

Legal Ethics: Compelling Conflicts

University of Toronto, Faculty of Law, September 27, 2019

Justice Lorne Sossin

Duty of Loyalty and Conflicts of Interest: Outline

- ▶ The Problem
- ▶ The Questions
- ▶ LSO Rules of Professional Conduct, r. 3.4
- ▶ Some key principles
- ▶ Some takeaway insights
- ▶ For further reading on conflicts, see Brent Cotter, “The Duty of Loyalty and Conflicts of Interest” in *Lawyer’s Ethics and Professional Regulation*, 3rd ed. (Toronto: LexisNexis, 2017), ch. 5

Green Ethics

- ▶ Can legal ethics contribute to a more sustainable planet and more sustainable vision of professionalism?
- ▶ Tom Lininger, “Green Ethics for Lawyers” (2016) 57 *Boston College Law Review* 61
<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3479&context=bclr>
- ▶ Trevor Farrow, “Sustainable Professionalism.” (2008) 46 *Osgoode Hall Law Journal* 51
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol46/iss1/2>

The Problem

- ▶ Sepia was a lawyer at the Vancouver office of Brown, Marron & Bhoora (BMB), an international firm with 3 offices in Canada as well as offices in 10 other countries around the globe. BMB represents some of the largest fossil fuel based energy companies in the world.
- ▶ After two years, Sepia realized she wanted more from her legal career, and moved to Toronto to join the pro bono Environmental Legal Action Centre (ELAC).
- ▶ ELAC is in the midst of coordinating a class action by coastal communities facing catastrophic effects from erosion and climate change against several multinational energy companies. The class action is in its 3rd year and already has been certified, though the trial is still at least a year away. One of the defendant companies is represented by the Toronto office of BMB.

The Problem

- ▶ BMB brings a motion to the Ontario Superior Court in charge of the class action seeking to have ELAC disqualified from representing the class based on an alleged conflict of interest in Sepia's involvement with ELAC.
- ▶ Sepia files an affidavit for the motion swearing that she had never seen any BMB document or confidential information relating to the case, and that each office of the firm was run independently, so she was not aware of the clients or matters relating to BMB's Toronto office while she was at the Vancouver office.
- ▶ ELAC argues that the class action will be prejudiced if they are removed as the representatives and would have to seek out a firm willing to take the case on a contingency fee basis.

The Questions

- ▶ Does Sepia's transfer to ELAC give rise to a conflict of interest in relation to the class action against the energy companies?
- ▶ What is a conflict of interest?
- ▶ What are the lawyer's duties in relation to conflicts of interest? What are the sources of this duty?
- ▶ What is the difference between an actual conflict and a perceived conflict?
- ▶ Are there exceptions where conflicts of interest are permitted?
- ▶ Who decides what is a conflict - the Law Society of Ontario, the courts or the legislature?

LSO Rules of Professional Conduct

- ▶ **3.4-1** A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.
- ▶ Commentary
- ▶ [1] As defined in rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. Rule 3.4-1 protects the duties owed by lawyers to their clients and the lawyer-client relationship from impairment as a result of a conflicting duty or interest. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

LSO Rules of Professional Conduct

- ▶ **3.4-2** A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.
- ▶ **Commentary**
- ▶ **Disclosure and consent**
- ▶ [1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

Emerging contexts for conflicts

3.4-16.3 A *pro bono* lawyer may provide short-term *pro bono* services without taking steps to determine whether there is a conflict of interest arising from duties owed to current or former clients of the lawyer's firm or of the *pro bono* provider.

- ▶ **3.4-16.4** A *pro bono* lawyer shall take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's firm.
- ▶ **3.4-16.5** A *pro bono* lawyer shall not provide or shall cease providing short-term *pro bono* services to a client where the *pro bono* lawyer knows or becomes aware of a conflict of interest.
- ▶ **3.4-16.6** A *pro bono* lawyer who is unable to provide short-term *pro bono* services to a client because there is a conflict of interest shall cease to provide such services as soon as the lawyer actually becomes aware of the conflict of interest and the lawyer shall not seek the *pro bono* client's waiver of the conflict.

Some key principles

- ▶ When a lawyer is retained by a client, the scope of the retainer is governed by laws of contract.
- ▶ The solicitor-client relationship thus created is, however, overlaid with certain fiduciary responsibilities, which are imposed as a matter of law.
- ▶ Fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for.
- ▶ Fiduciary responsibilities include the duty of loyalty, of which an element is the avoidance of conflicts of interest.

Some key principles

In *R. v. Neil* 2002 SCC 70, Per Binnie J.: The aspects of the duty of loyalty relevant to this appeal do include issues of confidentiality in the Canada Trust matter, but engage more particularly three other dimensions:

- (1) the duty to avoid conflicting interests,
- (2) a duty of commitment to the client's cause, and
- (3) a duty of candour with the client on matters relevant to the retainer.

Some key principles

- ▶ In *MacDonald Estate v. Martin*, [1990 CanLII 32 \(SCC\)](#), [1990] 3 S.C.R. 1235, a junior member of the defendant's solicitor's firm, privy to significant amounts of confidential information, later joined the law firm representing the plaintiff.
- ▶ The relocated lawyer did not discuss the case with any of the lawyers at her new firm.
- ▶ She swore an Affidavit that she had not disclosed any confidential information.

Some key principles

- ▶ As adopted by Sopinka J. in *Macdonald Estate*, supra, the two-step test to be used in determining whether a conflict of interest exists:
- ▶ 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?
- ▶ Sopinka J. found, in *MacDonald Estate*, that “clear and convincing evidence” of, for example, the use of “cones of silences” could be sufficient to rebut the presumption that confidential material is shared among lawyers. If such evidence was lacking, then the second question, relating to prejudice of the (opposing) client, needed to be answered.

Some key principles

- ▶ *Canadian National Railway Co. v. McKercher LLP*, [2013] 2 SCR 649, 2013 SCC 39
- ▶ [16] Both the courts and law societies are involved in resolving issues relating to conflicts of interest – the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession... In exercising their respective powers, each may properly have regard for the other’s views. Yet each must discharge its unique role. Law societies are not prevented from adopting stricter rules than those applied by the courts in their supervisory role. Nor are courts in their supervisory role bound by the letter of law society rules, although “an expression of a professional standard in a code of ethics . . . should be considered an important statement of public policy”...

Some key principles

- ▶ *Canadian National Railway Co. v. McKercher LLP*, [2013] 2 SCR 649, 2013 SCC 39
- ▶ [61] the courts in the exercise of their supervisory jurisdiction over the administration of justice in the courts have inherent jurisdiction to remove law firms from pending litigation. Disqualification may be required:
 - ▶ (1) to avoid the risk of improper use of confidential information;
 - ▶ (2) to avoid the risk of impaired representation; and/or
 - ▶ (3) to maintain the repute of the administration of justice.

Other types of conflicts of interest

- ▶ So far, we have dealt with conflicts arising from lawyers' professional relationships. Personal relationships may also give rise to conflicts:
- ▶ Lawyer-Client romantic relationships (see, for example, [Law Society of Upper Canada v. Hunter 2007 ONLSHP 27](#))
- ▶ Lawyer-Client financial relationships (see. For example, [Khan v Paul A Kazakoff Professional Corporation, 2019 ABQB 168](#))
- ▶ Lawyer-Lawyer spousal relationships (see, [B.M. \(Re\), 2009 ABPC 6](#))

Some takeaway insights

- ▶ Legal ethics is both about upholding key values of legal professionalism and the legal obligations to protecting clients and promote the integrity of the justice system;
- ▶ Solicitor-client relationships are governed both by contract and a broader fiduciary relationship;
- ▶ Categories and nature of confidentiality/conflicts are dynamic and not static;
- ▶ Perception of conflict may equal conflict; and
- ▶ Conflicts may be addressed in advance by disclosure, consent, recusal, ethical screens or other measures - more difficult ex-post.

Climate Change & Green Lawyering

- ▶ The Climate Change class action launched in Quebec in November 2018:
- ▶ *ENvironnement JEUnesse c. Attorney General Of Canada* https://enjeu.qc.ca/wp-content/uploads/2018/11/Application_for_authorization_UNOFFICIAL.pdf

Climate Change & Green Lawyering

- ▶ “The Government of Canada has behaved irresponsibly and has failed to take action to prevent the serious threat posed to its people by climate change. These failures constitute an infringement of its citizens’ fundamental rights, especially the right to life and security of the youngest generations. While recognizing the urgency to act and the serious dangers posed by climate change, the Canadian government has done virtually nothing. Canada's targets for reducing greenhouse gases ("GHGs") are inadequate to the point of constituting an intentional fault, and the measures put in place offer no hope of achieving them.
- ▶ The present proceeding thus seeks to obtain a declaration that the Government has failed in its obligations under the Canadian Charter of Rights and Freedoms to protect the fundamental rights of its citizens.”