

## MINUTES

**COMMITTEE:** Ethics Committee

**DATE:** December 11, 2003

**2. CHAPTER 6, RULE 4: WHETHER RULE 4 CAN BE RECONCILED WITH SECTION 148 OF THE SECURITIES ACT**

The Committee was asked whether a lawyer may continue to act jointly for more than one client where the lawyer is prevented by section 148 of the *Securities Act* from disclosing relevant information from one joint client to another. The Committee originally considered this matter in December of 2002, but reconsidered the issue after receiving further representations from lawyers concerning it.

Section 148 states:

*148(1) Without the consent of the commission, a person must not disclose, except to the person's counsel, any information or evidence obtained or sought to be obtained or the name of any witness examined or sought to be examined under section 143, 144, or 145.*

*(2) subsection (1) applies despite any provision of the Freedom of Information and Protection of Privacy Act other than section 44(2) and (3) of that Act.*

*(3) Subsection (2) does not apply to personal information, as defined in the Freedom of Information and Protection of Privacy Act, that has been in existence for 100 or more years or to other information that has been in existence for 50 or more years.*

The Committee noted that section 148 will prevent a lawyer from disclosing information given by one joint client to another in circumstances covered by the section. However, it is possible that information that is subject to the restrictions of section 148 will also have been given to the lawyer on occasions that are not subject to its restrictions. Where this occurs, the circumstances under which a lawyer must withhold relevant information may be minimal or non-existent.

The Committee referred to the cases of *R. v. Fisk* (1996) 108 C.C.C. (3d) and *R. v. Guess* 2000 BCCA 547 where courts contemplated that in certain circumstances counsel might, by court order or client agreement, have access to information that would not be available to counsel's client. The Committee recognized that in the *Fisk* and *Guess* situations counsel were prevented from communicating information to the client by court order while, in the hypothetical circumstances before the Committee, the information could not be communicated to a joint client because of a provision of a statute. Nevertheless, the decisions contemplate situations where a lawyer may continue to act where the lawyer must withhold relevant confidential information from the client.

It was the Committee's view that Rule 4 must defer to legislation that prevents a lawyer from complying with it. However, where section 148 prevents a lawyer from complying with the requirement to share relevant information with joint clients it does not necessarily follow that the joint retainer cannot proceed. The Committee concluded that it is proper for a lawyer to act for a

client jointly where section 148 of the *Securities Act* prevents the lawyer from disclosing relevant information given by one joint client to another where:

- The client is fully informed about the restrictions the lawyer is under in a manner that does not offend section 148, and consents to the lawyer acting on this basis;
- The lawyer provides the client with all relevant information, save information that section 148 requires that the lawyer keep confidential; and
- Notwithstanding the restrictions imposed by section 148, the lawyer reasonably believes that the lawyer will be able to provide effective representation to each affected client.