

Lawyer who lied about personal background and shared client information did not breach duty of loyalty

Duty of Loyalty | Litigation | Litigation & Dispute Resolution

12 October 2021

The duty of loyalty owed by lawyers to their clients is a foundational principle in the adversarial system. The Supreme Court of Canada has described the duty of loyalty as consisting of a duty not to disclose confidential information, a duty to avoid conflicting interests, a duty of commitment to the client's cause (zealous representation), and a duty of candour with the client on matters relevant to the retainer: *R. v. Neil*, 2002 SCC 70 (CanLII), at paras. 18-19.

However, the duty of loyalty is not unlimited. Lawyers also have duties to the court, to the standards of their profession, and to the public. At times, such duties may lead to a conflict with the client's wishes or with what the client thinks are in their personal interests.

In a recent decision, the Court of Appeal for Ontario addressed these issues while assessing the appellant's allegations that his trial counsel breached his duty of loyalty: *R. v. Gregson*, 2021 ONCA 685.

The appellant was convicted of the first-degree murder of a police officer and robbery following trial in 2012.

In 2021, the appellant sought to have the convictions quashed and a new trial ordered on the basis that his trial counsel had breached the duty of loyalty. The appellant complained that his lawyer lied to him about his personal background at the time he agreed to the retainer and that the lawyer improperly cooperated with the Crown and disclosed confidential information.

In essence, the appellant argued that his trial counsel had acted as a friend of the court (*amicus curiae*) rather than in his best interests, and that this divided loyalty effectively deprived him of counsel, thereby resulting in a miscarriage of justice.

The concepts of ineffective assistance of counsel and breach of the duty of loyalty should not be conflated. As stated by the Court of Appeal at para. 25:

A breach of the duty of loyalty does not occur whenever a client's interests are damaged by a lawyer's actions. A lawyer acting with intent to further a client's interests sometimes can, by incompetence, damage those interests. Such a lawyer has not breached the duty of loyalty. Otherwise, every incompetent act would be an act of disloyalty.

In order to establish a breach of the duty of loyalty, the appellant had to show, firstly, that there was an actual conflict of interest between the respective interests represented by his lawyer and, secondly, that there was some impairment of counsel's ability to represent his interests at trial as a result of the conflict: *R. v. Neil* at para. 39-40.

It was common ground that the appellant was "a difficult client," and the respondent lawyer agreed to take on the case only a few weeks before trial after the appellant's former lawyer asked to be removed from the record. At the time, the respondent was a staff lawyer for Legal Aid Ontario. The Crown's case was strong and there was only a faint chance that some aspect of diminished capacity could result in a verdict of manslaughter.

The appellant pointed to four particular instances which he claimed to be a breach of the lawyer's duty of loyalty.

Firstly, the lawyer lied about his personal background, which the appellant claimed was done to gain his trust so that he would retain him. Specifically, during their first meeting, the lawyer claimed that he had been a member of the RCMP and that he had killed two people in the course of duty. It turned out this was not true. It also turned out the lawyer had told his former law partner the same false story.

In the Court of Appeal's view, while the fabrication of one's biographical details is unethical and should not be condoned, this did not undermine the lawyer's entire relationship with the appellant. The fact that the lawyer told the same story to someone else meant that it was not due to divided loyalties on the lawyer's part.

Further, even if such a lie were foundational to the lawyer's relationship to the appellant, it would not constitute a breach of loyalty unless it involved an actual conflict and impaired counsel's representation. As the lawyer had not taken any steps as counsel at the time he discussed his background, there could be no impairment of his representation at that point.

In the Court of Appeal's view, the only inference that could reasonably be drawn to explain the lawyer's conduct was that he was concerned about developing a rapport with the appellant so that he could retain some control and prevent his client from losing his temper, changing instructions, and possibly firing him mid-trial. While his means for effecting this were not laudable, they did not demonstrate disloyalty.

Secondly, the appellant complained that the lawyer represented that he would contest the voluntariness of certain admissions and statements, but that he told Crown counsel that he knew this argument would not succeed.

The Court of Appeal concluded that the lawyer's approach to a *voir dire* concerning the voluntariness issue, in which the lawyer suggested that he go first and concede admissibility to avert possible problems with the appellant, demonstrated a misguided attempt to provide the best defence possible for the appellant in the face of a very strong Crown case.

The lawyer's explanation for a "somewhat bizarre factum" he submitted for the *voir dire* was that the appellant's statements were going to be admitted no matter what. There was no evidence to support the appellant's assertion that he did not have an operating mind when he made the statements at issue. Facing that reality, the lawyer was concerned that if he simply conceded, the appellant would be furious, discharge him, and that would derail matters to his detriment.

While the Court of Appeal noted that this strategy was "questionable," there was no basis to suggest that it was borne out of disloyalty. Rather, it was a function of the lawyer's attempt to build a respectful relationship with his client and allow him to determine how his defence would be conducted.

Thirdly, the appellant alleged that his lawyer improperly shared defence trial strategy and the weaknesses of his case with Crown counsel. In that regard, the lawyer had sent the Crown a copy of written instructions he wanted the appellant to sign. The Court of Appeal found this to be unquestionably misguided and wrong.

However, the lawyer's explanation for doing so did not support a finding that it was driven by disloyalty to his client. He believed, rightly or wrongly, that the best he could do for the appellant in the circumstances was to keep him calm with a view to preventing him from changing instructions again and ending up without a lawyer mid-trial. Further, the lawyer demonstrated that the instructions were not, in substance, different from admissions that the appellant's former lawyer had previously filed.

The lawyer acknowledged that, in retrospect, it had been an error for him to attempt to share the instructions with the Crown. However, this was not done as a result of any conflict.

Lastly, the appellant claimed that his lawyer lied about having consulted an expert with respect to a potential diminished capacity defence. In a letter to the Crown, the lawyer claimed to have spoken with a "consultant," namely his own daughter who he claimed was a neurosurgery resident in the United States. Fresh evidence filed on the appeal showed that the lawyer did not have a daughter—or any child or step-child—who was a neurosurgeon. It was unknown who, if anyone, the lawyer spoke to or why he would have made this up.

Nevertheless, the Court of Appeal concluded that there was no evidence of any conflict on the lawyer's part that could provide a motive for him to lie. Rather, he was trying to find support for some sort of limited capacity defence in a case where the evidence simply did not support it. The lawyer, while seeing the case as largely hopeless, never threw in the towel.



In summary, the Court of Appeal did not see the evidence overall as revealing any actual conflict of interest on the lawyer's part that could ground a finding of a breach of the duty of loyalty under the Supreme Court of Canada's test in *R. v. Neil*. The lawyer did not prefer the interests of another party. Given the difficult circumstances in which the lawyer was acting, there were reasonable explanations for his, at times, "misguided conduct." In the Court of Appeal's view, the lawyer was not acting out of divided loyalty but was committed to his client's cause.

As a result, the appellant's sole ground of appeal on the breach of the duty of loyalty was dismissed. A PDF version is available to download [here](#).

For more information please contact: **James Cook** at **416.865.6628** or jcook@grllp.com

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com