Date: 20090826
Docket: 09/04
Citation: 2009 NLCA 49

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 569	INTENDED APPELLANT

AND:

HUMAN RIGHTS COMMISSION	INTENDED FIRST RESPONDENT

AND:

SEAN RYAN	INTENDED SECOND RESPONDENT

AND:

CITY OF ST. JOHN'S	INTENDED THIRD RESPONDENT

Coram: Roberts, Welsh and Barry, JJ.A.
Court Appealed From: Supreme Court of Newfoundland & Labrador, Trial Division, 200701T2412

Appeal Heard: May 11, 2009
Judgment Rendered: August 26, 2009

Reasons for Judgment by Roberts J.A.
Concurred in by Welsh, J.A.
Dissenting Reasons by Barry, J.A.

Counsel for the Intended Appellant: Susan Coen
Counsel for the Intended First Respondent: Helen Conway
Counsel for the Intended Second Respondent: Lori Savory
Counsel for the Intended Third Respondent: Cheryl Mullett

Roberts, J.A.:

[1] The Canadian Union of Public Employees, Local 569 (CUPE) seeks leave to appeal from a Trial Division decision ordering Randell Earle, Q.C. (Earle, Q.C.) and his law firm O'Dea Earle removed as solicitors of record for CUPE in the appeal from a Human Rights Commission Board of Inquiry decision dated April 4, 2007 then before that Court.

[2] On March 24, 2009, Welsh J.A. ordered that the application for leave to appeal and the appeal be heard together.

[3] Regarding leave to appeal, having read the facta and heard counsel, we are satisfied that the issues raised are sufficiently important to grant leave. Furthermore, the nature of the issues is such that any appeal following final judgment would be of no practical effect.

Background

[4] CUPE is the certified bargaining agent under the **Labour Relations Act**, R.S.N.L. 1990, c. L-1, for a bargaining unit of employees of the City of St. John's (the City). Sean Ryan has been an employee of the City and a Union member since July 1984.

[5] Earle, Q.C. represented CUPE at a grievance arbitration concerning Sean Ryan's termination. CUPE won and Earle, Q.C.'s retainer ended. The arbitration panel ordered reinstatement of Sean Ryan and retained jurisdiction concerning the appropriate remedy.

[6] CUPE was represented on the question of implementation of the arbitration award by in-house counsel Lionel Clarke. Mr. Clarke, Sean Ryan and Sean Ryan's brother Robert met with representatives of the City to discuss Sean Ryan's return to work. All terms were agreed to except the following three:

(1) the amount of Sean Ryan's medical information the City was entitled to;

(2) what to do if the terms of the agreement were breached; and

(3) what should be the duration of conditions in the agreement.

These unresolved matters were submitted to the arbitration panel.

[7] Mr. Clarke represented CUPE at the reconvened arbitration. The arbitration panel in its Supplementary Award accepted the City's position about the amount of medical information Sean Ryan was to provide. The panel wrote:

> … The City must have proactive information in order for it to make proactive decisions. The Board is satisfied that the Employer must not only be aware of any clinical deterioration in the Grievor's condition that renders him unfit for work, but as well, in order to be proactive, it must also be aware of any failure on the Grievor's part to maintain medication compliance or his appointments with his attending physician.

[8] CUPE then proceeded to finalize the terms of the back to work agreement in accord with the Supplementary Award. Sean Ryan was not content with this outcome and filed a complaint with the Human Rights Commission, alleging that CUPE and the City, and also CUPE National, had discriminated against him (there were eventually two complaints filed, but further details are not necessary for purposes of this appeal). The Commission, after investigating, referred the matter to a board of inquiry pursuant to s. 21(3) of the Human Rights Code, R.S.N.L. 1990, c. H-14, as amended.

[9] The Board of Inquiry heard Sean Ryan's complaints, found that CUPE had not done everything it could have and awarded Mr. Ryan $20,000.00 for pain and suffering against it. (The amounts awarded against the City are likewise not relevant for purposes of this appeal). The adjudicator wrote concerning CUPE:

> It is further the finding of this Board of Inquiry that [CUPE] specifically, has not led evidence that establishes that it fulfilled its obligations regarding the accommodation of Sean Ryan's disability by the Employer. The Union could have sought a judicial review of the finding of the Arbitration Panel in the Supplementary Award as being patently unreasonable to the extent that it permitted the disclosure of unnecessary medical information on one of its

> members to his Employer and so as to challenge the very essence of what the Union was opposed to during the events of 1998. [para. 118]

CUPE and CUPE National were represented before the tribunal by Lionel Clarke; Sean Ryan by either his brother Robert or by independent counsel.

[10] CUPE sought and was given leave to appeal the tribunal's decision to the Trial Division and re-retained Earle, Q.C. to represent it. Sean Ryan, supported by the Human Rights Commission, applied to have Earle, Q.C. removed, alleging that he was in a conflict of interest. The chambers judge granted the application and ordered, as indicated above, that Earle, Q.C. and his law firm, O'Dea Earle, "be removed as solicitor[s] of record for CUPE in the within appeal".

Grounds of Appeal

[11] CUPE submits that the chambers judge erred either in fact or law, or both, in the following ways:

(1) in determining that Sean Ryan had imparted to Earle, Q.C. information of a confidential nature vis-à-vis CUPE;

(2) in failing to consider the entitlement of CUPE to have access to and make use of all information imparted to its counsel in the course of a retainer;

(3) in finding that Sean Ryan was a "near" client of Earle, Q.C., notwithstanding that Earle, Q.C. had been retained by CUPE;

(4) in determining and/or failing to determine the impact of the nature of the relationship between a trade union and a member of that trade union when the trade union is acting through its counsel in discharging its duty of fair representation to the member; and

(5) in determining that the arbitration and the appeal from the decision of the Human Rights Commission Board of Inquiry were related and that information given to Earle, Q.C. for purposes of the arbitration could be used on the Appeal to Sean Ryan's detriment.

Positions of the Parties

[12] CUPE argues that the recognized test for conflict of interest does not apply in the instant case because Earle, Q.C.'s client was CUPE and, therefore, any information imparted to Earle, Q.C. by Ryan necessarily became the information of CUPE. Ryan, consequently, could have no expectation of privacy. In other words, he was neither a client nor a "near" client.

[13] CUPE also submits that a 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 individual members separate from the union itself, and were thereby prevented from communicating all information received from a member. In addition, CUPE contends that, in any event, the issues on appeal are completely unrelated to the arbitration, and that the appeal will be decided wholly on the record of the Board of Inquiry hearing.

[14] Ryan and the Human Rights Commission (the Commission), while acknowledging that there was no solicitor-client relationship between Ryan and Earle, Q.C., submit that there was a "near" client relationship and that Ryan had an expectation that any confidential information he gave to Earle, Q.C. in preparation for the arbitration would not be used against him in an action against CUPE. They both emphasize the principle of maintaining the integrity of the justice system and the need to avoid even the appearance of impropriety. They stress that the appeal from the Board of Inquiry and the arbitration both arise out of Ryan's termination by the City.

Law and Analysis

[15] I begin with a reference to the Newfoundland and Labrador Law Society's Code of Professional Conduct, adopted by the Benchers of the Law Society on December 7, 1998 and in force on June 4, 1999. The "Foreword" to the Code states that it is an adoption, with several changes, of the 1987 Canadian Bar Association Code of Professional Conduct, and the "Preface" that "the rules that follow are … intended to serve as a guide, and the commentaries and notes appended to them are illustrative only".

[16] Chapter V of the Code is entitled "Impartiality". The Rule in Chapter V reads:

> 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.

[17] Rule V is followed by 13 commentaries, the most relevant of which for present purposes are numbers 8 and 9 which deal with acting against a 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 to 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.
>
> 9 For the sake of clarity the foregoing paragraphs are expressed in terms of the individual lawyer and client. However, the term "client" includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. It also includes the client of a lawyer who is associated with the lawyer in such a manner as to be perceived as practising in partnership or association with the first lawyer, even though in fact no such partnership or association exists.

[18] Rule V and commentaries 8 and 9 are essentially the same as the Rule and commentaries of the 1974 Canadian Bar Association Code of Professional Conduct referred to by Sopinka J. for the majority in **MacDonald Estate v. Martin**, [1990] 3 S.C.R. 1235. The CBA Code of Professional Conduct was the starting point for Sopinka J.'s consideration of what was and should be the law concerning conflict of interest, and **MacDonald Estate v. Martin** is the starting point for any analysis thereon since then.

[19] Concerning the relevance of the Code of Professional Conduct, Sopinka J. wrote:

> A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. …The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy. <u>The statement in Chapter V should therefore be</u>

> accepted as the expression by the profession in Canada that it wishes to impose a very high standard on a lawyer who finds himself or herself in a position where confidential information may be used against a former client. The statement reflects the principle that has been accepted by the profession that even an **appearance** of impropriety should be avoided. [pp. 1245-1246] [Emphasis added.]

[20] The above comment concerning the Code of Professional Conduct was made in the context of Sopinka's earlier statement that when resolving the issue of conflict of interest

> … 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. The review of the cases which follows will show that different standards have been adopted from time to time to resolve the issue. This reflects the different emphasis placed at different times and by different judges on the basic values outlined above. [p. 1243]

[21] Sopinka J. then proceeded to review the law in England, in Australia and here in Canada, and concluded with this observation:

> … it is evident from this review of authorities that the clear trend is in favour of a stricter test. This trend is the product of a strong policy in favour of ensuring not only that there be no actual conflict but that there be no appearance of conflict. [p. 1258] [Emphasis added.]

[22] Sopinka J. then detailed what he considered to be "The Appropriate Test". I extract therefrom the following portions:

> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?
>
> In answering the first question, the court is confronted with a dilemma. In order to explore the matter in depth may require the very confidential information for which protection is sought to be revealed. This would have the effect of defeating the whole purpose of the application. … 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. …

> The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship. [pp. 1260-1261] [Emphasis added.]

[23] The learned justice concluded the section as follows:

> These standards will, in my opinion, strike the appropriate balance among the three interests to which I have referred. In giving precedence to the preservation of the confidentiality of information imparted to a solicitor, the confidence of the public in the integrity of the profession and in the administration of justice will be maintained and strengthened. On the other hand, reflecting the interest of a member of the public in retaining counsel of her choice and in the interest of the profession in permitting lawyers to move from one firm to another, the standards 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. [p. 1263] [Emphasis added.]

[24] A review of the cases shows that the application of the **MacDonald Estate** test is frequently not as obvious as one might think. Parties continually seek inclusion or exclusion, arguing "particular facts". Some seek to restrict the test, others to expand it.

[25] An early example of the application of the test is found in **UCB Sidac International Ltd. v. Lancaster Packaging Inc.** (1993), 51 C.P.R. (3d) 449 (Ont. Ct. J. (Gen. Div.)), where the plaintiff carried on its business of marketing and selling packing products through an agency agreement with the defendant. The plaintiff's current solicitors, although not acting for the defendant, had taken instructions from the defendant's principal officer in the negotiations setting up the agency arrangement. When the plaintiff sued the defendant alleging breach of the agency arrangement, the defendant applied to remove the plaintiff's solicitors from the record on the ground that the proceedings would probably involve a member of the law firm and the

defendant's principal officer being on opposite sides of a credibility issue. The law firm argued that there had not been a solicitor-client relationship with the defendant. Blair J. (as he then was) found that, while it may have been technically true that it did not act for the defendant, the law firm took instructions from its principal in connection with both the operation of the agency arrangement and the negotiation of the agency agreement.

[26] To the law firm's contention that Sopinka J.'s test presupposes the existence of a solicitor-client relationship, Blair J. responded:

> I do not think the ethic expressed in the passages quoted above [from **MacDonald Estate**, including "The Appropriate Test"] 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 this 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.
>
> In my opinion, whether technically "clients" of Faskens or not, the Defendants Lancaster and Mulholland were "persons involved in or associated with" the client -- UCB -- in the matter of UCB's Canadian operations. Indeed, as noted earlier, they *were* UCB's Canadian operations until the dispute which is the subject matter of the lawsuit arose. The dispute is a "related matter" to the Fasken retainer regarding those Canadian operations. It certainly cannot be said to be "a fresh and independent matter wholly unrelated to any work [the Firm] has previously done" for the client or person associated with the client, to adopt the language of the code of ethics.
>
> I am satisfied that "there existed a previous relationship" between the law firm and the Defendants Lancaster and Mulholland "which is sufficiently related to the retainer from which it is sought to remove the solicitor[s]" that the inference regarding the imparting of confidential information arises. On the conflicting evidence before me the law firm has not discharged the "difficult burden" of displacing that inference. 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. [paras. 13-15] [Emphasis added.]

[27] In **Henson v. Ontario Hydro Corp.** (1995), 16 C.C.E.L. (2d) 31 (Ont. Ct. J. (Gen. Div.)), a case very similar to the present one, the union in question regularly and exclusively retained a particular law firm to act on its behalf in taking grievances to arbitration. The plaintiff went to the union with a complaint after she was allegedly sexually harassed and then suspended from work without pay. The plaintiff and her husband met with a lawyer from the law firm and discussed the matter in detail. A grievance was filed but subsequently abandoned. The plaintiff then retained other counsel and sued the union for damages for breach of its duty of fair representation, conspiracy and slander. She also moved for an order prohibiting the union's law firm from acting against her. In granting the motion, Thomas J.'s comments in his "Conclusion" are particularly cogent:

> The main thrust of the Union's position is that there was no solicitor-client relationship between Henson and Rothstein and no confidential information was disclosed by Henson to Rothstein in the particular circumstances.
>
> The leading case on disqualifying conflict of interest is the judgment of the Supreme Court of Canada in *MacDonald Estate v. Martin*. Sopinka J., who wrote the majority opinion, stressed the balancing which must take place between the concern to maintain the high standards of the legal profession and the integrity of our justice system and the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Cory J., who wrote the minority opinion, concluded that the integrity of the judicial system is the predominant consideration.
>
> It is clear that the integrity of the judicial system is based upon the well known maxim that justice must not only be done but must manifestly be seen to be done. The appearance of fairness of our justice system in the eyes of the general public must not be compromised.
>
> A very real appearance of professional impropriety must be avoided. The mere appearance of a conflict of duty is sufficient to taint the representation and overrides any private interests.
>
> It is also fundamental that a lawyer who has acted for an individual in a matter should not thereafter act against her in the same or any related matter.
>
> Although the Union was undoubtedly responsible for the fees of the Law Firm, and the Union could "call the shots" in the grievance process, it is my view that a reasonable person would conclude that the Law Firm was representing Henson in processing her grievance through the vehicle of the Union.
>
> Accordingly, when Henson, on her own initiative and at her own expense, commences a lawsuit against the Union, it is my opinion that the Law Firm should not act against her. It is entirely possible that Rothstein and Union representatives who were present at the meeting in the offices of the Law Firm might be called as witnesses. It is my respectful

> view that there is the very real appearance of a possibility of a conflict of duty in the eyes of the general public. [paras. 66-72]

[28] The issue of conflict of interest and the application of the **MacDonald Estate** test was the subject of an appeal to this Court in **Dobbin et al. v. Acrohelipro Global Services Inc. et al.** (2005), 246 Nfld. & P.E.I.R. 177. There, three former executives of defendant **Vector Aerospace Corp.** were claiming damages for wrongful dismissal. Their lawyer's law firm had previously represented Vector's bank in arranging a credit facility for it. In the course of advising the bank, the law firm was informed of the former employees' claims and how Vector intended to deal with them.

[29] This Court agreed with the trial judge that the lawyer was placed in a conflict of interest, i.e., that in preparing the credit facility agreement the law firm would have had to make assessments respecting the plaintiffs' litigation. The law firm owed a limited duty of loyalty to Vector as a person associated with the bank in the credit arrangement. Vector was a near client and there was a substantial risk that confidential information would be imparted to its lawyers by another member of the firm.

[30] In the present case, Sean Ryan and his brother met with Earle, Q.C. in preparing for the arbitration and in that meeting, in the words of the chambers judge, "… considerable information of a personal and confidential nature relating to [Sean Ryan's] mental illness, work experience and related matters was conveyed …". [para. 5] Subsequent to the arbitration, Sean Ryan filed a complaint against CUPE with the Human Rights Commission. The Commission referred the matter to a board of inquiry which Board found that CUPE had not done everything it could have and awarded him compensation. That finding is the subject of CUPE's appeal to the Trial Division where CUPE wishes to have Earle, Q.C. represent it. Earle, Q.C. will be presenting a position adverse to Sean Ryan's, arguing that CUPE did not seek judicial review of the arbitration award for good reasons, some of which may relate to Sean Ryan's health history and work experience. As stated by Sopinka J. in **MacDonald Estate**, at para. 22 above, "… the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant".

[31] The standard of review concerning the legal test to be applied in determining whether a conflict of interest exists is correctness. The standard of review concerning findings of fact and the application of the test to those

facts is palpable and overriding error: see **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235. I am satisfied that the chambers judge applied the correct law and made no palpable and overriding error otherwise. I wholly agree with the concluding paragraphs of his decision:

> [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. [Emphasis in original.]
>
> [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.

Disposition

[32] Leave to appeal is granted. The appeal is dismissed with costs.

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D.M. Roberts, J.A.

I Concur: _____

B. G. Welsh, J.A.

Barry, J.A. (Dissenting Reasons)

[33] I have read the reasons of Roberts J.A. and accept his statement of the background facts. I also agree with his statement of the law. I differ with him, however, on his application of the **McDonald Estate** test to the facts of this case. I have concluded the appeal should be allowed because, although Sean Ryan was a "near" client of Earle, Q.C., any information imparted to Earle, Q.C. by Ryan necessarily became information to which Earle, Q.C.'s client, CUPE, was entitled. So, even if Earle, Q.C., is regarded as having acted for Ryan as well as CUPE, on the facts it is not appropriate to infer that relevant confidential information was or could be imparted to CUPE by Earle, Q.C. CUPE already had the information through its solicitor, Earle, Q.C.

[34] Another reason for allowing the present appeal arises from the fact that the appeal from the decision of the Human Rights Board will be based upon the information already before the Board and part of the record. So, even if Earle, Q.C. is regarded as having received confidential information from Ryan which is not on the record, that information can have no influence upon the appeal from the Board. It is not relevant. In the eyes of a reasonably informed member of the public who is possessed of all these facts, no appearance of impropriety could arise.

[35] The **Henson** case must be distinguished because there the trial judge concluded the solicitor, who initially had been retained by the union to take on a union member's sexual assault grievance, could be called as a witness in the subsequent case by the member against the union for breach of the duty of fair representation. Earle, Q.C., will not be called as a witness in the appeal from the Board's decision.

[36] Applying the **Housen v. Nikolaisen** standard of review, I have, with respect, for the above reasons concluded the chambers judge made a

palpable and overriding error in finding that Earle, Q.C. had confidential information which could be used against Ryan and that a reasonably informed person, fully apprised of the facts, would have a perception of impropriety.

[37] I would allow the appeal.

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L.D. Barry, J.A.