

Lawyer Ordered To Repay Legal Fees Collected During “Conflict Of Interest”

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Lawyers owe their clients a duty of loyalty and cannot act if their personal interests or interests of other clients create a conflict of interest. Where a conflict of interest arises a lawyer needs to obtain informed consent from a client to continue acting or sometimes stop acting for the client altogether. If a lawyer fails to do so he/she can be exposed to various consequences including the loss of their right to claim fees for services rendered. Reasons for judgement were released last week by the BC Supreme Court, Vancouver Registry, discussing this area of law.

In last week's case ([Campbell v. Ragona](#)) the Plaintiff was injured in a motor vehicle collision in Hong Kong in 1992. He hired a Vancouver lawfirm to prosecute his claim. The Vancouver firm retained a Hong Kong firm to assist in the prosecution. A trial was held on the issue of fault in 1998 and a Hong Kong judge found that the motorist who struck the Plaintiff's vehicle was at fault for the crash. The 'damages' portion of the trial did not proceed in a timely fashion. In 2004, some 12 years after the crash, the at fault driver brought a motion to have the lawsuit dismissed for 'want of prosecution' and succeeded. The Plaintiff appealed this dismissal. Prior to having the appeal heard the Plaintiff settled his lawsuit on a compromised basis with the at fault motorist and waived his right to sue the Hong Kong lawfirm that acted on his behalf.

The Vancouver lawfirm continued to act for the Plaintiff during the settlement negotiations. After the claim was settled the Plaintiff sued his Vancouver lawyer and lawfirm arguing that they were negligent and that they continued to act on his behalf despite a conflict of interest. Mr. Justice Pearlman agreed with the Plaintiff and found that the Vancouver lawfirm should have insisted that the Plaintiff obtain independent legal advice after the Hong Kong lawsuit was dismissed for want of prosecution.

Mr. Justice Pearlman went on to award the Plaintiff the difference between the realistic trial value of his personal injury lawsuit and the settlement amount. The Court went on to order that the Vancouver firm 'discourage' the legal fees collected for representing the Plaintiff. In making this order Mr. Justice Pearlman made the following comments about a lawyer continuing to act after a conflict of interest arises:

[563] *The rationale for the duty of loyalty, including the duty to avoid conflict, was explained by Wilson J.A. (as she then was) in Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599 (C.A.) at 602:*

The underlying premise ... is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between the client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith....

[565] *The codes of conduct published by both the British Columbia Law Society and the Canadian Bar Association contain provisions requiring the withdrawal of a lawyer if the lawyer's continued employment would place the latter in a conflict of interest. The Canadian Bar Association Code of Professional Conduct Rule XII Commentary 4(c) provides:*

Obligatory Withdrawal

4. In some circumstances the lawyer will be under a duty to withdraw ...:

(c) if it becomes clear that the lawyer's continued employment will lead to a breach of these Rules such as, for example, a breach of the Rule relating to conflict of interest (Chapter V).

[566] Similarly, the Law Society of British Columbia's Annotated Professional Conduct Handbook, Chapter 10, s. 1 states:

Obligatory withdrawal

1. A lawyer is required to sever the solicitor-client relationship or withdraw as counsel if:

(d) the lawyer's continued involvement will place the lawyer in a conflict of interest, ...

[568] Mr. Ragona knew, at the very latest, on June 9, 2004 that there was the potential for a claim for professional negligence against him and his firm. Mr. Ragona told Mr. Campbell that he could or should get independent legal advice when they met at the offices of AHBL on June 23, 2004. At that time, the plaintiff indicated that he did not wish to obtain independent legal advice, and Mr. Ragona did not insist that he do so....

[574] Independent legal advice at this point would probably also have ensured that if Mr. Campbell chose to continue with AHBL's representation, he would do so on the basis of an informed waiver of the conflict of interest.

[575] A client must have a full understanding of the nature of the conflict in order to make an effective waiver. This may require independent legal advice: *Moffat v. Weinstein* (1996), 135 B.L.R. (4th) 298 (Ont.Gen.Div.).

[576] In some cases, nothing short of the lawyer ceasing to act for the client will suffice to avoid subsequent liability for the consequences of breach of fiduciary duty: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R.(2d) 599 (C.A.), leave to appeal to SCC refused, 37 O.R.(2d) 499. In my view, given the nature of the conflict, and AHBL's role in the loss of Mr. Campbell's right to maintain his action in Hong Kong, this was a case where AHBL ought either to have informed the plaintiff that they could no longer act, or they should have insisted that the plaintiff take independent legal advice, at their expense, before they settled his claim. If AHBL did not withdraw, then they were under a duty to insist that Mr. Campbell obtain independent legal advice: *Re A Solicitor* (1995), 14 B.C.L.R. (3d) 100 (C.A.). Because Mr. Ragona continued to act for Mr. Campbell and did not insist upon the plaintiff obtaining independent legal advice, he and AHBL must bear the consequences of their breach of the fiduciary duty to avoid conflicts of interest.

[577] The defendants are responsible for the consequences flowing from their breach of fiduciary duty. The plaintiff bears the onus of proving a causal relationship between a breach of fiduciary duty and any loss for which he claims compensation. Here, by the time of the breach of the duty to avoid conflict of interest, which occurred upon dismissal of the Hong Kong action for want of prosecution, Mr. Campbell had already suffered the loss resulting from inordinate delay in the prosecution of his action, for which he claims damages in contract and tort.

[578] In *Strother v. 3464920 Canada Inc.*, [2007] S.C.R. 177 at paras. 75 and 76, Justice Binnie held that the remedy of disgorgement may be ordered for either prophylactic or restitutionary purposes. The prophylactic purpose is served by appropriating "for the benefit of a person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict, the objective is to preclude the fiduciary from being swayed by considerations of personal interest." *Strother* at para. 75, citing *Chan v. Zacharia* (1984), 154 C.L.R. 178 (Aust H.C.) per Deane J., at p.108.

[579] The prophylactic purpose of disgorgement is intended to teach fiduciaries that conflicts of interest do not pay. The plaintiff is not required to prove a loss in order to recover a gain or benefit received by the fiduciary as a result of its breach of duty: *Strother*, at para.77.

[580] Subsequent to the dismissal of Mr. Campbell's action for want of prosecution, Mr. Ragona, in breach of the fiduciary duty he owed to avoid conflict of interest, accepted the plaintiff's offer of hourly remuneration for work performed on the file. He did so in order to benefit himself and his firm, at the plaintiff's expense. The plaintiff is entitled to disgorgement of all fees or benefits received by Mr. Ragona and AHBL in consequence of this breach of their fiduciary duty to avoid conflict of interest : *Strother* at para. 83.

[581] There will be an order that AHBL disgorge and pay to Mr. Campbell's estate the sum of \$84,391.86, representing the full amount of the fees charged by AHBL in their account rendered to Mr. Campbell dated December 29, 2004.