

MINUTES

COMMITTEE: Ethics Committee

DATE: June 20, 2000

3. CHAPTER 6, RULE 7: WHETHER PROPER TO DECLINE TO IMPUTE CONFLICTS TO OTHER FIRM LAWYERS IN CERTAIN CIRCUMSTANCES

The Committee was asked whether it is proper for a lawyer to continue to act for a client in circumstances similar to those that existed in *Mottershead v. Burdwood Bay Settlement Co.* [1999] Civ. L.D 379 (B.C.S.C.).

In *Mottershead* the lawyers for two defendants sought to add the applicant as a defendant to an action for the resolution of ownership of company assets commenced nine years earlier. The applicant had followed the proceedings closely, since her husband had been a defendant from the outset and she had also been a witness at an arbitration relating to the dispute.

The applicant sought removal of the lawyer, R., who acted for two other defendants on the ground that she had consulted another lawyer, O., in R.'s firm three years before concerning the issues raised by the litigation. That consultation had lasted between 45 minutes and one hour and did not result in the applicant retaining O. O. left the firm a year after the consultation, taking his notes concerning the matter with him. O. gave affidavit evidence that he had not disclosed any information or advice he gave to the applicant to any member of his former firm. The applicant alleged she had given O. confidential information during the consultation that could be used against her by other defendants in the litigation.

Applying the tests set out in *MacDonald Estate v. Martin*, the trial judge found the applicant had given O. confidential information relevant to the litigation during her consultation. However, given the short duration of the consultation and O.'s sworn statement about non-disclosure, the Court concluded there was no ongoing concern about confidentiality and the risk the information would be used to the applicant's prejudice could be discounted. The Court accepted the affidavit of O. as evidence from which a reasonably informed person could and would conclude that any appearance of conflict or impropriety was unfounded.

The Committee noted that in these circumstances the Court declined to impute possession of confidential information to R. Although the professional conduct rules were not mentioned in the decision, Chapter 6, paragraph 7 of the *Professional Conduct Handbook* has been interpreted at the Law Society to mean that as a general rule, the possession of confidential information is imputed to all other lawyers within the firm.

In the Committee's opinion, it is generally appropriate to impute the conflicts of one lawyer in a firm to all other lawyers in the firm in circumstances involving Rule 7. However, the Committee observed that in *Mottershead*, the departing lawyer, O., had only a short consultation with the affected client, left the firm without discussing the facts of the case with any other members of

the firm and took all notes with him. On these unusual facts, the Committee was of the view that it is proper for a lawyer to continue to act on the basis that the confidential information of the lawyer who left the firm should not be imputed to the other lawyers in the firm.

JO/jeh

00-06