ONTARIO COURT OF JUSTICE

DATE: 2022 08 17
COURT FILE No.: Hamilton- #20-6013/21-6934

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

DEVONTE SKYE-DAVIS

Before Justice M.K. WENDL
heard on August 17, 2022
Reasons for Judgement Released on August 22nd, 2022

R. Branton.....Counsel for the Provincial Crown
J. Goldlist……..……...……Counsel for Devonte Skye-Davis

WENDL J.:

[1] Devonte Skye-Davis is charged with manslaughter. The matter is set for a preliminary hearing on October 31, 2022. Devonte Skye-Davis's previous lawyer on this charge is now an Assistant Crown Attorney in the Hamilton Crown's office, the very office which is prosecuting the manslaughter charge. Ms. Goldlist, Mr. Skye-Davis's current lawyer, argues that this has created a conflict of interest for the Hamilton Crown Attorney's Office and submits that when the former counsel joined the Hamilton Crown Attorney's Office, the office had no procedures in place to ensure the protection of the accused's confidential information.

[2] The Crown, on the other hand, argues that while measures were not in place at the time former counsel joined the office, they are now, some three and a half months later. The Crown states that it has confirmed that former counsel did not have any discussions with anyone at the Hamilton Crown Attorney's office about the case. Furthermore, the Deputy Crown Attorney has confirmed by way of email with all Crown counsel in the Hamilton Office that they have had no discussions with Mr. Skye-Davis's former counsel and has instructed all Crown counsel that no discussions about this case should occur in the future with Mr. Skye-Davis's former counsel.

Facts

[3] On April 6, 2022, former counsel for the applicant was removed from the record in the case at bar. She started at the Hamilton Crown's office on March 21, 2022, and therefore could no longer defend the accused. She had been Mr. Skye-Davis's counsel for approximately 13 months. A six-day preliminary hearing was set by the former counsel starting May 9, 2022. On April 13, 2022, the applicant retained Ms. Goldlist and she brought an application to adjourn the May 9, 2022, preliminary hearing dates. The dates were subsequently reset for October 31, 2022.

[4] Again, on April 13, 2022, the first day of her retainer, Ms. Goldlist emailed the Crown with the carriage of this case inquiring what steps were being taken to ensure the protection of confidential information of the applicant. As a result of this email, former counsel's access to the Skye-Davis file on SCOPE was limited on April 14, 2022.

[5] On July 12, 2022, the Crown Attorneys prosecuting the case advised the Deputy Crown Attorney, Eric Taylor, of the conflict-of-interest application. In response the Deputy Crown spoke with both prosecuting crowns and confirmed that they did not have any conversations with the former counsel and that all parties understood their duty not to discuss the case. He also emailed all counsel in the office and confirmed no one else had any discussion with former counsel and instructed all counsel in the office that there were to be no discussion of Mr. Skye-Davis's case with former counsel.

LAW and ANALYSIS

[6] The leading decision on conflict-of-interest is *Macdonald Estate v. Martin*[1]. In *Macdonald Estate* the respondent, the estate of Macdonald, brought an action against the appellant, Martin, for an accounting. Appellant's solicitor was assisted by a junior member of his firm who was actively engaged in the case and was privy to many confidences disclosed by appellant to his solicitor. The junior member later joined the law firm that was representing the respondent in the action. Appellant applied to the Provincial Superior Court for a declaration that the law firm was ineligible to continue to act as solicitors of record for respondent.

[7] In *MacDonald Estate*, the Supreme Court articulated a two-part test to determine a conflict of interest. First, did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? In answering the first question, 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 degree of satisfaction must withstand the scrutiny of the reasonably informed member of the public,

[1] [1990] 3 SCR 1235

it will be a difficult burden to discharge. The first aspect of this test is conceded by the Crown.

[8] Second, is there a risk that it will be used to the prejudice of the client? In answering the second question, whether the confidential information will be misused, a lawyer who has relevant confidential information is automatically disqualified from acting against a client or former client. With respect to the partners or associates in the firm, the concept of imputed knowledge is unrealistic in the era of the mega-firm. The court should therefore draw the inference that lawyers who work together share confidences, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence.

[9] The Supreme Court also noted that undertakings and conclusory statements in affidavits are not sufficient, since affidavits of lawyers are difficult to verify objectively, and the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used.

> *A fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement with the statement of Posner J. in *Analytica*, *supra*, to which I have referred above, that affidavits of lawyers difficult to verify objectively will fail to assure the public.[2]

[10] Ultimately, the Supreme Court in *Macdonald Estates* found that the protections in place were insufficient. It noted:

> The answer to the first question in this case presents no problem. It is acknowledged that Kristin Dangerfield actively worked on the very case in respect of which her new firm is acting against her former client. She is therefore in possession of relevant confidential information.
>
> With respect to the second question, there is nothing beyond the sworn statements of Sweatman and Dangerfield that no discussions of the case have occurred and undertaking that none will occur. In my opinion, while, as stated by the courts below, there is no reason not to accept the affidavits of apparently reputable counsel, this is not sufficient to demonstrate that all reasonable measures have been taken to rebut the strong inference of disclosure. Indeed, there is nothing in the affidavits to indicate that any independently verifiable steps were taken by the firm to implement any kind of screening. There is nothing to indicate that when Ms. Dangerfield joined the firm, instructions were issued that there were

[2] *Ibid*

> to be no communications directly or indirectly between Ms. Dangerfield and the four members of the firm working on the case. While these measures would not necessarily have been sufficient, I refer to them in order to illustrate the kinds of independently verifiable steps which, along with other measures, are indispensable if the firm intends to continue to act.[3]

[11] The key aspect of this conclusion, that a conflict existed, for the case at bar is the fact that the court notes that nothing was in place when the former counsel joined the new firm.

[12] It is a trite legal principle that it is not enough that justice be done, justice must also be seen to be done, so that the public can have confidence in the Canadian Criminal Justice System.[4]

[13] While institutional safeguards are now in place to ensure Mr. Skye-Davis's confidential information is not disclosed, they were not in place and implemented at the outset when former counsel joined the Hamilton Crown Attorney's office. Those measures and safeguards were only implemented when Mr. Skye-Davis's new counsel made inquiries regarding the conflict-of-interest situation. Put another way, the protections came in well after the horse left the barn.

[14] I hasten to point out that I find as a fact that former counsel did not discuss any confidential information with anyone in the Hamilton Crown Attorney's office. Mr. Skye-Davis's former counsel was a reputable Defence counsel and is now a reputable Assistant Crown Attorney. However, as set out in *Macdonald Estates*, that does not end the inquiry. The after-the-fact implementation of safeguards, some of which only occurred after Defence counsel filed a conflict-of-interest motion, and all of which occurred after Ms. Goldlist's email to the Crown Attorney's office on April 13th, 2022, some 22 days after former counsel joined the Hamilton Office, is not acceptable. Clearly, no one in the Hamilton Office turned their mind to this issue. In my view, for the public to have confidence in the administration of justice it requires more than a reactionary approach from the Crown when former Defence counsel, who were actively involved in the cases against them, join the office. Former Defence counsel leaving private practice for the Crown attorney's office which is not an uncommon occurrence. It is concerning to this court that there does not appear to be any policy in place to deal with potential conflict-of-interest situations in the Hamilton Office. Again, a reactionary approach which waits for new Defence counsel to raise the issue or bring a conflict-of-interest motion is unacceptable.

[15] Finally, I reject the Crown's argument that because the Crown Attorney's office has a quasi-ministerial role there should be no concern about conflict-of-interest when the former counsel undertook not to discuss the case and senior Crown officers undertook not to receive that information.

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[3] *Ibid*
[4] *R. v. Mandamin* 2017 ONSC 418 at para 24

[16] I agree with the reasoning of Shaw J. in *Mandamin*:

> The Crown submits that different standards should be applied to the Office of the Crown Attorney because it is not the same as a private law firm. The Crown does not prosecute cases on behalf of a particular client or party. The Crown does not win or lose.
>
> In support of its submission, the Crown relies on a decision of the Quebec Provincial Court in R. v. Morales, [1993] R.J.Q. 2940 (C.Q.). In Morales, it was held that because the Crown Attorney's office did not have a profit motive which is present in private firms, and because its role was not to "win" but to see justice done, there would be no concerns about a conflict of interest where (a) a lawyer, moving from private practice to the Crown's office undertook not to discuss confidential information about a private client, and (b) senior Crown officers undertook that they would not receive such information.
>
> Morales was expressly rejected by Rowe J. (as he then was) in R. v. D.P.F., [2000] N.J. No. 170 (Nfld. S.C.). Rowe J. held that Morales could not be squared with the majority decision of Sopinka J. and, accordingly, was wrongly decided. In light of the statement of Sopinka J. at paragraph 50 of MacDonald, that undertakings and conclusory statements in affidavits of the lawyers involved, without more, are not acceptable, Rowe J. held that such an affidavit is not enough for Crown Attorneys in a position of conflict of interest.
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> Rowe J. cited with approval two Nova Scotia decisions where Defence lawyers had joined the Crown's office: R. v. Stokes, [1999] N.S.J. No. 170 (N.S.S.C.), and R. v. Hill (1998), unreported, N.S.P.C. He found, at para. 37, that Stokes and Hill stand for the following, which he said accorded with the majority decision of Sopinka J:
>
> > (1)in a conflict of interest situation that arises when a Defence lawyer joins a Crown Attorneys' office, an affidavit by the former Defence lawyer and senior Crown prosecution officials that no confidential information has been or will be disclosed is not enough to meet the Martin v. Gray standard;
> >
> > (2)in absence of adequate "institutional safeguards", when a Defence lawyer joins a Crown Attorney's office, everyone in that office is conflicted out from appearing against former clients of the "tainted" lawyer (or the "tainted" lawyers firm);
> >
> > (3)however, a Crown Attorney from another office is not so conflicted;
> >
> > (4) nor is a lawyer from outside the Crown Attorney's office, including a Crown agent (per diem counsel); and
> >
> > (5) as an exception to (1) above, there are circumstances (including where a conflict objection is raised at a late stage in proceedings with limited scope for the misuse of confidential

> information) where an affidavit by the Crown Attorney will be enough to meet the Martin v. Gray standard.
>
> Rowe J. held, in concert with Stokes and Hill, that for certain limited purposes Crown Attorneys should be treated differently from private lawyers in dealing with conflicts of interest. He observed that he would not read MacDonald as allowing a lawyer at another office or a multi-office private law firm to be used to resolve a conflict of interest. However, he would consider that a Crown Attorney who worked in a separate Crown Attorney's office may not be conflicted out, even though in a sense, all Crown Attorneys work for the same "firm." This, he said, reflects one difference that might exist between dealing with the issue of a conflict at a private firm and one involving Crown Attorneys. If it could be shown that the Crown Attorney prosecuting the accused had always worked in a Crown Attorney's office separate from the "tainted" lawyer, that would, in his view, "rebut the strong inference of disclosure" referred to by Sopinka J. at para. 49 of MacDonald.
>
> I accept the reasoning in D.P.F. The principles set out in MacDonald apply to this case. The Kenora Crown Attorney's Office is a relatively small office. Its lawyers are in regular contact with one another. They socialize on a frequent basis. There is no clear and convincing evidence to rebut the strong inference that these Crown Attorneys share confidences. Because "a fortiori undertakings and conclusory statements in affidavits without more are not acceptable," and no "independently verifiable steps" have been taken by the Kenora Crown Attorney's Office, I am of the view that a reasonably informed member of the public would not be satisfied that no use of confidential information would occur.[5]

[17] I highlight Rowe J.'s (as he then was) second point in *D.P.F.*[6] that the conflict of interest occurs at the outset of counsel joining the Crown's office if no institutional safeguards are in place at the time of joining.

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[5] Ibid para. 16-21
[6] *R. v. D.P.F.*, [2000] N.J. No. 170

Conclusion

[18] I find that the Hamilton Crown Attorney's office is in a conflict-of-interest vis-à-vis Mr. Devonte Skye-Davis. I order that the prosecution of this matter be continued by a Crown from outside the Hamilton Crown Attorney's office.

Released: August 22nd, 2022

Signed: Justice M. Wendl