Ontario Court of Appeal disqualifies law firm despite compliance with ethical screen

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Introduction

The Ontario Court of Appeal in *Ontario v Chartis Insurance Company of Canada*,**(1)** disqualified a law firm from acting for one of its longstanding insurer clients in an insurance dispute where a lawyer who had assisted with carriage of the plaintiff's claim in the dispute moved his practice to the law firm representing the defendant insurer. The ethical screen set in place by the law firm representing the defendant insurer may have met the Law Society of Upper Canada's guidelines for ethical screens, but the "intense working relationship" **(2)** between the lawyers drew the attention of the court. This update examines the somewhat unusual facts of the case and the analysis undertaken by the court of appeal.

Facts

The plaintiff government and the defendant insurer were involved in an insurance coverage dispute. During the dispute, a lawyer who had assisted with carriage of the plaintiff's claim moved his practice to the law firm representing the defendant insurer. At the new firm, the lawyer did not work on the insurance dispute, but spent 50% to 60% of his time working with counsel to the defendant insurer and about half of his work was for the defendant insurer on other unrelated matters.

The new firm put several safeguards in place through the establishment of an ethical screen, following the guidelines of the Law Society of Upper Canada. These included the following:

- The lawyer would have no involvement in the coverage action;
- The lawyer would not discuss the coverage action;
- The new lawyer's office would be physically separated from the lawyer acting for the insurer;

- The two lawyers would use separate assistants; and
- The ethical screen would be monitored and enforced by a senior lawyer who had no involvement in the dispute.

Motion for declaration and motion to disqualify

The defendant insurer brought a motion for a declaration that the ethical screen put in place at the firm was sufficient to prevent disclosure of the plaintiff's confidential information. The plaintiff in turn brought a cross-motion seeking to disqualify the firm from acting for the defendant insurer. The motion judge granted the defendant insurer's motion for a declaration, and dismissed the motion to disqualify the law firm. He reviewed the steps taken by the defendant's law firm and asked rhetorically what more could be done to protect the confidentiality of the plaintiff's information. The motion judge held on that basis that a reasonably informed person would be satisfied that the use of confidential information had not occurred or would be unlikely to occur.

The motion judge also highlighted the impact of a contrary order on the defendant's right to counsel of choice – especially given the lawyer's experience on insurance matters, his long-standing relationship with the insurer client and the significant amount of work done on the file to date.

Divisional court decision

The Ontario Divisional Court disagreed with the motion judge and disqualified counsel from acting for the defendant insurer. There is a presumption in such situations that confidential information will be inadvertently disclosed, although this presumption can be rebutted. The divisional court held that it was incorrect to approach the matter as if this presumption will be rebutted if the evidence shows that counsel has implemented all reasonable precautions to minimise the risk. Instead, there may be some instances where an ethical screen cannot satisfy a reasonably informed person that no use of confidential information would occur, and due to the close working relationship of the two lawyers this was one of those cases.

The divisional court held that it was also incorrect to suggest that any residual risk of disclosure can be tolerated or balanced by consideration of the impact of disqualification on the right to a party's counsel of choice.

Appeal decision

The Ontario Court of Appeal made it clear that "the integrity of counsel involved is unchallenged and there is no suggestion of actual impropriety".**(3)** Instead, the issue was whether a reasonable person would be satisfied that there was no risk that confidential information would be used to the prejudice of the plaintiff. The test for assessing a risk of prejudice assumes that lawyers who work together share confidences. The inference that lawyers share confidences can be rebutted where there is "clear and convincing evidence" that would "satisfy a reasonably informed person that use of confidential information had not occurred or would not occur".**(4)**

The court of appeal, like the divisional court, held that the motion judge had asked the incorrect question. The test does not ask what more could be done to protect the confidentiality of the client's information. Instead, there may be some instances where the Law Society of Upper Canada guidelines will not effectively address the potential disclosure of confidential information – for example, in a firm of two lawyers with a familial relationship. The court of appeal noted that its decision was "not about small firms versus large firms", but rather the "integrated nature" of the two lawyers' practices and specifically that 50% to 60% of the new lawyer's time was spent working with the lawyer representing the defendant insurer.**(5)**

The Ontario Court of Appeal ultimately concluded that while the ethical screen was compliant with the Law Society of Upper Canada guidelines, it did not address the spirit of those guidelines. The guidelines are meant to limit interaction between lawyers on opposing sides of a dispute. Where the lawyers work together as closely as in this case, a reasonable person could not be satisfied that no use of confidential information would occur.

In addition, the court of appeal held that the motion judge placed too much weight on the right to counsel of choice. The other two values at stake in a conflict situation – that is, the integrity of the administration of justice and the legal profession – are paramount. These interests are not to be balanced with a party's right to select its counsel of choice.

Comment

The facts of this case are rather unusual insofar as the relationship between the lawyer who left the plaintiff's firm and the lawyer who had carriage of the defence of the insurer is concerned. While the lawyer who transferred firms was obviously to have no part in the case defending the insurer, he nonetheless spent 50% to 60% of his time working with the lawyer who represented the insurer on other matters, including for the same insurer. In most cases where a lawyer moves firms, the relationship between a former plaintiff's firm's lawyer and the defendant's firm's lawyer is nowhere near that significant. In this respect, the decision of the Ontario Court of Appeal, while chilling at first blush, is not apt to have an extensive impact on lawyers transferring between law firms and the clients involved. However, the decision does give law firms – particularly those with longstanding relationships with clients – reason to pause before recruiting lawyers who have previously acted on the other side of a case.

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Endnotes

(1) 2017 ONCA 59 (CanLII).
(2) *Ibid* at para 68.
(3) *Ibid* at para 1.
(4) *Ibid* at paras 35-36.
(5) *Ibid* at para 65.


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