durham) provides technology solutions for legal, business professionals; amalgamated with OneMove Technologies Inc. (OneMove) in 2016 — OneMove provided web-based real estate transaction platforms, including real estate conveyancing software platform "eConveyance™" (eConveyance) — Appellants now operating eConveyance — OneMove's former Chief Executive Officer (CEO), Matthew Proud, is now Dye & Durham's CEO — Other appellant DoProcess LP (DoProcess) offered several products related to real estate conveyancing; was acquired by Dye & Durham in 2020 — Some lawyers from Cartel & Bui LLP (Cartel & Bui), including Calvin Goldman, were counsel of record to proposed class action plaintiffs — Mr. Goldman was formerly Chair of Competition, Antitrust, Foreign Investment Group at Goodmans LLP (Goodmans) — In 2014, Mr. Proud called Mr. Goldman to seek advice about potential abuse of dominance complaint under Act, s. 79 against DoProcess on basis that DoProcess prevented eConveyance's expansion into Ontario — Mr. Goldman later advised OneMove that law firm he worked at was withdrawing from that retainer due to business conflict — Later, Mr. Goldman acted for Information Services Corporation (ISC) in relation to its investment in OneMove, to OneMove's abuse of dominance complaint against DoProcess — ISC, OneMove agreed to joint defence agreement for purpose of abuse of dominance complaint but agreement provided that no lawyer-client relationship would be created with other party's counsel — In course of this retainer, Mr. Goldman received copy of OneMove's abuse of dominance complaint submitted to Competition Bureau — Before Federal Court, appellants submitted that Mr. Goldman obtained confidential or commercially sensitive information — In 2022, respondents brought class action against Dye & Durham alleging conspiracy to increase price of real estate conveyancing software through Dye & Durham's acquisition of DoProcess from other appellant (OMERS Infrastructure Management Inc.) contrary to Act, s. 45, resulting in damages under Act, s. 36 — Shortly thereafter, Dye & Durham raised concerns about Mr. Goldman's previous involvement in competition matters with OneMove — Consequently, Mr. Goldman withdrew as counsel but Cartel & Bui did not withdraw, giving rise to motion in Federal Court — Thrust of appellants' motion was that Cartel & Bui was tainted because of Mr. Goldman's alleged conflict, should therefore also be removed as counsel — Core of appellants' submission was that Federal Court erred in assessment of whether Mr. Goldman's prior retainers with respect to abuse of dominance under Act, s. 79 were sufficiently related to proposed class action alleging conspiracy under s. 45; alleged more specifically that Federal Court erred by focusing on differences between elements of Act, ss. 45, 79, ignoring factual elements they share in common — Issues on present appeal were whether Federal Court erred in rendering its decision; whether Act, ss. 45, 79 are sufficiently related — Principles governing removal of counsel discussed — Two questions must be

asked in determining whether conflict of interest exists: whether lawyer received confidential information attributable to solicitor-client relationship relevant to matter at hand; if so, is there risk it will be used to prejudice of client — Conflict of interest defined as substantial risk that lawyer's representation of client would be materially, adversely affected by lawyer's own interests or by lawyer's duties to another current client, former client, or third person — Moving party bearing onus of establishing that relevant confidential information was shared — This can be discharged either by showing evidence that confidential information was in fact imparted to the lawyer during the solicitor-client relationship, or by showing that new retainer is "sufficiently related" to matters covered in prior relationship — When retainer is sufficiently related, rebuttable presumption is created that lawyer or firm received confidential information — It is also assumed that information received by "tainted" lawyer would be shared with lawyer's affiliates, such as was alleged in present case — Presumption can be rebutted by demonstrating that no confidential information was actually shared or by demonstrating that information is not relevant to matter at hand — In considering motion to remove counsel, court must balance public interest in maintaining confidence in integrity of bar, consequently, judicial system, against party's right of choice of counsel, desirability for reasonable mobility within legal profession — Federal Court's analysis of Act, ss. 45, 79 was unimpeachable — However, Federal Court not considering whether two proceedings were, from conflicts perspective, sufficiently related — Offence is committed under s. 45 when person conspires, agrees or arranges with competitor to fix prices, allocate sales, territories, customers or markets or restrict output in respect of product or service — Section 79, in contrast, prohibits businesses from abusing their dominant position — There is limited but certain underlying commonality to both provisions — *Mens rea* for offence under s. 45 also illustrates factual overlap between actions under ss. 45, 79 — Presumption that confidential information has been shared can be rebutted by proving that no information was actually imparted or that no information was imparted that could be relevant — To warrant removal, information previously imparted to lawyer must be capable of being used against client in tangible manner, which is relatively high threshold — In present case, conclusion that no information was imparted was conclusive — Federal Court found that there was "no realistic possibility" that relevant confidential information was provided to Mr. Goldman in his prior retainers — Found that descriptions of documents, information imparted were very generic; was also unable to determine what was in fact asserted to be "confidential" — Such findings were open to Federal Court on evidence; no reviewable error was demonstrated — Therefore, although Federal Court erred in finding that retainers under Act, ss. 45, 79 were not sufficiently related, it was error of no consequence — While finding of sufficient relationship shifted burden to respondents to prove that no confidential information was received, Federal Court's conclusion that no information was in fact shared was amply supported by evidence, fully responded to presumption — Such finding was dispositive of appeal — Appeal dismissed.

DYE & DURHAM LIMITED V. INGARRA (A-208-23, 2024 FCA 76, Rennie J.A., reasons for judgment dated April 18, 2024, 18 pp.)