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Lawyer who was consulted by another lawyer disqualified from acting against other lawyer

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In general, lawyers are not allowed to act on matters where they have a conflict of interest. To do so is contrary to the common law and the *Rules of Professional Conduct*. Accordingly, a lawyer can be removed from representing a client in a litigation matter where there is a reasonable possibility of the misuse of confidential information by a lawyer against a former client or where the lawyer will be a necessary witness at trial.

In the recent decision of *2658396 Ontario Inc. v. Sanayei*, 2022 ONSC 3189 (not yet on CanLII), these two separate grounds were successfully argued to remove the plaintiff's lawyer from the record, thus requiring the plaintiff to retain a new lawyer.

2658396 Ontario Inc. v. Sanayei

The action stemmed out of mortgage proceedings in which the plaintiff, which was the second mortgagee on a property, learned that the defendant lawyer had acted for the mortgagor on the property in relation to a subsequent third mortgage registered on the same property. A term of the plaintiff's second mortgage prohibited the registration of any subsequent mortgages. The defendant lawyer did not contact the plaintiff at the time the third mortgage was registered.

On April 22, 2019, the second mortgage went into default. Two months later, the first mortgagee issued a Notice of Sale under the *Mortgages Act* to sell the property. At this time, the plaintiff learned about the third mortgage.

The defendant lawyer advised the plaintiff to retain a mortgage enforcement lawyer in connection with its second mortgage and provided the plaintiff's principal the names of multiple mortgage enforcement lawyers.

What the plaintiff's instructions were to the defendant to protect its interest is an outstanding issue.

The plaintiff later retained his current lawyer (DB), who was one of the lawyers referred by the defendant lawyer, and

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commenced a mortgage enforcement action of its own against the mortgagor. No steps were taken by the plaintiff to bring the first mortgage into good standing, to take over the power of sale proceedings, buy out the first mortgage, or otherwise protect the interests of the second mortgagee. The property was sold by the first mortgagee, with a significant shortfall on the second mortgage. The mortgagor subsequently made an assignment in bankruptcy. This caused the plaintiff to sue the defendant lawyer to cover his losses.

The defendant lawyer contended that DB was in a conflict of interest in the action against him. The defendant lawyer provided evidence that DB had previously acted for him on matters that overlapped the mortgage enforcement dispute and that before DB had been retained by the plaintiff he had consulted with DB and sought advice about the second and third mortgage problem that was the subject matter of the plaintiff's action.

Although there was no formal retainer between the defendant lawyer and DB, the defendant lawyer viewed the consultation as an occasion whereby he conveyed confidential and privilege protected information to DB.

The defendant lawyer and DB had known each other for 20 years and they had maintained a friendly and professional relationship during this period of time.

The defendant lawyer expressed concern that DB had provided the plaintiff's principal with confidential information in connection with one of the previous matters for which the defendant lawyer had been retained by DB because the plaintiff had referred to facts in a reply pleading that were never discussed between the plaintiff's principal and the defendant lawyer and that the defendant lawyer could only have come from DB. Amongst other things, the defendant lawyer argued that while he referred the plaintiff's principal to DB to enforce the second mortgage, he never anticipated the plaintiff retaining DB to sue him.

DB acknowledged that he knew the defendant lawyer for 20 years and that he had represented the defendant lawyer on a few matters over the years. In July 2019, DB had been specifically retained by the defendant lawyer to act for his mortgage company on the enforcement of a mortgage on another property. However, DB denied having disclosed to the plaintiff any information about this retainer and did not recall the defendant lawyer ever imparting any confidential information on him that could be used in the action against the defendant lawyer.

After retaining DB, but prior to commencing the action against the defendant lawyer, the plaintiff the plaintiff's principal surreptitiously recorded a meeting between himself and the defendant lawyer. In this meeting, the defendant lawyer was told that DB had considered an appraisal given to the plaintiff about the value of the property was illegal, that DB advised the plaintiff to not accept settlement offers in respect of the mortgage enforcement and that the plaintiff's principal was not interested in power of sale proceedings or purchasing the property.

In *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), the court determined that a lawyer will be found to have a disqualifying conflict of interest where there is a probability of real mischief and the possibility of real mischief that a lawyer will misuse confidential information against a former client. The test is such that the public represented by the reasonably informed person

would be satisfied that no use of confidential information would occur.

Justice Sopinka in this seminal Supreme Court of Canada case described that these kinds of cases required two questions to be answered:

1. 1Did 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?

The court found that the DB and the defendant lawyer had been in a previous solicitor-client relationship and that DB had received confidential information from him with respect to the subject matter of the plaintiff's action against the defendant lawyer.

There was a risk that this information would be used to the prejudice to the defendant lawyer as his discussion with DB about his involvement in the two mortgages went to the heart of the plaintiff's claim and would be impossible for DB compartmentalize.

Although there was some delay in bringing the motion, this was insufficient to prevent DB's disqualifying conflict of interest.

In the alternative, the court found that DB had a disqualifying conflict of interest because there was a sufficient likelihood that he would be a witness at the trial. In *Mazinani v. Bindoo*, 2013 ONSC 4744, the court found that a lawyer will have a disqualifying conflict of interest where he or she acts for a party but will be a witness in the same proceeding. In circumstances where it is sought to remove a lawyer on the grounds that he or she will be a witness, factors set out by the Divisional Court in *Essa (Township) v. Guergis*, 1993 CanLII 8756 (ON SCDC) must be considered. Those factors are:

(i) the stage of the proceedings,

(ii) the likelihood that the witness will be called,

(iii) the good faith (or otherwise) of the party making the application,

(iv) the significance of the evidence to be led,

(v) the impact of removing counsel on the party's right to be represented by counsel of choice,

(vi) whether the trial is by judge or jury,

(vii) who will call the witness if, for example, there is a probability counsel will be in a position to cross-examine a favourable witness, a trial judge may rule to prevent that unfair advantage arising, and

(viii) the connection or relationship between counsel, the prospective witness and the parties involved in the litigation.

Applying the *Essa (Township)* factors, the court reasoned that they either favoured removal or were neutral. The only factor that did not favour removal was that the plaintiff would be put to the expense of retaining a new lawyer. This would cause some delay in the prosecution of the plaintiff's case. While delay also raised a question of good faith in seeking DB's removal, DB could nevertheless not be both and a witness in the proceeding.

Removing DB as lawyer from the record for being a likely witness was consistent with numerous other decisions, including *Kitchen v. McMaster*, 2018 ONSC 3717 (CanLII) , *8657181 Canada Inc. v. Medhi Au LLP*, 2019 ONSC 6380 (CanLII) and *Elkay Management Inc. v. Law Studio Professional Corp.*, 2021 ONSC 7880 (CanLII).

Representation by Gardiner Roberts LLP
The defendant lawyer was represented on the motion to remove DB as lawyer of record for the plaintiff by James Cook and Kevin Mooibroek.

Mr. Cook is a senior partner in the firm's Dispute Resolution Group. Mr. Mooibroek is a junior associate in this Group.

Mr. Cook and Mr. Mooibroek were assisted in the preparation of written argument used in support of the motion to remove DB as lawyer of record for the plaintiff by Stephen Thiele, a partner and the firm's Director of Legal Research.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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