

CANADA / JUDGMENT

Knoglinger v. Solbakken et al

2007 BCSC 157

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 157 Knoglinger v. Solbakken et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Knoglinger v. Solbakken et al,

2007 BCSC 157

Date: 20070131

Docket: 05-5237

Registry: Victoria

Between:

Claudia Knoglinger and Christian Knoglinger

Plaintiffs

And:

Erik Solbakken, Executor and Trustee under the Last Will and Testament

of Rudolf Knoglinger, Thomas Knoglinger, Guntram Knoglinger,

Maria Mittermayer, and Bernard Mittermayer

Defendants

Before: The Honourable Madam Justice Dorgan

Reasons for Judgment

(in Chambers)

Counsel for the Plaintiffs and Cox, Taylor:

H. J. Rusk

Counsel for the Executor/Applicant:

F. Hunter

Counsel for Defendants Thomas Knoglinger, Guntram Knoglinger, Maria Mittermayer and Bernard Mittermayer:

K. A. Woods

Date and Place of Trial/Hearing:

December 13, 2006

Victoria, B.C.

- [1] In this Wills Variation Act action, R.S.B.C. 1996, c. 490, the defendant executor, supported by the other named defendants, seeks an order that the plaintiffs' law firm Cox, Taylor ("the firm") and their lawyer, Mr. Van Driesum, a member of the firm, be removed as solicitors of record on the basis of a conflict of interest.

Background

- [2] Commencing in 1993, and for approximately four years thereafter, the firm and Mr. Van Driesum acted for the testator Rudolf Knoglinger. The services rendered may generally be described as related to the testator's acquisition of three parcels of real estate, mortgage financing, potential subdivision of one parcel, and litigation relating to the land.
- [3] The plaintiffs, together with the testator, were involved in the ownership and/or claims in respect of one such parcel of land, namely 1224 Balmoral Road.
- [4] In 1996, Mr. Van Driesum drew the wills of Rudolf Knoglinger and his then wife Birgit Knoglinger. The testator then had two children of his marriage to Birgit Knoglinger, namely the plaintiffs, and one child of a previous marriage, the defendant Thomas Knoglinger.
- [5] Birgit Knoglinger and the testator subsequently separated and eventually divorced. Neither the firm nor Mr. Van Driesum acted for either of the Knoglingers in this matter. In his affidavit, Mr. Van Driesum states the firm's representation of the testator ended in 1997; that he knows of no information relevant to this action, or if relevant, of a confidential nature subject to solicitor client privilege, that was obtained by the firm throughout its representation of the testator. He states further that documentation prepared in his representation of the testator is a matter of public record; for example, documents filed in the Victoria Land Title Office. He states that neither he nor the firm retained a copy of the 1996 will. The will at issue is dated April 28, 2005; it was not drawn by the firm or Mr. Van Driesum.

- [6] The plaintiff Claudia Knoglinger deposes that Mr. Van Driesum and the firm are her solicitors of choice and the choice of her brother, the other plaintiff. In resisting the application, she states further that Mr. Van Driesum has acted for her and for her brother since 1997 on various matters, that they have a strong solicitor client relationship, and that changing lawyers now will mean delay and potential financial prejudice to them.
- [7] The plaintiffs in their amended statement of claim plead, *inter alia*, that in 1991 the plaintiffs, at the testator's request, gave money to their half-brother, the defendant Thomas Knoglinger, and, that the testator did as well. Further, the plaintiffs plead that in or about 1993, each of the plaintiffs contributed money to a property then owned by the testator and his wife, their mother Birgit Knoglinger.

The Law

- [8] The leading case regarding conflicts of interest between a lawyer and a former client is the Supreme Court of Canada's decision in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235.
- [9] A unanimous court found that the more robust "probability of real mischief" test applied in England and by some Canadian courts should be replaced by the less strenuous "possibility of real mischief" standard developed in the United States. A majority of the court favoured a flexible version of the "possibility of real mischief" test that would allow courts to strike an appropriate balance among three competing values: maintaining high standards in the legal profession and the integrity of the justice system; allowing for a client's counsel of choice; and allowing for reasonable mobility within the legal profession.
- [10] Mr. Justice Sopinka set out a two-part test to determine whether a conflict exists between a former client and a current client (at 1260):
1. Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?
 2. Is there a risk that it will be used to the prejudice of the client?
- [11] Mr. Justice Sopinka recognized the dilemma the first question creates. How can this question be answered, when such an answer would require that confidential information be revealed? He answered this question through the "sufficient relationship" test at 1260-61:

... [O]nce 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. This will be a difficult 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 communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.

[emphasis added]

- [12] In *Rosin v. MacPhail*, [1997] B.C.J. No. 7 (C.A.)(QL), Esson J.A. considered the meaning of the term "sufficiently related" at paras. 11-22. Although the Court of Appeal is clearly not bound by the ethics codes of the Law Society of British Columbia or the Canadian Bar Association, it looked to both of these for guidance. The Professional Conduct Handbook of the Law Society of British Columbia currently provides at c. 6:

Acting against a former client

7. Subject to Rule 7.4, a lawyer must not represent a client for the purpose of acting against the interests of a former client of the lawyer unless:
- (a) the former client is informed that the lawyer proposes to act for a client adverse in interest to the former client and the former client consents to the new representation, or
 - (b) the new representation is substantially unrelated to the lawyer's representation of the former client, and the lawyer does not possess confidential information arising from the representation of the former client that might reasonably affect the new representation.

[emphasis added]

- [13] In *Rosin v. MacPhail*, the Court considered the case of a woman who was represented in a prior divorce proceeding by a friend of her current husband. In the current divorce proceeding, that friend was representing her current husband in opposition to herself. She applied to have the friend removed as counsel for her husband.
- [14] The Court of Appeal found that the wife had proven that the two retainers were "sufficiently related" despite the fact they involved different parties, were based on significantly different circumstances, and were separated in time by almost ten years (para. 17). The Court based this finding on the fact that the conflicted lawyer had become privy to the wife's confidential financial information during the first proceeding. Although the Court acknowledged that this information may prove not to be relevant in the second proceeding, there was clearly a possibility that it would.
- [15] Further, the Court held that despite the lawyer's protestations that he did not remember any of the confidential information passed to him by the wife, it was likely that his memory could be jogged during discovery and trial. The Court asserted that such revelations, if they came about, could be used to the wife's disadvantage.
- [16] In the case at bar, I am particularly concerned by the fact that the plaintiffs' solicitors drew a will for the testator in 1996. It is reasonable to assume that Mr. Van Driesum, as a competent lawyer, then reviewed with the testator the nature of his assets, potential claims against his estate, his obligations to provide for, among others, his three children, one of whom is the half-sibling of the other two; namely those matters which have the potential of triggering claims under the Wills Variation Act. Such a consideration might well include discussions,

albeit nuanced of inter-family relationships and dynamics. Further, it should be noted that prior to 1996, according to the amended statement of claim, the financial affairs of the plaintiffs, the defendant Thomas Knoglinger, and the testator, were co-mingled to some extent. In these circumstances, it is reasonable to assume that relevant confidential information would be disclosed, or at the very least, that the potential for such disclosure exists. When, as here, the former client has not waived, and indeed cannot waive, solicitor client privilege, the issue is truly highlighted.

[17] It may be expected that busy lawyers do not, or are unable to, recall precisely what information was passed on to them ten years ago. It is equally plausible that memories of such information may be triggered as the litigation progresses.

[18] In these circumstances, I am satisfied there is a risk that "sufficiently related" information was obtained by the plaintiffs' solicitors; information which could be used to the detriment of the defendants. The executor may take an order in the terms outlined in paras. 1 and 2 of the Notice of Motion.

[19] Failing agreement as to costs, counsel are at liberty to speak to the matter.

"J.L. Dorgan, J."

The Honourable Madam Justice J.L. Dorgan

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