C.A. No. 115466

NOVA SCOTIA COURT OF APPEAL

Cite as: International Christian Mission Inc. v. D.L.G., 1995 NSCA 127
Clarke, Matthews and Bateman, JJ.A.

BETWEEN:

THE INTERNATIONAL CHRISTIAN MISSION INCORPORATED Appellant - and - D. L. G. and A. J. H. L. Respondents	Michael V. Coyle for the Appellant Lynn M. Connors for the Respondents Appeal Heard: May 30, 1995 Judgment Delivered: June 20, 1995

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal allowed per reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Bateman, J.A. concurring.

MATTHEWS, J.A.:

The respondents sued the appellant, among others. The respondents' solicitor of record is Lynn M. Connors of the firm Waterbury, Newton and Johnson. By interlocutory application the appellant sought to remove, as solicitor in this action, Ms. Connors or any lawyer associated with her firm on the ground of conflict of interest.

A chambers judge of the Supreme Court denied the application. It is from that decision the appellant now appeals.

In their suit the respondents allege, *inter alia*, that in 1983, while at the Bible Baptist Church or Bible College, each was sexually assaulted by the defendant Leroy Owen Wood and that at the time of the assaults Wood was an assistant pastor at the defendant Bible Baptist Church and an employee and/or agent of the defendant, Kingston Bible College and of the defendant-appellant. In particular, the respondents say that due to the alleged association of the appellant with the other defendants, the appellant owed to the respondents a duty of care to ensure they were not sexually assaulted by Wood and that the appellant was negligent in failing to supervise Wood. The respondents further allege that the appellant was vicariously liable for the actions of its agents and/or employees Wood and one other defendant, William Moorehead, and that the appellant breached a fiduciary duty owed to each of them.

The corporate structure which may involve the appellant with the other defendants will be of prime importance on any determination of liability of the appellant for the alleged assaults.

It is of some importance that the amended statement of claim alleges:

> 4. The Defendant William Moorehead, hereinafter referred to as "William Moorehead" was the Senior Pastor at the Bible Baptist Church, an unincorporated body, in Kingston in the County of Kings Province of Nova Scotia at all times material to this action. Further William Moorehead is a member of the Board of Governors of the Kingston Bible College and a member of the teaching faculty, and as well is a

> member of the "Cabinet" which is a management committee of the International Christian Mission Incorporated. The Plaintiffs state that at all times material to this action William Moorehead controlled and directed all decisions made by the members of the Bible Baptist Church, an unincorporated body, the Defendant, the Kingston Bible College, and the Defendant the International Christian Mission Incorporated, concerning staffing, curriculum, administration, and recreational programs at the Bible Baptist Church and the Kingston Bible College. The plaintiffs state that at all times material to this action William Moorehead was an agent and/or employee of the Bible Baptist Church, an unincorporated body, the Kingston Bible College, and the International Christian Mission Incorporated.
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> 12A The Plaintiffs state that William Moorehead, as a senior pastor of the "Bible Baptist Church" was the spiritual guide and mentor of all of the members of the Church. Further as a member of the teaching faculty and board of governors of the "College" and as an agent, employee of the Christian Mission, William Moorehead was in a position of trust and in a position of authority over the Plaintiffs. The Plaintiffs state that William Moorehead knew or should have known that the Plaintiffs were being or had been sexually assaulted by Leroy Wood. The Plaintiffs state that William Moorehead breached his fiduciary duty owed to the Plaintiffs by not preventing the sexual assaults from occurring, and by not taking appropriate and remedial action when it was disclosed to him that the sexual assaults had occurred. (emphasis is in the amended statement of claim)

The appellant's application before the chambers judge was supported by the affidavit of Reverend W. Keith Jenereaux, the Commissioner (i.e. head) of the appellant. That affidavit sets out, that, in February, 1993, and again on July 19, 1994, the appellant retained Eric O. Sturk, a partner in the Waterbury, Newton & Johnson firm.

Paragraphs 5 and 6 of Mr. Jenereaux's affidavit are germane to the issues on this appeal:

> 5. In February of 1993 the International Christian Mission retained Mr. Eric O. Sturk, Barrister and Solicitor, a partner in the firm of Waterbury, Newton and Johnson, to give us a legal opinion on the inter-relation between the International Christian Mission

> and the Kingston Bible College and on certain other matters related to the operation of the Kingston Bible College. Mr. Sturk took our instructions at a meeting on February 24, 1993 and provided a written legal opinion on those subjects by letter dated March 8, 1993, a copy of which is attached hereto and marked as Exhibit "A".
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> 6. In July of 1994 the International Christian Mission again retained Mr. Sturk to give us legal advice respecting the eligibility requirements for membership on the Board of Governor's of the Kingston Bible College and whether land held by the International Christian Mission could be conveyed by the Kingston Bible College without the approval of the International Christian Mission. On July 19, 1994 Mr. Sturk met with myself and Dr. William Moorehead (who is a named Defendant herein) and provided us with his legal advice on these points. He also recommended certain amendments to the Constitution of the Kingston Bible College. A copy of Mr. Sturk's handwritten notes of this consultation and the legal advice given to us is attached hereto and marked as Exhibit "B'. Also attached and marked as Exhibit "C" is a copy of our written Release and Direction to Mr. Sturk of October 24, 1994 pursuant to which Exhibit "B" was forwarded to our present solicitor.

Paragraph 8 is of particular significance:

> 8. In this action the plaintiffs allege that the International Christian Mission is negligent or vicariously liable for the alleged acts of certain other of the Defendants herein. The plaintiffs specifically plead and rely on their interpretation of the Acts of Incorporation of both the Kingston Bible College and the International Christian Mission and on their interpretation of the legal inter-relation between these corporate bodies, as set out in the Statement of Claim. This is the very subject matter on which we sought advice from Mr. Sturk, gave him confidential instructions, and received his legal opinion. (emphasis added)

The originating notice and statement of claim in this action were dated July 22, 1994, three days after the July 19 meeting.

Presumably to add some explanation for the separate retainers of himself and Ms. Connors, in his affidavit Mr. Sturk deposes:

1. THAT on February 24, 1993, I met with Keith Jeneroux and Daniel Freeman to discuss the most appropriate method to change the qualification for appointment to the Board of Governors of the Kingston Bible College.

2. THAT I sent a letter of opinion to the International Christian Mission dated March 8, 1993, which summarizes the consultation of February 24, 1993.

3. THAT I met with Keith Jeneroux and Dr. William Moorehead on July 19, 1994 concerning the interpretation of the Act of Incorporation of the Kingston Bible College which required a member of the Board of Governors to be a member of the International Christian Mission.

4. THAT I never discussed the contents of my file or my dealings with the International Christian Mission with Lynn Connors. To the best of my knowledge, information and belief, the first time she viewed the contents of my file was upon receipt of the Interlocutory Notice (Application Inter Partes) and supporting Affidavit from Mr. Coyle.

...

7. THAT the file concerning the International Christian Mission has always been kept in the Berwick Office. Ms. Connors does not practice law from the Berwick Office and to the best of my knowledge, information, or belief has never been in the Berwick Office beyond the reception area and does not have a key to the Berwick Office. Although both offices are linked for accounting and administrative purposes, the practices of the lawyers in the Berwick Office and the lawyers of the Kentville Office are separate in nature and not interconnected.

...

10. THAT at no time did I discuss the possibility of any lawsuits against Kings Bible College or International Christian Mission Inc., William Moorehead or any other person connected with either of the two incorporated bodies.

In essence Mr. Sturk deposed that his discussions in February, 1993 and July,

1994 dealt only with matters concerning certain aspects of the corporate relations between I.C.M. and K.B.C.

That there was discussion at the February 24, 1993 meeting other than that which is set out in paragraph 1 of Mr. Sturk's affidavit is clear from the following excerpt from Mr. Sturk's letter of March 8, 1993:

> However, this clause does not mean that the College must accept every person who applies to be a student, nor does it prohibit the college from establishing and enforcing a code of conduct for its students. Likewise, it does not prohibit the College from establishing a code of conduct for its teachers and other staff. However, it should be made clear at the time of hiring, the code of conduct that is expected by the College.

The chambers judge rendered his decision orally after hearing counsel. He reviewed the facts and law enunciated in the leading case respecting conflict of interest, **MacDonald Estate v. Martin and Rossmere Holdings (1970) Ltd.** (1991), 121 N.R. 1 (commonly referred to as **Martin v. Gray**.) He noted that there the lawyer involved in the subject matter of the conflict of interest had been a member of a firm that had dealt with the very issue that was involved in the proceeding, had assisted a senior member of that firm in some appeals of the proceeding and subsequently left that firm to join the firm representing the opposing party.

After referring to the affidavit of Mr. Jenereaux, the letter of Mr. Sturk and the notes of Mr. Sturk he remarked:

> ...In my opinion, the subjects under discussion on that occasion (i.e. July 19, 1994) were clearly not related in any sense to any issue involved in the present litigation and there is no conflict of interest, in my opinion, insofar as that consultation was concerned.

He continued:

> ...I must say that I fail to see how the subjects discussed in the February, 1993, consultation were <u>sufficiently related</u> to the retainer in the present case

> to cause any reasonably informed member of the public to believe that there was a conflict of interest with respect to the involvement of Mr. Sturk and Ms. Connors in the matter at hand. (emphasis added)

He noted that he considered the affidavits of the plaintiffs in which they expressed their desire to continue to be represented by Ms. Connors and that "...it would be a great hardship to them if they now had to quit their present counsel in midstream and find other counsel to represent them". However serious that may be for the plaintiffs, it is not the paramount consideration to be applied when considering a conflict of interest issue.

As earlier mentioned he dismissed the application.

If the issue here were simply that of **G. and L. v. Wood** then the conclusion reached by the chambers judge would be unassailable. However, here we have the additional parties:

> WILLIAM MOOREHEAD, THE KINGSTON BIBLE COLLEGE, a body corporate, THE INTERNATIONAL CHRISTIAN MISSION INCORPORATED, a body corporate, OSCAR CORMIER and WAYNE BRAY, trustees of the unincorporated body known as the Bible Baptist Church.

They have been sued not because they, and again, in particular the appellant, participated in the sexual assaults, but because of those allegations against them earlier set out. Thus, the corporate structure and the interrelationships of those parties in respect to the appellant are relevant. The question then becomes: in this respect is there a disqualifying conflict of interest?

The Nova Scotia Barristers' Society in 1990 produced a handbook entitled **Legal Ethics** and Professional Conduct**.** Chapter 6 concerns **Impartiality and Conflict of Interest Between Clients**. Paragraphs 8 and 9 are relevant:

> 8. A lawyer or any associate of the lawyer who has acted for a person in a matter has a duty not to act against that person in the same or a related matter.

> 9. Nothing in this paragraph prohibits a lawyer from acting against a person in a fresh and independent matter wholly unrelated to any matter in which the lawyer previously represented that person. (emphasis added)

The commentary respecting paragraph 8 states:

> Decisions in several recent cases have focused upon the appearance of professional impropriety created in situations in which a solicitor acting against a former client might have received confidential information from that former client: **Canada Southern Railway v. Kingsmill, Jennings** (1978), 8 C.P.C. 117; 4 B.L.R. 257 (Ont. H.C.); **Szebelledy v. Constitution Ins. Co. of Canada** (1985), 11 C.C.L.I 140 (Ont. Dist. Ct.); **Fisher v. Fisher** (1986), 73 N.S.R. (2d) 181 (T.D.) But see **Aldrich v. Struk** (1986), 26 D.L.R. (4th) 352; 1 B.C.L.R. (2d) 71; [1986] 3 W.W.R. 341 (S.C.).

The appearance of professional impropriety and that the solicitor might have received confidential information from the former client are the cornerstones for consideration in this application.

Sopinka, J. speaking for the majority in **Martin**, **supra**, at p. 11 had this to say about a code of professional conduct:

> A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example, **Law Society of Manitoba v. Giesbrecht** (1983), 24 Man. R. (2d) 228 (C.A.). 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. The statement in Chapter V should therefore be 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. (emphasis added)

At some length he considered the law in Canada and in other jurisdictions in determining whether a disqualifying conflict of interest exists. There are two basic approaches: (1) the probability of real mischief, or (2) the possibility of real mischief. As Justice Sopinka commented at pp. 11-12:

> ...The term "mischief" refers to the mis-use of confidential information by a lawyer against a former client. The first approach requires proof that the lawyer was actually possessed of confidential information and that there is a probability of its disclosure to the detriment of the client. The second is based on the precept that justice must not only be done but must manifestly be seen to be done. If, therefore, it reasonably appears that disclosure might occur, this test for determining the presence of a disqualifying conflict of interest is satisfied.

The test is not to determine whether counsel did in fact receive confidential information, but whether counsel "might have" received such information and further that a court ought to be concerned not only with the actual possibility of a conflict of duty, but also with the appearance of such a possibility. The issue is not only related to the clients' perception but as well the public's perception, given all of the facts, that a conflict might occur to the prejudice of the client and the public's interest and perception of the administration of justice.

Justice Sopinka rejected the "probability of mischief" test in favour of the stricter "possibility of mischief" test. He then said at p. 28:

> Nevertheless 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. (emphasis added)

He concluded that the public, lawyers and judges have found the probability test wanting. He remarked at pp. 29-30:

> ...In dealing with the question of the use of confidential information we are dealing with a matter that is usually not susceptible of proof. As pointed out by Fletcher Moulton, L.J., in **Rakusen**, "that is a thing which you cannot prove" (at p. 841). I would add "or disprove". If it were otherwise, then no doubt the public would be satisfied upon proof that no prejudice would be occasioned. Since, however, it is not susceptible of proof, the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict. (emphasis added)
>
> 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?

According to paragraph 8 of Mr. Jenereaux's affidavit his discussions with Mr. Sturk were definitely related to a subject matter of this lawsuit, that is, the inter-relationship of the several defendants.

Sopinka, J. continued at p. 30:

> ...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. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden. (emphasis added)

On the facts contained in the material before us, is the relationship of Mr. Sturk to the appellant in the subject matters of the consultations in March of 1993 and July of 1994 "sufficiently related" to the retainer of Ms. Connors by the plaintiff?

It is clear that the subject matter of Mr. Sturk's retainer did not concern the sexual assaults nor were those assaults discussed with Mr. Sturk. That is not the test. Is there an "appearance of conflict" and a "possibility of real mischief"?

In canvassing the liability of the appellant it will be necessary for a trial court to determine the corporate structure and the interrelationships of the Kingston Bible College, the Bible Baptist Church, Mr. Moorehead and the appellant, the International Christian Mission Incorporated. In my opinion, it is clear from paragraph 8 of Mr. Jenereaux's affidavit that there was discussion concerning these issues with Mr. Sturk. The breadth and depth of those discussions is not clear, nor do they have to be clear, when considering this application. To delve further would involve "revealing specifics of the privileged communication". (Sopinka, J. at p. 30). No use of the confidential information may be made.

In my opinion the inference to be drawn from paragraph 8 of Mr. Jenereaux's affidavit is that his discussions with Mr. Sturk ranged further than that which was set out in Mr. Sturk's letter and his notes and that confidential information was imparted.

Mr. Jenereaux made a definitive statement concerning the allegations in the statement of claim respecting "the legal inter-relation between" the various defendants that "This is the very subject matter on which we sought advice from Mr. Sturk, gave him confidential instructions, and received his legal opinion." That statement has not been refuted in any of the material before the chambers judge or this Court.

It follows then that the proper procedure is to accept that statement rather than, as did the chambers judge, look to the letter and notes of Mr. Sturk and attempt to draw inferences therefrom.

It is clear that the corporate structure and, in particular, the interrelationships among those named defendants are related to the issues which must be considered at trial. As some of the cases relied upon by Mr. Justice Sopinka point out: the court ought to be concerned not only with the actual possibility of a conflict of duty, but with the appearance of such a possibility. The issue is reduced to a matter of appearance and perception. The information obtained by Mr. Sturk may be helpful in proving liability of the appellant.

As Sopinka, J. commented, once it is shown that the previous relationship is sufficiently related to the retainer from which it is sought to remove the solicitor there is an inference that confidential information was imparted which could be relevant. Further, the burden on the solicitor to satisfy the court that the relevant information was not imparted is a difficult burden to discharge.

Sopinka, J. pointed out at p. 32:

> ...There is, however, a strong inference that lawyers who work together share confidences.

Applying the principles enunciated in **Martin**, there is no difficulty in imputing the knowledge of Mr. Sturk to Ms. Connors.

Cory, J., with Wilson and L'Heureux-Dubé, JJ. concurring, agreed with Justice Sopinka's disposition in **Martin** but would impose a stricter duty upon lawyers than that which Sopinka, J. proposed, but that was, in particular, respecting duties and responsibilities in mega firms and where there are mergers. He remarked at pp. 35-6:

> ...Neither the merger of law firms nor the mobility of lawyers can be permitted to adversely affect the public's confidence in the judicial system. At this time, when the work of the courts is having a very significant impact upon the lives and affairs of all Canadians, it is fundamentally important that justice not only be done, but appear to be done in the eyes of the public.
>
> My colleague stated that this appeal called for the balancing of three competing values, namely: the maintenance and integrity of our system of justice; the

> right of litigants not to be lightly deprived of their chosen counsel; and the desirability of permitting reasonable mobility in the legal profession.
>
> Of these factors, the most important and compelling is the preservation of the integrity of our system of justice. The necessity of selecting new counsel will certainly be inconvenient, unsettling and worrisome to clients. Reasonable mobility may well be important to lawyers. However, the integrity of the judicial system is of such fundamental importance to our country and, indeed, to all free and democratic societies that it must be the predominant consideration in any balancing of these three factors.
>
> Lawyers are an integral and vitally important part of our system of justice. It is they who prepare and put their client's cases before courts and tribunals. In preparing for the hearing of a contentious matter, a client will often be required to reveal to the lawyer retained highly confidential information. The client's most secret devices and desires, the client's most frightening fears will often, of necessity, be revealed. The client must be secure in the knowledge that the lawyer will neither disclose nor take advantage of these revelations.
>
> Our judicial system could not operate if this were not the case. It cannot function properly if doubt or suspicion exists in the mind of the public that the confidential information disclosed by a client to a lawyer might be revealed.

For a member of a law firm to represent a client at one time and another member of that firm represent the client's adversary at another time in sufficiently related matters creates an appearance of conflict of interest. That appearance, in my opinion, is exacerbated when, as here, clients with conflicting interests retained members of the same firm in July, 1994.

With deference, the chambers judge did not apply the correct principles of law. He applied too restrictive a test as to that which constitutes a "sufficiently related" matter and a test not in accord with the principles enunciated in **Martin**. He also failed to infer that confidential relevant information was imparted by the appellant to Mr. Sturk; failed to apply

the policy of "ensuring not only that there be no actual conflict but that there be no appearance of conflict"; and failed to apply the "difficult burden" to the solicitor. Accordingly, this court may interfere even though the chambers judge was considering an interlocutory application.

I have read the cases to which counsel has referred us and which are subsequent to **Martin**. In my view they reinforce my opinion.

I would allow the appeal and order that Ms. Connors, or any lawyer associated with the firm of Waterbury, Newton and Johnson be removed as solicitor of record in this proceeding.

I would allow the disposition of costs before the chambers judge and this Court to be determined by the trial judge.

J.A.

Concurred in:

Clarke, C.J.N.S.

Bateman, J.A.