LAW SOCIETY OF MANITOBA *v.* GIESBRECHT: *CONFLICT OF INTEREST AND A SOLICITOR'S OBLIGATION NOT TO ACT AGAINST A FORMER CLIENT*

Michael E. Rice*

The recent decision of the Manitoba Court of Appeal in *The Law Society of Manitoba* v. *Giesbrecht*[1] is that Court's first opportunity to consider the two conflicting lines of authority in the area of conflict of interest and a solicitor's obligation to a former client not to act against that client in future litigation.

In the *Giesbrecht* case the appellant was a solicitor who found himself acting for a husband, one William Gartry, in a marital dispute. The appellant's partner, one Norman Watkins, had previously acted for both husband and wife with respect to a land transaction. More specifically, the partner was contacted by a local bank and requested to act on its behalf in acquiring the appropriate mortgage security on a bank loan the couple wished to obtain. On completion of the matter, which involved bringing title to a parcel of land into the names of the Gartrys, Mr. Watkins prepared a single statement of account and it was sent, along with a reporting letter to Mr. and Mrs. Gartry, who paid the account.

In addition to this mortgage transaction, there was evidence before the Court that Mr. Watkins had acted for Mr. Gartry in relationship to his business dealings. Apparently, Mr. Gartry had been sued on one or more occasions and Mr. Watkins handled such matters. Although it was conceded that Mrs. Gartry had no interest in her husband's business there were times when she discussed her husband's business and marital relations with her husband and Mr. Watkins. In particular, Mrs. Gartry testified that she had complained to Mr. Watkins that her husband was not financially responsible and that he was a heavy drinker.[2]

According to the majority judgement, Mr. Watkins recalled only one discussion with Mrs. Gartry. At this meeting, Mrs. Gartry advised him that she and her husband were separated and requested that Mr. Watkins act on her behalf.[3] Mr. Watkins declined because he knew both parties on a casual personal basis and because of his desire to avoid the acrimony of a contested marital dispute. Shortly thereafter, Mr. Gartry approached Mr. Watkins and told him that the parties had come to an agreement on the division of property and so forth, but that a solicitor was required to assist in putting the agreement into effect. Watkins agreed to participate, but when he found, a brief time later, that in fact there was no agreement, he immediately withdrew.

It was at this point that Mr. Watkins suggested to Mr. Gartry that he retain the appellant, Lorne Giesbrecht, and Mr. Gartry did so. However, at

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* B.A., LL.B. (of the Manitoba Bar)
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1. [1984] 1 W.W.R. 430 (Man. C.A.).
2. *Ibid.*, at page 434.
3. *Ibid.*, at page 434-5.

this time, the two lawyers were in the process of forming a partnership. The partnership came about, and now Mr. Giesbrecht found himself, now as a partner of Mr. Watkins, acting against Mrs. Gartry.[4]

Mrs. Gartry was distressed with her husband's choice of solicitor and she complained to the Judicial Committee of the Law Society who found the appellant guilty of having breached the rule regarding impartiality and conflict of interest found in Chapter V of the *Canadian Bar Association Code of Professional Conduct.* The relevant section of Chapter V is paragraph 11 which reads as follows:

> 11. A lawyer who has acted for a client in a matter should not thereafter act against him (or against persons who were involved in or associated with him in that matter) in the same or any related matter, or place himself in a position where he might be tempted or appear to be tempted to breach the Rule relating to Confidential Information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work he has previously done for that person.[5]

The majority judgement, written by Huband J.A., referred to a single case, that being the oft-cited and leading English case of *Rakusen* v. *Ellis, Munday & Clark.*[6] In that case the plaintiff retained one of two partners in a firm of solicitors to represent him in a wrongful dismissal suit. The other partner knew nothing of the retainer. Some four months later the plaintiff changed solicitors and the new solicitors instituted proceedings against the former employer. At this point the employer retained the partner of the solicitor who had initially been consulted by the plaintiff. The plaintiff requested an injunction restraining the solicitor from acting.

The Court of Appeal in England, in refusing the injunction, held that there is no hard and fast rule that a solicitor who has acted in a particular matter for one party cannot subsequently act in that matter for his opponent. Rather, before a solicitor can be restrained from so acting the court must be satisfied in the particular case that "real mischief and real prejudice" will probably result if he does so act.[7]

Mr. Justice Huband quoted, with approval, an excerpt from the reasons of Cozens-Hardy M.R. when he said at page 835:

> I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client; but in my view we must treat each of these cases, not as a matter of form . . . but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.[8]

While no other precedents were cited in the majority judgement, the *ratio* in *Rakusen* has been followed in several other Canadian decisions. In *Farmers Mutual Petroleums Ltd.* v. *United States Smelting, Refining &*

4. *Ibid.*, at page 435.
5. *The Canadian Bar Association Code of Professional Conduct*, (1974) Chapter V, Paragraph 11, page 19.
6. [1912] 1 Ch. 831 (C.A.).
7. *Ibid.*, at page 835.
8. *Ibid.*

Mining Co.,[9] the plaintiff applied to the court for an order restraining the defendants from continuing to be represented by a solicitor on the basis that the solicitor had been previously retained by the plaintiff with respect to some of the contracts giving rise to the litigation.

Mr. Justice Culliton, in delivering the unanimous judgement of the Saskatchewan Court of Appeal, cited the *Rakusen* decision with approval and said at page 655:

> The general principle to be drawn from the decision in the *Rakusen* case is that there is no general rule that a solicitor who, having acted for some person, either before or after the litigation began, could in no case act for the opposite side, and before a solicitor could be restrained from so acting, the Court must be satisfied in the particular case that mischief would probably result if he did so act.[10]

The *Rakusen* ruling was also relied upon in the case of *Mercator Enterprises Ltd.* v. *Mainland Investments Ltd.*[11]. In that case, the solicitor for the plaintiff had, prior to the present litigation, been engaged by the defendants to assist in the establishment of a cruise ship operation. That project became the subject matter of the litigation. The evidence was in conflict as to whether the solicitor, who was also a professional engineer, had under his prior engagement performed legal services or had acted in an non-advisory legal capacity. Also at issue was whether the solicitor had become privy to any confidential information which would be prejudicial to the defendants, and whether his prior engagement had been in the same matter as that in issue in the litigation. The defendants applied to restrain the plaintiff's solicitor from acting in the litigation.

In confirming the *Rakusen* judgement, Jones J. quoted from the reasons of Fletcher Moulton L.J. when he said at page 841:

> As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the Court feel that, in its duty as holding the balance between the high standard of behavior which it requires of its officers and the practical necessities of life, it ought to interfere and say that a solicitor shall not act.[12]

In the result, Mr. Justice Jones held that the application should be dismissed, as the plaintiff, although having raised a "serious question" regarding the solicitor's conduct, had not discharged the onus of demonstrating that there was a probablity of mischief and prejudice resulting from the possession of confidential information.

It is interesting to note that Mr. Justice Jones, in his application of the principles in *Rakusen,* adopts a strict interpretation of the criteria needed to restrain a solicitor from acting. Indeed, he went so far as to state that even a "grave suspicion of prejudice" was not enough to warrant the solicitor's removal from the case.[13] This "grave suspicion of prejudice" test

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9. (1961), 28 D.L.R.(2d) 618, 34 W.W.R. 646 (Sask. C.A.).
10. *Ibid.*, at 626 D.L.R.; page 665 W.W.R.
11. (1978), 29 N.S.R.(2d) 703, 6 C.P.C. 297 (S.C. (T.D.)).
12. *Supra*, n. 6, at 841.
13. *Supra*, n. 11, at 301 (C.P.C.).

would appear to place a higher onus on the applicant than the traditional "probability of mischief and prejudice" test advocated by their Lordships in the *Rakusen* case.[14]

In *Carson* v. *Benchers of the Law Society of Saskatchewan,*[15] the court reaffirmed the probability of mischief and prejudice test and stressed that this test must be applied in light of the particular circumstances of each case. This was illustrated when Hall J.A., speaking for the majority, set out the following statement from the reasons of Buckley L.J.:

> Mr. Cave has asserted this general principle which he says is to be found in the authorities that when a solicitor has acted for a client in a particular matter he, or his partners, cannot act against the client in anything relating to the matter, and that this is true irrespective of the particular circumstances of the case. I am of the opinion that there is no such principle. There is no law that because a solicitor has acted for a person he may not afterwards act against him in the same matter. It depends upon circumstances whether he shall be allowed to act or not.[16]

Stated simply, the *ratio* in these cases make it clear that each situation must be judged against the standard of a probability of real mischief and real prejudice arising under the particular circumstances of the individual case rather than against a fixed and arbitrary rule.[17]

The majority decision in *Giesbrecht* has clearly embraced this probability of mischief and prejudice test and, after an extensive discussion of the facts before the court, held that "the possibility, let alone the probability, of mischief or real prejudice in Mr. Giesbrecht continuing to act for Mr. Gartry was virtually nil."[18] Accordingly, the majority found there to be no conflict of interest and set aside the decision of the Judicial Committee.

Mr. Justice Hall wrote the dissenting judgement and upheld the decision of the Judicial Committee to reprimand the appellant for having breached the rules regarding impartiality and conflict of interest. His approach to the case, unlike the majority ruling, was not to conduct an extensive review of the facts with a view to learning whether there was evidence of real mischief and prejudice. Rather, His Lordship chose to address two different questions. First, was it appropriate for the appellant to continue to act having regard to a reasonable complaint which gave rise at the very least to a *prima facie* appearance of "unfairness"? Second, should the primary concern be the protection of the solicitor under investigation or the protection of the public interest?

Turning first to the concept of "unfairness" as the relevant test of misconduct, after a brief recitation of the charges against the appellant, Mr. Justice Hall concludes that the mere "appearance of unfairness" was sufficient to support a finding of professional misconduct. Curiously, His

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14. A similar approach to *Mercator* was taken in *Schmeichel* v. *Saskatchewan Mining Development Corporation; Schmeichel* v. *Lane*, 3 W.W.R. 30, 22 Sask. R. 170 (Sask. Q.B.), affirmed [1983] 5 W.W.R. 151 (Sask. C.A.).

15. [1975] 6 W.W.R. 544 (Sask. C.A.).

16. *Supra*, n. 6, at 843.

17. See, for example, *Devco Properties Ltd.* v. *Sunderland* (1977), 2 C.P.C. 158, 2 Alta L.R. (2d) 37, 5 A.R. 234, [1977] 2 W.W.R. 664 (S.C. (T.D.)).

18. *Supra*, n. 1, at 437.

Lordship chose to adopt this liberalized test without reference to any outside authorities. This is perhaps unfortunate as there have been several recent Canadian cases which have endorsed this broader standard. In *Canada Southern Railway Co.* v. *Kingsmill,* Jennings[19], the Ontario Supreme Court was confronted with a situation where the plaintiff sought to enjoin the defendant law firm from acting for an opposing party in arbitration proceedings or litigation. The defendant and its predecessor firm had for many years acted for the plaintiff. However, during all relevant times within the experience of present members of the defendant, the plaintiff had had none of its own employees, and it had been controlled by the companies with which the plaintiff was now engaged in litigation or arbitration proceedings. Apparently, all the defendant's instructions while acting for the plaintiff had been received from the employees of the companies formerly controlling the plaintiff.

The Court held that the claim to enjoin the defendant from acting for an opponent of the plaintiff must fail. What is significant about the decision is the test which Mr. Justice Southey chose to apply. His Lordship concluded that the court need not, indeed cannot, inquire whether the lawyer did, in fact, receive confidential information during his previous employment. Rather, to effect removal of the solicitor, the plaintiff need only show that it would be "unfair" for the solicitor to act for an opponent of the plaintiff.

This liberal test based upon the notion of fairness was also supported in the case of *Falls* v. *Falls.*[20] In that case, a husband applied for an order to restrain his wife from continuing to be represented by her solicitor's firm on the basis that the wife's solicitor had obtained confidential information while acting previously on behalf of the husband.

The Court, in granting the application, cited the *Rakusen* case without comment and stated that:

> I must apply this (Rakusen) principle in light of present day practices and decisions with respect to conflict of interest, justice and the appearance of . . . "fairness." My observation is that the Courts are requiring higher and stricter standards in all these areas.[21]

The *Canadian Southern Railway* and *Falls* decisions are important as they introduce a broad test based upon the notion of fairness. This test dispenses with the necessity of having to prove the actual or probable possession by the solicitor of confidential information and the resultant probability of mischief and prejudice. Rather, to warrant a solicitor's removal, the applicant need only show some reasonableness to his complaint and that he was right to perceive unfair treatment which could possibly lead to his prejudice.[22]

Nowhere is this new test of unfairness more clearly evident than in the recent Ontario case of *MTS International Services Inc.* v. *Warnat Corpo-*

19. (1979), 8 C.P.C. 117, 4 B.L.R. 257 (Ont. H.C.).

20. (1979), 12 C.P.C. 270 (Ont. County Court).

21. *Ibid.*, at 272-273.

22. See, for example, *Steed & Evans Ltd.* v. *MacTavish* (1976), 12 O.R. (2d) 236, 68 D.L.R. (3d) 420 (H.C.J.) wherein Goodman J. applied a slightly different test based upon the notion of "justice."

ration Ltd.[23]. In that case the defendant applied to remove the plaintiff's solicitor as the solicitor had previously acted for both plaintiff and defendant with respect to the drafting of certain documents. The litigation now involved the interpretation of these same documents.

Montgomery J. ordered the plaintiff's solicitors to remove themselves from the record and candidly remarked:

> Parties to a concluded lawsuit should feel that they have been fairly dealt with. How can they have confidence in a just result when their former solicitor acts for the other side in a matter where he advised both parties?[24]

Significantly, Mr. Justice Montgomery chose not to examine any of the evidence before the Court with a view to discerning whether the solicitor was in possession of prejudicial confidential information. Rather, in adopting similar reasoning to Mr. Justice Hall in the *Giesbrecht* case, his Lordship comments that when faced with a reasonable complaint in a potential conflict of interest situation the solicitor "should avoid even the appearance of professional impropriety"[25] and should be removed from the case.

In addition to this new test of unfairness, Mr. Justice Hall directs his attention as to whether the primary concern should be the protection of the solicitor under investigation or concern for protection of the public interest. The salient portion of the judgement reads:

> My purpose in alluding to this text is because there is a tendency to exercise the disciplinary or appellate power not in terms of the public interest but rather in terms of the members' interest. In the present case I think the benchers well recognized their primary concern for the public interest, for which they are to be commended.[26]

In other words, it was the perception of the applicant for removal, namely Mrs. Gartry, that was a major factor in a finding of professional misconduct against the appellant.

An examination of recent jurisprudence reveals that at least one other Canadian decision has stressed the importance of the protection of the public interest in a conflict of interest setting. In *Goldberg* v. *Goldberg*[27] a solicitor had acted for a husband and wife by incorporating a management company of the husband's business of which the wife was the sole shareholder and president. The solicitor also prepared a management agreement with respect to the same company. Subsequently, matrimonial problems developed between the couple and the solicitor found himself acting for the husband in these proceedings. The wife applied to have the husband's solicitor removed from the record.

The Court, in allowing the wife's application, stated:

> Of more importance, however, is the fact that the principles involved herein are designed not only to protect the interests of the individual clients, but they also protect the public confi-

23. (1980), 31 O.R. (2d) 221, 118 D.L.R. (3d) 561 (H.C.J.).
24. *Ibid.*, at 222 (O.R.); at 562 (D.L.R.).
25. *Ibid.*, at 224 (O.R.); at 565 (D.L.R.).
26. *Supra*, n. 1, at 439.
27. (1982), 141 D.L.R. (3d) 133, 31 R.F.L. (2d) 453 (Ont. H.C.).

> dence in the administration of justice. This is particularly so when the litigation involves a family dispute. Furthermore, when the public interest is involved, the appearance of impropriety overrides any private interest claimed by waiver.[28]

In conclusion, there are currently two fundamentally different tests which the Courts have applied when confronted with a solicitor acting against a former client. The first test, as adhered to by the majority in *Giesbrecht,* follows the strict rule laid down by *Rakusen* and requires the tribunal to find evidence of real mischief and prejudice in the solicitor continuing to act. The second test, as seen in the strong dissent in *Giesbrecht,* concludes that the appearance of fairness and protection of the public interest are the paramount concerns.

There would appear to be a third possible test, however, which the Canadian Judiciary has not yet adopted. Briefly, as we saw previously, Paragraph 11 of Chapter V of *The Canadian Bar Association Code of Professional Conduct* states that ". . . It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work he has previously done for that person."[29] One wonders, therefore, why the Courts have not seriously attempted to apply these words and simply ask whether the present litigation is a fresh and independent matter from the previous retainer. In the *Giesbrecht* case, for example, it would appear that domestic litigation was a fresh and independent matter from the previous real estate dealings and, accordingly, there was no conflict of interest. In short, in future cases *The Code of Professional Conduct* could be looked to as a statute with its language accorded the same strict interpretation.

In conclusion, it is this author's sincere hope that the Manitoba Court of Appeal will have occasion to consider this issue again and, through a thorough examination of the case law and *The Code of Professional Conduct,* arrive at a much needed unanimous decision that can guide the solicitors of the Manitoba Bar.

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28. *Ibid.*, at 135-6 (D.L.R.); at 456 (R.F.L.).
29. *Supra*, n. 5, at 19.