IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *Canadian Union of Public Employees, Local 569 v. Human Rights Commission et al* 2009NLTD1
Date: 20090107
Docket: 200701T2412

IN THE MATTER OF two (2) Human Rights Complaints bearing Numbers 2007 and 2328, filed Pursuant to the Human Rights Code, R.S.N.L. 1990, c.H-14;

AND IN THE MATTER OF an Application for an Order granting the Applicant, the Canadian Union of Public Employees, Local 569, leave to Appeal Pursuant to s. 30 of the Human Rights Code, R.S.N.L. 1990, c.H-14.

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 569	PLAINTIFF
AND:	
HUMAN RIGHTS COMMISSION	FIRST RESPONDENT
AND:	
SEAN RYAN	SECOND RESPONDENT
AND:	
CITY OF ST. JOHN'S	THIRD RESPONDENT

Before: The Honourable Mr. Justice James P. Adams

Place of hearing: St. John's, Newfoundland and Labrador

Summary:

The Applicant's union retained the services of a lawyer to represent it in a grievance arbitration arising out of the termination of the

Applicant's employment. The Applicant was ordered to be reinstated. The lawyer's retainer concluded at the end of the arbitration. In supplemental proceedings before the Arbitrators to determine the conditions of reinstatement, the union was represented by a different lawyer. Coincidental with the arbitration, the union filed a complaint on behalf of the Applicant with the Human Rights Commission alleging discrimination by the employer based on mental illness. The Applicant later filed a second complaint with the Human Rights Commission in which he alleged that not only the employer but also the union had discriminated against him. The Commission upheld his complaint, finding that the employer and the union had discriminated against him.

The Union appealed the Commission ruling and retained the lawyer who had originally represented it at the arbitration to represent it at the appeal. The Applicant applied to have the lawyer removed alleging that he was in a conflict of interest.

The lawyer was ordered to be removed as there was at least an appearance of conflict of interest which had not been removed by the lawyer by showing that there was no confidential information which could be used against the Applicant in the appeal. The Applicant had the right to be confident that he would receive a completely fair and impartial hearing before the Court.

Appearances: Michelle Coady for the Applicant.
Randell J. Earle, Q.C. for CUPE.
Jane M. Fitzpatrick for the Human Rights Commission.
Irene Muzychka for the City of St. John's.

Authorities Cited:

CASES CONSIDERED: MacDonald Estate v. Martin, 3 S.C.R. 1235; **Dobbin v. Acrohelipro Global Services Inc., et al.**, (2004) 240 Nfld. & P.E.I.R. 313 (NLTD), affirmed, (2005) 246 Nfld & P.E.I.R. 177 (NLCA); **UCB Sidac International Ltd. v. Lancaster Packaging Inc.**, (1993), 51 C.P.R. (3d) 449 (Ont.Gen.Div.); **Almecon**

Industries Ltd. v. Nutron Manufacturing Ltd. [1994] F.C.J. No. 1209 (F.C.A.); **Toddglen Construction Ltd. v. Concord Adex Developments Corp.** [2004] O.J. No. 1788; **R. v. Neil** [2002] 3 S.C.R. 631; **Amcan Consolidated Technologies Corp. v. Connell Ltd. Partnership**, 2001 CarswellOnt 2769; **Richards v. Producers Pipelines Inc.**, 1996 CarswellSask 137 (Sask. C.A.); **Henson v. Ont. Hydro Corp.** (1995), 16 C.C.E.L. (2d) 31 (Ont. Court of Justice, Gen. Div.); **Manville Canada Inc. v. Ladner Downs** (1992), 88 D.L.R. (4th) 208, appeal dismissed (1993), 100 D.L.R. (4th) 321.

REASONS FOR JUDGMENT

ADAMS, J.:

INTRODUCTION

[1] This is an application by Sean Ryan (hereinafter the "Applicant") to have Randell Earle, Q.C. (hereinafter "Earle, Q.C.") removed as the solicitor for the Canadian Union of Public Employees, Local 569 (hereinafter "CUPE") on the basis of a conflict of interest.

FACTUAL BACKGROUND

[2] The Applicant was an employee of the City of St. John's (hereinafter the "City") from 1984 until the City terminated his employment in December 1998. Prior to his termination, the Applicant became ill and was unable to perform some of his duties. He was a member of CUPE.

[3] Due to his illness, the Applicant left the workplace in June 1998, following a meeting between representatives of the City, CUPE and the Applicant in which certain conditions were imposed on the Applicant if his employment was to

continue. Ultimately, in mid-June 1998 the Applicant was placed on sick leave. On 1 December, 1998 the City terminated the Applicant's employment.

[4] The Applicant grieved his termination through CUPE. CUPE retained Earle, Q.C. to represent it at the impending arbitration. Earle, Q.C. took carriage of the matter. There is no dispute that he was retained by and reported to CUPE in respect of the arbitration.

[5] Earle, Q.C. met with the Applicant and his brother, Robert Ryan, who was assisting him in preparing for the arbitration. During the meeting, considerable information of a personal and confidential nature relating to the Applicant's mental illness, work experience and related matters was conveyed to Earle, Q.C. by the Applicant and his brother.

[6] The arbitration was conducted before a board of arbitrators over eight days in the first half of 2000. The only issue before the arbitrators was whether the City was entitled to terminate the Applicant's employment following what the City considered to be fulfillment of its obligation to accommodate the Applicant's disability.

[7] While the arbitration was ongoing, CUPE filed Complaint 2007 with the Human Rights Commission (hereinafter the "Commission") on behalf of the Applicant in relation to the City's treatment of him which was also the subject of the arbitration. On 31 August, 2000, the Arbitration Panel upheld the grievance and ordered the Applicant's reinstatement.

[8] Upon receipt of the arbitrators' award and reporting to CUPE, Earle, Q.C.'s retainer in respect of the grievance concluded. However, this was not the end of the matter from the Applicant's or CUPE's perspective.

[9] Following the arbitrators' award, CUPE was represented by Mr. Lionel Clarke. He, the Applicant and the Applicant's brother met with representatives of the City to discuss the Applicant's return to the workplace. These discussions led to substantial agreement between all parties except for the amount of medical information on the Applicant's condition which should be made available to the City as well as the duration of the agreement.

[10] The Arbitration Panel retained jurisdiction over implementation of its award and following the impasse among the parties, was asked to reconvene to consider the matter. CUPE (represented by Mr. Clarke), the Applicant and his brother attended at the further hearings of the Arbitration Panel. In December 2000 the Panel released Supplementary Reasons in which it agreed with the City's position regarding the amount of medical information on the Applicant which should be supplied to the City.

[11] CUPE considered whether to seek judicial review of the Supplemental Award but ultimately determined that it would not be successful and so did not pursue it. The terms of the agreement were finalized in accordance with the Supplementary Award and was signed by the City and CUPE. On 22 October, 2002 the Applicant filed Complaint 2328 with the Commission, alleging that CUPE, CUPE's national office and the City discriminated against him by the terms of the agreement to accommodate his return to employment. The Applicant also sought and was granted an amendment to Complaint 2007 to add CUPE and CUPE's national office as parties.

[12] Both Complaints proceeded jointly to a Board of Inquiry pursuant to the Human Rights Code which rendered a decision on 4 April, 2007. The Board found that in Complaint 2007 neither CUPE nor CUPE's national office had discriminated against the Applicant but allowed his complaint against the City. In Complaint 2328, the Board of Inquiry found that CUPE's national office had not discriminated against the Applicant but allowed his complaint against CUPE and the City in relation to the creation and the terms of the agreement to return to employment. The Board also found that the City and CUPE had not provided sufficient evidence to determine that the agreement had met the standard of a bona fide occupational

requirement and that CUPE could have sought judicial review of the Supplementary Arbitration Award.

[13] Upon receipt of the decision of the Board, CUPE retained Earle, Q.C. to advise it on the merits of an appeal of the Board's decision in Complaint 2328. Ultimately, leave was granted to the City to appeal the Board's decision in Complaint 2007 and to CUPE to appeal the decision in Complaint 2328.

[14] The Applicant and the Commission submit that Earle, Q.C. is in a conflict of interest respecting his retention to represent CUPE in the appeal of the Board's decision in Complaint 2328 because of his previous representation of CUPE in the initial arbitration respecting the Applicant's termination of employment. The City was present at the hearing of this application but took no position on the matter. Neither Earle, Q.C. nor anyone from his firm, O'Dea Earle, had any involvement in these matters between the conclusion of his retainer to represent CUPE in the initial arbitration and his retention to represent CUPE in the appeal of the decision of the Board of Inquiry in Complaint 2328. CUPE submits that Earle, Q.C. is not in a conflict of interest.

Positions of the Parties

[15] Both the Applicant and the Commission take the position that Earle, Q.C. is in a conflict of interest in representing CUPE in the appeal against the Board's decision. They both acknowledge that Mr. Earle was CUPE's solicitor at the arbitration and that there was not a solicitor/client relationship between him and the Applicant. However, they both also submitted that the Applicant was in a “near client” relationship with Earle, Q.C. and that he had an expectation that any confidential information he’d imparted to Earle, Q.C. in preparation for the arbitration would not be able later, even potentially, to be used against him in an action against CUPE. They say that the important principle here is to maintain the integrity of the administration of justice and to avoid even the appearance of impropriety as the appeal is clearly a matter related factually to the arbitration as they both arise out of the termination of the Applicant's employment with the City.

[16] CUPE submitted that there is no conflict of interest. It submitted that since Earle, Q.C. was retained by and represented CUPE only pursuant to its duty to fairly represent the Applicant, one of its members, any information imparted to Earle, Q.C. by the Applicant necessarily became information of CUPE. In this way, CUPE submitted that Ryan could have no expectation of privacy in the information conveyed to Earle, Q.C. It was submitted that no matter who represented CUPE at the appeal, since CUPE must be deemed to already be in possession of the information conveyed to Earle by Ryan, mischief of the type to be avoided could not occur. CUPE also submitted that the union would not be able to effectively discharge its responsibility to its members if its lawyers were deemed to owe a duty of loyalty to its individual members separate from the union itself in these circumstances as the lawyer would be precluded from communicating all information he or she received from a member.

[17] CUPE also submitted that even if such a duty were held to exist, it shouldn't apply in this case as the appeal is completely unrelated to the arbitration which occurred over seven years before. The appeal is solely based on legal arguments and relates to the finding of the Human Rights Adjudicator that CUPE ought to have sought judicial review of the arbitrators' decision. The appeal will be determined entirely on the record from the Human Rights adjudication and there could be no chance of Earle, Q.C. becoming a witness. Finally, CUPE submitted that from a policy perspective, the union, which has the duty to fairly represent all its members not just the grievor, must not be deprived of its counsel of choice except in the clearest of circumstances and the facts of this case don't meet that test.

ISSUE

[18] Is Earle, Q.C., and by extension, O'Dea Earle law firm, in a conflict of interest by representing CUPE in the within appeal due to his prior representation of CUPE at the arbitration?

ANALYSIS

[19] The starting point for any analysis of a claim of conflict of interest involving a solicitor is the Supreme Court of Canada's decision in **MacDonald Estate v. Martin** [1990] 3 S.C.R. 1235. Sopinka, J., for the majority, at paragraph 16, referred to at least three competing values which must be considered in resolving such issues:

> In resolving this issue, the court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession. …

We are here concerned with the first two values only.

[20] As noted by Sopinka J. at paragraph 21, when considering such issues, the Code of Professional Conduct adopted by every law society in Canada, while not binding on the court, is of considerable assistance as an "important statement of public policy" as to how the self-governing legal profession views such matters. Chapter V of the Code of Professional Conduct of the Law Society of Newfoundland and Labrador entitled: Impartiality and Conflict of Interest between Clients, states the following rule:

> The lawyer shall not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.

[21] That chapter then goes on to provide Commentary in the form of Guiding Principles to be applied when interpreting this rule. The following principles are, in my view, particularly relevant to the matters at hand:

> Guiding Principles
>
> 1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgement or advice on behalf of, or loyalty to a client or prospective client.
>
> 2. The reason for the Rule is self-evident. The client or the client's affairs may be seriously prejudiced unless the lawyer's judgement and freedom of action on the client's behalf are as free as possible from compromising influences.
>
> 3. Conflicting interests include, but are not limited to the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.
>
> 6. If, after the clients involved have consented, an issue contentious between them or some of them arises, the lawyer, although not necessarily precluded from advising them on other non-contentious matters, would be in breach of the Rule if the lawyer attempted to advise them on the contentious issue. In such circumstances the lawyer should ordinarily refer the clients to other lawyers. However, if the issue is one that involves little or no legal advice, for example a business rather than a legal question in a proposed business transaction, and the clients are sophisticated, they may be permitted to settle the issue by direct negotiation in which the lawyer does not participate. Alternatively, the lawyer may refer one client to another lawyer and continue to advise the other if it was agreed at the outset that this course would be followed in the event of a conflict arising.
>
> Acting Against Former Client
>
> 8. A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter, or take a position where the lawyer might be tempted or appear to be tempted to breach the Rule relating to confidential information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person. (Emphasis added)
>
> 12. A lawyer who is employed or retained by an organization represents that organization acting through its duly authorized constituents. In dealing with the

> organization's directors, officers, employees, members, shareholders or other constituents, the lawyer shall make clear that it is the organization that is the client when it becomes apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing. The lawyer representing an organization may also represent any of the directors, officers, employees, members, shareholders or other constituents, subject to the provisions of this Rule dealing with conflicts of interest.

[22] There is no doubt, as acknowledged by the Applicant and the Commission, that at the time of the arbitration, Earle, Q.C.'s client was CUPE, not Ryan, and it was to CUPE that he owed his primary duty of loyalty. But that does not end the inquiry. As recognized by Commentary 8 above, the prohibition against acting against a client for whom the lawyer previously acted extends not just to the matter in question but also to a "related matter" and includes not only the "client" but "persons who were involved in or associated with the client in that matter."

[23] This issue arose in the recent decision in this court in **Dobbin v. Acrohelipro Global Services Inc., et al.,** (2004) 240 Nfld & P.E.I.R. 313 (NLTD),affm'd, (2005) 246 Nfld & P.E.I.R. 177 (NLCA). In that case, three former executives of the defendant were claiming damages for wrongful dismissal. Their lawyer's law firm had previously represented the defendant's bank in arranging a credit facility for the defendant. As part of advising the bank in this regard, the law firm was informed of the claims of the former employees and the employer's strategy in dealing with the claims.

[24] The court held that the lawyer was placed in a conflict of interest because of the knowledge he was deemed to have received regarding the employer's strategy in respect of the claim by the employees (not personally, but through the attribution of knowledge to him through another member of his firm in another city). The lawyer's firm, while not acting for the employer directly at any point, acted for the employer's bank, a "near client" in a related matter and as such the lawyer was forced to withdraw from his representation of the employees.

[25] In **UCB Sidac International Ltd. v. Lancaster Packaging Inc**., (1993), 51 C.P.R. (3d.) 449 (Ont. Gen. Div.) (A case relied on in **Dobbin**, supra, by both the trial and the appeal courts) the plaintiff and defendant were parties to an agency agreement by which the plaintiff's business would be conducted by the defendant in Canada. The plaintiff's solicitor (who the defendant was now seeking to have removed) did not act for the defendant but did take instructions from the defendant's principal officer who had at one time been an employee of the plaintiff. There was conflicting evidence as to whether confidential information had been imparted but the court inferred that it had been in the circumstances.

[26] Blair, J. referred to the principles enunciated by Sopinka, J. in **MacDonald Estate, supra** and the Code of Professional Conduct of Ontario which is identical to that of the Law Society of Newfoundland and Labrador. He rejected the suggestion that Sopinka, J., presupposed the existence of a formal solicitor and client relationship. At paragraph 13 of **UCB Sidac**, Blair, J. stated:

> I do not think the ethic expressed in the passages quoted above can be so confined. There are two reasons for this conclusion. The first is that the word "client" must be taken, in this context, to include "persons who were involved in or associated with [the client] in [the] matter" as pointed out in the excerpt cited from the Commentaries to the Code of Professional Conduct by Sopinka, J. earlier in the decision. The second is that the central question addressed in the judgment was not the two "typical" questions noted, but the overriding question: "Is there a disqualifying conflict of interest?" (see p. 137). In addressing the question one should look to see whether there is "a previous relationship" not only between the lawyer and the client but also between the lawyer and the "person involved in or associated with" the client in connection with the original matter, "which is sufficiently related to the retainer from which it is sought to remove the solicitor" to justify the removal sought.

[27] In the result, Blair, J. ordered the removal of the law firm. That case was followed by the Federal Court of Appeal in **Almecon Industries Ltd. v. Nutron Manufacturing Ltd.** 1994 CarswellNat 2887 (F.C.A.). In that case, the court ordered the removal of the solicitors in a patent infringement case where a solicitor, through a change in employment, acted for one company in one case and Almecon in another case where the issue was the validity of the same patent in each case.

The defences raised were the same. The lawyer had never had a solicitor and client relationship with Nutron which was seeking his firm's removal. At paragraph 32 McDonald, J. A., stated:

> I agree with Blair J.'s reasoning. Rather than narrowly focusing upon the parameter of a solicitor-client relationship, I am of the opinion that the confidential nature of the particular relationship must be considered. …

[28] In **Toddglen Construction Ltd. v. Concord Adex Developments Corp.** [2004] O.J. No. 1788 , Master Sandler removed a law firm from a construction mechanic's lien action where the firm, although not in a solicitor and client relationship with one of the claimants, was found to be "a person clearly associated with" the group of companies of which the claimant was one and to which group the law firm had previously given advice. Sandler concluded that the "bright line" rule in **R v. Neil** [2002] 3 S.C.R. 631, at para 29, applied to hold the firm in conflict.

[29] There is no dispute that Earle, Q.C. received confidential information from Ryan in preparation for the arbitration. There is also no dispute that while the arbitration was ongoing, CUPE, on behalf of the Applicant, filed Human Rights Complaint 2007 (the first complaint) alleging discrimination by the City against Ryan by reason of mental disability. CUPE was not initially a party to the complaint but was subsequently added as a respondent by order of the Board of Inquiry[1].

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[1] Decision of Human Rights Board of Inquiry in Complaint 2007 and Complaint 2328, 4 April, 2007, Judy S. Morrow, Adjudicator.

[30] In this matter, CUPE submitted that Earle, Q.C. could not be held to be in a conflict of interest as he was retained by CUPE to represent a CUPE in the arbitration, not Ryan, and any knowledge in his possession automatically became the knowledge of CUPE and, therefore, Ryan could have had no expectation of confidentiality vis-à-vis Earle. CUPE stated further that it would severely hamper a union's duty to fairly represent its members if it was found to owe a duty to a grievor whose grievance it took to arbitration.

[31] While I appreciate the apparent difficulties presented in such cases, I find the argument unpersuasive. The Applicant filed a grievance alleging he was wrongfully terminated. His union decided that the matter should be pursued to arbitration. It owed him a duty of fair representation. The union also owed a duty to its other members and would have had the authority to compromise Mr. Ryan's position, which it ultimately did do to his dissatisfaction.

[32] CUPE placed considerable reliance on the case of **Amcan Consolidated Technologies Corp. v. Connell Ltd. Partnership**, 2001 CarswellOnt 2769 (Ont.Sup.Ct.). In that case, a lawyer allegedly received confidential information arising out of a patent application involving two parties. The lawyer had a solicitor-client relationship with only one of the parties. About one year after he was first retained, the lawyer was introduced to the other party and the patent application was made jointly.

[33] In a later dispute over the patent rights, the lawyer purported to represent the one partner with whom he was in the solicitor-client relationship. The other partner sought to have him removed.

[34] I find that case is distinguishable from this one. In **Amcan**, all communication with the lawyer took place in the presence of representatives of both parties as they jointly pursued the patent. When the interests of the parties diverged, the lawyer was not possessed of any information of the other party not already in the knowledge of **Amcan**. As stated by Campbell, J. in **Amcan** at para. 50:

> I accept as did the British Columbia Court of Appeal in *Williamson* that actual or potential misuse of confidential information is not the only necessary ingredient to disqualification. However, in its absence, there must be in my view some real and tangible evidence on which the court can conclude that the circumstances are such to conclude a reliance or reposement of trust sufficient to be akin to a solicitor/client relationship.

[35] In the case before me, the Applicant and his brother met privately with Earle, Q.C. alone at least once at which confidential information was imparted.

[36] In another case relied on by CUPE, **Richards v. Producers Pipelines Inc.**, 1996 CarswellSask 137 (Sask. C.A.), the plaintiff was the president and chief executive officer of a corporation which was the subject of a takeover bid. The plaintiff consulted a law firm to advise the corporation regarding the matter. On the plaintiff's instructions, the law firm prepared a draft confidentiality agreement to be used in the event a third party wished to carry out a due diligence investigation. Later, the plaintiff advised the law firm that the draft agreement that had been forwarded to the corporation would not be used. The same day, the plaintiff consulted the law firm regarding a notice of termination he had recently received from the corporation alleging improper action by him with third parties involving his shares in the corporation. The corporation applied to have the law firm restrained from acting for the plaintiff. The Court of Appeal overturned the trial decision removing the law firm from representation of the plaintiff.

[37] The Court of Appeal applied the **MacDonald v. Martin** test and found that a reasonably informed person would conclude that no confidential information could be misused in the circumstances. All of the information passed by the plaintiff to the law firm was in his capacity as president of the corporation and as such all information in the knowledge of the plaintiff was, by definition, also in the knowledge of the defendant corporation and its directors. There was evidence from the lawyers that they were not aware of any disclosure of any confidential information to third parties by the plaintiff and that no information they had from the previous retainer was relevant to the pleadings in the wrongful dismissal action.

[38] I find that that case is also distinguishable from the case here as I have found that the Applicant and his brother divulged confidential information to Earle, Q.C. about CUPE's alleged failure to properly represent him in his grievance with the City. This had nothing to do with the arbitration and there is no evidence before me that that was ever communicated by Earle, Q.C. to CUPE.

[39] In **Escott v. Collision Clinic Ltd.** (1996), 141 Nfld & P.E.I.R. 16 (NLTD) a former employee of a company catered a party at a law firm. At the party she discussed with one of the lawyers a potential wrongful dismissal action she may have against her former employer which was a long-standing client of the law firm. The plaintiff sought to have the law firm removed as solicitor for the company in her wrongful dismissal action. The application was dismissed on the basis that there was not a solicitor-client relationship between the plaintiff and the law firm and there was no relationship to protect in the interest of maintaining public confidence in the administration of justice. The plaintiff did not present any evidence of circumstances giving rise to a justifiable expectation of confidentiality, nor did the evidence disclose that the lawyer with whom she spoke shared in her expectation of confidentiality.

[40] As Orsborn, J. stated at para. 25:

> I was not referred to any authority which has considered communication to a solicitor outside the confines of a solicitor/client relationship. However, it seems to me that, if the circumstances are such as to warrant a reasonable expectation of confidentiality, the absence of the relationship should not automatically exclude a disqualifying conflict of interest. But in such a case, the person seeking to disqualify the solicitor must bring forward evidence of all the circumstances, and in particular those circumstances and facts giving rise to a "justifiable belief" in confidentiality. The circumstances would include anything tending to show that the lawyer shared the individual's expectation of confidentiality.

[41] I find that that case is also distinguishable from the one before me on its facts. The plaintiff imparted her information to the lawyer at a social gathering. The lawyer filed an affidavit stating that he did not recall the conversation. This is unlike the case before me in which the very essence of the meeting with Earle,

Q.C. was the Applicant's termination of employment and the sole reason Earle, Q.C. had been retained by CUPE was to represent it at the arbitration. The Applicant's termination was also the basis for the allegations before the Human Rights Board of Inquiry.

[42] In respect of the comment by Orsborn, J. that the lawyer did not share in the Plaintiff's expectation of privacy in respect of the information she allegedly relayed to the lawyer, while that is also the case here, that is but one of the circumstances to be considered in the balancing of the three competing values referred to by Sopinka, J. in **MacDonald v. Martin**.

[43] As I have already stated, there is no evidence before me that Earle, Q.C. did or did not impart to CUPE the confidential information he received from Robert Ryan and the Applicant in the initial meeting and subsequently. However, I infer that he did so inform CUPE. There is no evidence to the contrary before me.

[44] As stated by Sopinka, J. in **MacDonald v. Martin, supra**, at para. 49:

> In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant.

He also held that the onus of establishing that no confidential information was imparted rests on the lawyer.

[45] In preparing for the arbitration, the Applicant had the duty and the obvious personal interest in being fully candid and complete in providing all information he felt relevant and appropriate to Earle, Q.C. While we will never know in detail what that information was, there is some evidence before the court from Robert

Ryan, the Applicant's brother, who assisted him throughout all these matters and actually represented him before the Board of Inquiry

[46] Robert Ryan stated in his affidavit that he had requested of CUPE's national office that he and the Applicant be permitted to choose the solicitor to represent CUPE at the arbitration. After initially refusing the request, the national office eventually agreed. The Applicant and his brother chose Earle, Q.C., with whom Robert Ryan (a former union representative himself) was apparently familiar. As it turned out, Earle Q.C. had also been a long-time counsel to CUPE in any event.

[47] Shortly thereafter, the Applicant and his brother met with Earle, Q.C. Robert Ryan testified in his affidavit that in this "lengthy meeting" they informed Earle, Q.C. of what they considered to be various failures on the part of CUPE to provide the Applicant with fair representation and their belief that "the Union had collaborated with City officials in discriminating against [the Applicant] on many occasions."[2] He stated that his information included but was not limited to:

> a) The chief shop steward of the Union and the City of St. John's forcing my brother to enter a mental health facility on June 11th, 1998
>
> b) A meeting the chief shop steward brought my brother to on June 2nd, 1998 and the particulars of same.
>
> c) My brother and I meeting with local and national Union representatives on multiple prior occasions and requesting that grievances be filed as a result of such things as my brother being laid off out of line and not being recalled in line with his seniority.[3]

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[2] Robert Ryan affidavit, para. 9.

[3] Ibid, para. 7.

[48] Mr. Ryan stated that CUPE initially attempted to retain Earle, Q.C. to represent its interests in Complaint 2328 in which CUPE was a respondent. Mr. Ryan averred that he complained to counsel for the Commission, shortly after which Earle, Q.C. withdrew. This was denied by Mr. Dave Reynolds, National Representative of CUPE in an affidavit he filed in response to Mr. Ryan's affidavit.

[49] Mr. Ryan stated that at the time of his affidavit, the Applicant was suffering from stress as a result of the ongoing matters and was taking large doses of prescription medication which impacted his thought processes and his ability to remember past events. He stated further, that as a consequence, the Applicant was unable to file an affidavit in support of this application and that he, Robert Ryan, was fully knowledgeable of the entire history of the matter.

[50] Neither Mr. Robert Ryan nor Mr. Dave Reynolds was cross examined on his affidavit. Mr. Earle represented CUPE on this application. He did not file an affidavit or testify at the hearing.

[51] Robert Ryan stated in paragraph 8 of his affidavit filed in this matter:

> THAT in order for Sean and I to afford Mr. Earle with a clear picture of relevant events, we relayed information to him concerning Sean's employment history as well as his medical condition and treatments. We also divulged how Sean's diagnosis and treatments impacted upon his well being, ability to work and interpersonal relationships, including those with co-workers and supervisors. We related to Mr. Earle, challenges associated with the discharge of Sean's employment duties in light of his condition and prescribed treatments. Such information was of a private and confidential nature, known only to Sean, me and his treating professionals. Disclosure of such information to Mr. Earle was necessary in order for him to have a clear understanding of Sean's condition and the manner in which he had been treated by the Union and the City in light of same. Such information was necessary in order for Mr. Earle to make out a case at the arbitration that Sean's employment had been unjustly terminated. (Emphasis added)

[52] The grounds of the appeal in the Human Rights matter state:

> a) The Board of Inquiry erred in law or mixed fact and law in its determination of the effect of the Agreement as being discriminatory;
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> b) The Board of Inquiry erred in law or mixed fact and law in failing to properly consider, evaluate and apply the principles of discrimination, accommodation, *bona fide* occupational requirement, and liability;
>
> c) The Board erred in law or mixed fact and law in failing to properly consider the binding nature of Arbitration and the effect of the Supplemental Award under the Labour Relations Act R.S.N.L. 1990 c. L-1, and specifically s. 86 thereof;
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> d) The Board erred in law or mixed fact and law in finding CUPE 569 in violation of the Human Rights Code for abiding by the terms imposed by the Supplemental Award;
>
> e) The Board erred in law or mixed fact and law in finding CUPE 569 in violation of the Human Rights Code in any manner.

[53] I am satisfied that in the circumstances, the Applicant should be considered a "near client" of Earle, Q.C. in the sense that I have described above, i.e., that he was a person who was involved in or associated with the client (i.e., CUPE) in a related matter (i.e., the arbitration). In my view, it would be totally unfair to the Applicant to hold otherwise.

[54] The Applicant had a personal interest in the outcome of the arbitration. After all, it was he whose employment had been terminated and who was seeking reinstatement. It was he whose mental illness was the subject of the alleged discriminatory actions of the employer and the union. And it was he whose employment relationship with the City was to be affected by the conditions placed on him by agreement between the City and CUPE.

[55] I acknowledge that this ruling may raise some complications for unions in their duty to fairly represent their members. But that is part of the price for being granted the right to do so. I do not share CUPE's concern that it will serve to undermine its ability to fulfill its duty. I am satisfied that the proper interpretation is that Earle, Q.C. owed a reduced duty of loyalty to the Applicant as well as his primary duty to CUPE because of the significant personal consequences to the Applicant of the outcome of the arbitration and Applicant's duty to fully cooperate with CUPE and in turn, Earle, Q.C. These factual circumstances are not likely to arise often but the rules regarding conflict of interest must be flexible enough to accommodate such concerns when they do.

[56] There are other relational circumstances which might give rise to similar concerns in other contexts. Some of these are referenced in footnote 5 to Chapter 5 of the Code of Professional Conduct. They include the defending of co-accused, the representation of co-plaintiffs in tort cases or of insureds and their insurers, the representation of classes or groups such as beneficiaries under a will or trust and construction lien and bankruptcy claimants. While none of these is identical to the relationship of a union member to his union, I am satisfied that they are sufficiently similar that similar considerations should be taken into account.

[57] A similar case arose in **Henson v. Ont. Hydro Corp** (1995), 16 C.C.E.L. (2d) 31 (Ont. Court of Justice, General Division). In that case, an employee alleged sexual harassment by a supervisor and suspension from work in retaliation for her complaint. She brought the matter to her union who set up a meeting with a lawyer from the firm which regularly handled grievance arbitrations for the union. A grievance was filed but was subsequently abandoned. The employee sued the union for damages for breach of its duty of fair representation, conspiracy and slander. She applied for an order prohibiting the law firm of the lawyer with whom she had met from acting for the union in her civil action.

[58] Thomas, J. concluded that the law firm should be removed as solicitor for the union. Many of the same arguments made here were also advanced before Justice Thomas. In the end, he concluded that on a proper appreciation of the facts,

the only way to preserve the integrity of the judicial system was to order the removal of the solicitors in question.

[59] In my view, in the circumstances of this case, a sufficiently close relationship existed between the Applicant and Earle, Q.C. that an expectation of at least limited confidentiality arose on the Applicant's part. Based on the uncontradicted evidence of his brother, he disclosed to Earle, Q.C. in their initial meeting that he had concerns about his representation from CUPE. There is no evidence that Earle, Q.C. did or did not disclose this to CUPE.

[60] In **Almecon Industries, supra,** at paragraph 14, McDonald JA stated:

> … The court's power to disqualify a solicitor from acting may also be based on the "appearance of impropriety" test, when it is found that a solicitor's continuing to act could reflect adversely on the administration of justice: Manville Canada Inc. v. Ladner Downs (1992), 88 D.L.R. (4th) 208, at pp. 214-7, appeal dismissed (1993), 100 D.L.R. (4th) 321.

[61] At paragraph 35, he stated, (referring to the trial division decision in **Manville**):

> Several decisions have recognized the existence of a legal relationship based on an expectation of confidentiality which is tantamount to that of solicitor and client. In *Manville, supra*, the Supreme Court of British Columbia dealt with the initial argument that the petitioner had no standing to bring the motion. The law firm had been retained by one Manville Sales Corporation but had provided professional services for the petitioner, another member of the corporate group. Esson, J. held (at pp. 214-217]:
>
> > The court's power to enjoin a lawyer from acting for a party against some adverse in interest rests on the confidential character of the relationship between the lawyer and the party who seeks to enjoin him from acting. <u>If the applicant has reposed confidence in a lawyer in circumstances which properly give rise to an expectation of confidentiality, that applicant has an interest in protecting that confidence even if it was not, in the strict sense, a client of the lawyer</u> … The retainer of Osler, Hoskin & Harcourt by

> Manville Sales Corporation created, in respect of the issue of confidentiality, a relationship tantamount to that of solicitor and client between the law firm and Manville Canada Inc. … (Emphasis added)

[62] And at paragraphs 41 and 42, McDonald JA stated:

> 41. The *Martin* decision also emphasizes a concern about the appearance of impropriety. The goal is not just to protect the interests of the individual litigant but also to protect public confidence in the administration of justice. …
>
> 42. I appreciate that a party should be entitled to retain the services of a firm of solicitors of its choice. This right must, however, be tempered by the right of an adverse party, whether a former client or person who has reposed confidence in a lawyer, to feel that the solicitor would not represent another party against him in a related dispute. As noted by the Court of Appeal in *Manville*, *supra*, the Supreme Court of Canada has imposed a very high standard on the legal profession where there is a risk that confidential information given to a lawyer or his firm may come to the knowledge of an opposing interest. As noted, *supra*, the *Martin* test applies to all those who are in a solicitor-client relationship. However, as the cited jurisprudence demonstrates, that test is not restricted to such a relationship. It is possible, in cases where a previous relationship establishes a clear nexus with the solicitor's retain, to conclude that the *Martin* test should be applied. (Emphasis added)

[63] The combination of the maintenance of the high regard in which the legal profession is held and the integrity of the administration of justice is one of the competing values to be considered in an allegation of conflict of interest involving a solicitor. The test to be applied is that of the reasonably informed person. As stated by Blair J. in **UCB Sidac, supra,** at paragraph 15:

> In the interests of ensuring, in the eyes of the reasonably informed member of the public who is possessed of all the facts, "that even an appearance of impropriety should be avoided" the law firm should cease to act in the action.

CONCLUSION

[64] It is clear from the authorities that the Supreme Court of Canada has placed a very high standard on the legal profession to ensure that no confidential information could be used by a lawyer against a person with whom the lawyer had a previous relationship. The person does not have to show that it has been used but that there is a potential that it could be used. The perception of possible impropriety may be enough to warrant removal of the lawyer in order to preserve the high standards of the legal profession and the integrity of the administration of justice. In some cases, private interests in being able to retain counsel of choice may have to give way to this imperative.

[65] In my view, this is one of those cases. There is no suggestion that Earle, Q.C. has breached the rules of solicitor/client confidentiality. If that were so, this would have been an easy decision.

[66] In this case, it is the perception flowing from the previous relationship between Earle, Q.C. and the Applicant as previously outlined which gives rise to the concern. In my view, a reasonably informed person fully apprised of the facts would conclude that Earle, Q.C. was representing Sean Ryan in the arbitration of his grievance for wrongful dismissal, in addition to representing CUPE. In the course of that representation, that reasonably informed person would also conclude that Earle, Q.C. became aware of knowledge which could be used to the detriment of the Applicant, even though the retainer in respect of which he is sought to be removed is an appeal which will be based upon the record before the Human Rights Board of Inquiry and legal arguments.

[67] The Applicant must have confidence that he will get a completely fair and impartial hearing before this court. In my view, that will not be accomplished if Earle, Q.C. continues to represent CUPE in this appeal.

[68] I therefore order that Earle, Q.C. and his law firm, O'Dea Earle, shall be removed as solicitor of record for CUPE in the within appeal. The Applicant shall have his costs of this application on a party/party basis.

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JAMES P. ADAMS
Justice