Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 47
Date: December 2, 2019
File Nos.: T2319/7418 and T/2318/7318

Between:

Kim Arcand

Complainant

- and -

Canadian Human Rights Commission

Commission

- and –

Alexander First Nation

- and –

Kurt Burnstick

Respondents

Ruling

Member: Alex G. Pannu

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Potential conflict of interest of counsel for Respondent Burnstick

A. Background

[1] The Respondent Alexander First Nation ("Alexander") filed a motion seeking the disqualification of counsel Colleen Verville, who is representing the Respondent Kurt Burnstick ("Burnstick") in this matter, on the basis that she is in a conflict of interest.

[2] The Complainant was employed by Alexander, and was supervised by Alexander's Chief at the time, Kurt Burnstick. The Complainant alleges that she was sexually harassed by Mr. Burnstick, and filed human rights complaints against him directly and against Alexander for failure to provide a harassment-free workplace and on the basis of adverse differential treatment based on prohibited grounds.

[3] The Parties agree that Ms. Verville was initially retained by both Alexander and Mr. Burnstick to respond to the complaints against them and drafted their initial responses. In January of 2018, Ms. Verville's firm terminated all retainers with Alexander but she continued acting for Mr. Burnstick.

[4] Alexander alleges that since Ms. Verville previously represented them in this matter, she received confidential information and that because the Respondents are adverse in interest, Ms. Verville is in a conflict of interest and should be disqualified from continuing to act in these proceedings. Alexander points out that Ms. Verville did not seek their consent for her continued representation of Mr. Burnstick, and further make clear that if asked, they would not have granted it.

[5] The Complainant supports Alexander's motion to disqualify Ms. Verville from further representation of Mr. Burnstick in this complaint.

[6] Mr. Burnstick opposes the motion, contending that Ms. Verville does not possess any confidential information that could prejudice Alexander, there is no evidence that Ms. Verville's continued representation would adversely affect Alexander, and a change of legal representative at this point would cause him serious prejudice.

B. Law

Jurisdiction

[7] Although historically only courts had the power to disqualify lawyers, today most administrative tribunals also exercise this power, as part of their ability to control their own procedure. In a leading 2004 decision, Nordheimer J of the Ontario Superior Court of Justice held that the Ontario Labour Relations Board had erred when it concluded that it did not have jurisdiction to decide whether a solicitor had a conflict of interest. *Universal Workers' Union, Labourers' International Union of North America, Local 183 v. Laborers' International Union of North America, 2004 CanLII 66334 (ON SC).* Justice Nordheimer pointed to ss. 23(1) and 25.0.1. in the *Statutory Powers Procedure Act*:

> "Section 23(1) states:
> 23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."
> Section 25.0.1 states:
> "25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
> (b) establish rules under section 25.1"

[8] He said "In my view, these sections, either individually or collectively, give the Board authority to determine whether a lawyer or law firm representing any party is or is not in a conflict of interest and, in the former case, then allows the Board to make the appropriate order disqualifying that lawyer or law firm."

[9] *Universal Workers* has been followed by other boards and tribunals. For example the Human Rights Tribunal of Ontario said in *Romanchook v. Garda Ontario* 2009 HRTO 1077 at para 46:

> "The result of the Court's decision in *Universal Workers' Union* is that tribunals, like courts, have the power to control their process to ensure the integrity of the administration of justice and, in particular, the avoidance of conflicts of interest by licensees of the Law Society. Controlling the process to prevent conflicts of interest by licensed representatives is not merely a matter of protecting the interests of clients or litigants. It is also about ensuring the public's confidence in the legal profession and the administration of justice: *MacDonald Estate v. Martin,* [1990] 3 S.C.R. 1235 at para. 15."

[10] Section 50 of the CHRA grants the Tribunal a broad discretion to craft its process as it sees fit, while subsection 48.9(1) mandates that proceedings be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow, and 48.9(2) gives the Chair power to make procedural rules. Together, these provisions are analogous to 25.0.1 of the SPPA as cited in *Universal Worker's Union*.

[11] Although the CHRA does not confer an express statutory abuse of process power akin to that in the SPPA, the decision of the Federal Court in *Canada* (*Human Rights Commission) v Canada Post Corp*, 2004 FC 81, aff'd , *Canada (Canadian Human Rights Commission) v Canada Post Corp*, 2004 FCA 363 [*Cremasco*] at paras 13 and 15 makes it very clear that the Tribunal does have this jurisdiction.

[12] In *Cremasco,* the Federal Court said at paras 13 and 15:

> "Administrative tribunals are masters of their own procedure. As Sopinka, J. stated in *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, at pages 568-569:
>
> > In order to arrive at the correct interpretation of statutory provisions that are susceptible of different meanings, they must be examined in the setting in which they appear. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice."

> It strikes me as evident that one cannot maintain that the Tribunal is the "master in its own house" if it cannot protect its own process from abuse.

[13] All the parties have expressly accepted the jurisdiction of the Tribunal to make a ruling on Alexander's motion. This would appear to be the first time that the Tribunal has been required to issue a written ruling on a motion to disqualify a lawyer due to a conflict of interest.

Jurisprudence

[14] The Supreme Court of Canada has examined the issue of lawyers' conflict of interest and laid out the test for disqualification. In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, the court established a two-part test:

> Did the lawyer receive confidential information attributable to a solicitor-client relationship with the opposite party; and
>
> Is there a risk that such information will be used to the prejudice of the other party?

[15] On the first question, the court said "…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." The court noted that this was a high 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 information."[1]

[16] On the second question, the court stated "A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there

[1] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 pp1260-1261

would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client."[2]

[17] In *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39, the Supreme Court found that the duty to avoid conflicts is based on the protection of a former or current client's confidential information and ensuring the effective representation of the current client. When assessing the duty to avoid conflicts, several competing values must be weighed including the high repute of the legal profession, the administration of justice, and allowing the client's choice of counsel.

[18] Lawyers and the courts have long been guided in matters of lawyers' ethics, duties and responsibilities by rules established by provincial law societies. While the CHRT is not bound to apply a code of ethics, the fact remains that an expression of a professional standard in a code of ethics relating to a matter before the Tribunal should be considered an important statement of public policy. (MacDonald Estate, p. 1246)

[19] The Law Society of Alberta sets out the duty to avoid conflicts in 3.4-1 of its Code of Conduct: "A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code".

[20] Section 3.4-6 of the Rules states: "Unless the former client consents, a lawyer must not act against a former client

> (a) in the same matter,
>
> (b) in any related matter, or
>
> (c) except as provided by Rule 3.4-7, in any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

[21] Section 3.4-7 of the Rules allows another lawyer in the firm to continue to act even if there is a conflict, provided the former client has given fully informed and voluntary consent after disclosure of the conflict.

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[2] Ibid. p. 1261

C. Ruling

[22] Having considered the arguments submitted by the parties, I have decided that Ms. Verville and her firm MLT Aikins are disqualified from acting for Mr. Burnstick on this matter before the Tribunal.

[23] My decision is based upon the decision of the Supreme Court of Canada in *MacDonald Estate* and Ms. Verville's failure to abide by the obligations imposed on lawyers by the Alberta Law Society's Code of Conduct.

[24] The Tribunal will allow Mr. Burnstick a reasonable length of time to retain alternative legal representation.

D. Analysis

[25] Ms. Verville admits that she acted for Alexander from late 2016 to January 2018 representing it as the employer in the complaint. As such, she may have received information from Alexander that was essential to the evidence and legal strategy to be relied upon in its defence of the complaint. Applying the two-part test in *MacDonald Estate v. Martin*, it can be inferred that 1) Ms. Verville did receive confidential information from Alexander and 2) a reasonable member of the public would conclude that there is a risk the information would prejudice Alexander.

[26] Ms. Verville provides no basis on which to rebut the presumption that she received confidential information. She merely asks the Tribunal to accept her statement that she does not possess any such information that could prejudice Alexander. That does not meet the high bar required by the court in *MacDonald Estate* especially given the duration and subject of Ms. Verville's retainer with Alexander.

[27] Instead Ms. Verville cites *McKercher* to advance the novel argument that since Mr. Burnstick possesses the same information as Alexander, because he was formerly Alexander's chief, Ms. Verville's information is not confidential. Therefore, disqualifying Ms. Verville will not prevent him from using that information against Alexander.

[28] I do not believe that this legal argument can be allowed to stand. To claim that information obtained by a lawyer from their former client is not confidential because other parties (*i.e.* a current client) may also possess it, would constitute an unacceptable end-run around long-held rules about client-solicitor confidentiality.

[29] I find that, over the course of their solicitor-client relationship, Ms. Verville would have obtained confidential information from Alexander. For reasons given below, I further find that there is a risk that the information could now be used against her former client by Ms. Verville's current client. That risk can only be negated by removing Ms. Verville from representing Mr. Burnstick.

[30] In my view, Ms. Verville should have followed the guidance set out by the Law Society of Alberta to avoid conflicts in 3.4-1 of its Code of Conduct: "A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code". According to the Law Society, "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."

[31] Having acted for Alexander, the employer-respondent, Ms. Verville should have realized how acting for the individual respondent in the same human rights complaint could put her in a conflict of interest. The risk of her being in a conflict is real and significant. It is more than a mere possibility. The rules also prohibit lawyers from acting against a former client in the same or any related matter without the former client's consent. Alexander states that Ms. Verville never sought their consent, and had she done so, they would not have given express or implied consent for Ms. Verville to act for Mr. Burnstick.

[32] Ms. Verville says that the immediate interests of Mr. Burnstick and Alexander are aligned and not adverse: the Statements of Particulars submitted by both show they are unified in their defence against the complaints, the witness statement summaries provided by both parties suggest that the witnesses will corroborate one another's

testimonies, and Alexander and Mr. Burnstick are both seeking dismissal of the complaints.

[33] The fact that Alexander and Mr. Burnstick both deny the Complainant's allegations does not in and of itself align their interests. Indeed, I find that the Respondents' respective interests are adverse to a significant extent, and I expect their positions to be presented in an adversarial manner at a hearing. In particular, I note that Alexander denies that their witnesses will be the same or will corroborate Mr. Burnstick's witnesses. Furthermore, Alexander has already indicated their position that, but for the actions of Mr. Burnstick, they would not have been subject to this complaint, and that if they are found liable, they may pursue action against him.

[34] On behalf of Mr. Burnstick, Ms. Verville claims that Alexander is statute-barred under Alberta law from taking further legal action against him. Even if that is accurate, it does not negate the existence of an adverse interest. Moreover, Mr. Burnstick cannot possibly know all grounds that Alexander may have for legal proceedings against him as a result of this complaint.

[35] The final issue to be addressed is the potential prejudice to Mr. Burnstick from having to find a new lawyer. I should note at the outset that, unlike the cases cited in *McKercher*, in this matter the evidence does not show that the motion to disqualify was a tactical move designed to prejudice Mr. Burnstick. I am prepared to address any prejudice accruing to Mr. Burnstick in having to retain a new lawyer by affording him a reasonable adjournment to do so.

[36] The disqualification of Ms. Verville also applies to her firm MLT Aikins. Section 3.4-7 of the Rules requires that when her firm terminated its retainer with Alexander and continued representing Mr. Burnstick in this matter, it should have obtained the consent of Alexander. The firm also did not take any precautions against a potential conflict such as assigning a different lawyer to the file and erecting a confidentiality screen. Therefore, Mr. Burnstick cannot retain anyone from MLT Aikins to act for him in this matter.

Signed by

Alex G. Pannu
Tribunal Member

Ottawa, Ontario
December 2, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2319/7418 and T/2318/7318

Style of Cause: Kim Arcand v. Alexander First Nation and Kurt Burnstick

Ruling of the Tribunal Dated: December 2, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Kate Engel, for the Complainant

Heather A. Beyko, for the Respondent Alexander First Nation

K. Colleen Verville, for the Respondent Kurt Burnstick