See paras. 6, 16-18

Indexed as:

Davies, Ward & Beck v. Baker and McKenzie

Between
Davies, Ward & Beck, applicant (appellant), and
Baker and McKenzie (an international law firm) et al.,
respondents (respondents), and
Boston Professional Hockey Association, Inc. and others,
respondents (appellants)

[**1998**] **O.J. No. 3284**

40 O.R. (3d) 257

164 D.L.R. (4th) 423

111 O.A.C. 352

18 C.C.P.B. 225

26 C.P.C. (4th) 51

81 A.C.W.S. (3d) 892

Docket Nos. C29886 and C29888

Ontario Court of Appeal
Toronto, Ontario

Catzman, Osborne and Weiler JJ.A.

Heard: August 4, 1998.
Judgment: August 17, 1998.

(9 pp.)

Barristers and solicitors -- Relationship with client -- Conflict of interest -- Where lawyer joins opposite party's lawyer's firm.

This was an appeal by Davies Ward & Beck (Davies) and the National Hockey League (NHL) from dismissal of their application that Finkelstein, a solicitor working for Davies, could continue to represent the NHL in its pending action against the law firm Baker & McKenzie (Baker). In January, 1997, Baker retained a solicitor, Cullity, in the Davies firm to provide expert evidence for Baker in the action brought against it by the NHL. Cullity was subsequently appointed to the bench in November, 1997. Baker asserted that Davies was under an obligation to provide another partner to sustain Baker's position once Cullity became unavailable. The trial judge agreed, finding that Davies' retainer include an ethical obligation to make a second partner available upon the unforeseen unavailability of Cullity. Finkelstein then became a partner in the Davies firm, bringing with him his client, the NHL. The trial judge concluded that it was more financially attractive for Davies to represent the NHL than to provide expert opinion evidence for Baker at trial. Davies asserted that it had established elaborate screening measures to shield Finkelstein from any confidential information received by Cullity from Baker in the course of their solicitor and client relationship. The trial judge said that no safeguards were foolproof and it was wrong to require Baker to accept the effectiveness of those safeguards.

HELD: The appeal was allowed and an order would issue granting the relief sought by Davies, an order permitting Finkelstein to continue to act for the NHL. The test imposed on Davies that the safeguards be totally foolproof was higher than the law required. A threshold set so high could never be crossed. Davies had no obligation, ethical or legal, to put forward a second solicitor to sustain Baker's position when Cullity became unavailable. The trial judge relied on unfounded findings of fact about Finkelstein's and the Davies firm's view of Finkelstein's NHL clients. In the court's view, had the trial judge not made the errors he did, he would not have concluded that Davies' application should be dismissed. Having regard to the good faith of the parties, the adequacy of the measures taken to avoid disclosure of confidential information, and the extent of prejudice to the respective parties, Davies met the legal test by showing that a reasonable member of the public in possession of all the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur.

Counsel:

Sheila Block and Chris Bondy, for the appellant Davies, Ward & Beck.
Jeffrey Galway, for the appellants, NHL interests.
Alan Lenczner, Q.C., for the respondents.

The following judgment was delivered by

THE COURT:--

The appeal

1 The appellant Davies, Ward & Beck ("Davies") applied for a declaration that the steps taken by it in respect of Neil Finkelstein's continued representation of the National Hockey League and its member clubs ("the NHL") in their pending action against the law firm of Baker & McKenzie ("Baker") comply with the requirements of Rule 29(4)(b) of the Rules of Professional Conduct of the Law Society of Upper Canada, and for an order permitting Mr. Finkelstein to continue to act for the NHL in that action.

2 Matlow, J. dismissed the application. This is an appeal by Davies and the NHL from that decision. The grounds of appeal

3 Ms. Block advanced three arguments in support of the appeal. In her submission, Matlow, J.

(a) applied the wrong test in determining the application;
(b) imposed on Davies an obligation to Baker that Davies did not have; and
(c) made unfounded findings of fact that coloured his view respecting Davies' good faith.

4 We deal with each of these submissions in the order indicated.

1. The wrong test

5 At p. 5 of his written reasons, Matlow, J. said:

> Although the safeguards put in place to protect Baker from any breaches of confidence may be effective, no such safeguards can be guaranteed to be totally foolproof. In any event, it seems to me to be wrong to require Baker to accept in blind faith the effectiveness of those safeguards.

6 We agree with Ms. Block's submission that this test imposed a higher standard on Davies than the law requires. Sopinka, J., speaking for the majority in MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235, at pp. 1259-1260, defined the test to be "such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur". Matlow, J., in framing the test as he did, erroneously burdened Davies with the creation of "totally foolproof" safeguards and erroneously measured the safeguards Davies put in place against the necessity of Baker's "blind faith" in their effectiveness. By that definition, no safeguards, however comprehensive, could ever adequately respond to an allegation of disqualifying conflict of interest. A threshold set so high could never be crossed. Davies was entitled to have its application determined by reference to the test enunciated in MacDonald Estate v. Martin.

2. Davies' obligation to Baker

7 In January, 1997, counsel for Baker retained Maurice Cullity of the Davies firm to provide

expert evidence for Baker in the action brought against it by the NHL. That action claimed damages alleged to have arisen from Baker's negligence in advising the NHL of its entitlement to deal with a pension surplus in a manner that was subsequently held to be erroneous in law.

8 The appeal was argued on the footing that, prior to his appointment to the bench in November, 1997, Mr. Cullity formed an opinion that was supportive of Baker's position in the NHL action and conveyed that opinion orally to Baker and to its counsel. After Mr. Cullity was appointed, he suggested to Baker's counsel that it "consider using Tim Youdan [another member of the Davies firm] as your expert witness". Much argument was devoted to the questions whether Mr. Youdan endorsed Mr. Cullity's opinion and whether and when Baker accepted the invitation to retain Mr. Youdan as its expert witness in place of Mr. Cullity. We do not consider it necessary to resolve those questions in order to dispose of this ground of appeal.

9 Ms. Block's complaint arises from the conclusion Matlow, J. expressed at page 4 of his reasons:

> In my respectful view, Davies' retainer included an ethical obligation to make the first partner [Mr. Cullity] available to give evidence on behalf on Baker at trial and, failing his availability for unforeseen reasons, to make the second partner [Mr. Youdan] available in his stead.

10 There was no foundation for this conclusion. It should have played no role in the consideration of the competing rights and obligations of Davies, Baker and the NHL interests. Assuming - although this was the subject of much debate before us - that Baker, in retaining Mr. Cullity to provide expert evidence supportive of its position, did not retain him personally but rather retained the Davies firm, we do not agree that there was any obligation on Davies, ethical or legal, to put forward a second partner to sustain Baker's position if the first partner became unavailable.

11 Expert witnesses must testify to their belief in the opinion they express, on the basis of facts which they assume to be true. The area of law in which Mr. Cullity's expertise was sought was one of considerable difficulty and complexity, and the evidence simply does not support the conclusion that Mr. Youdan devoted either the time or the analysis necessary to form any opinion, let alone the opinion held by Mr. Cullity. It was wrong to impose on Davies the obligation to produce, from among its ranks, a second expert who would compliantly espouse the opinion of its departing member.

3. Unfounded findings of fact

12 Matlow, J. formed an adverse view of the conduct of Davies in seeking to support Mr. Finkelstein's continuing representation of the NHL in its action against Baker. He found Davies' conduct to have "fallen below the standard that ought to be met by solicitors in their dealings with clients" and that it "reflect[ed] badly on the integrity of our justice system": reasons, pp. 3-4. He found there to be "an unsavoury air about Davies wishing to terminate its relationship with Baker" and found Davies' request to permit Mr. Finkelstein to continue to act for the NHL in the pending

action to be "understandably offensive" to Baker: reasons, pp. 4-5.

13 In reaching these conclusions, Matlow, J. made two findings of fact that were the subject of attack by Ms. Block. The first is found at p. 2 of his reasons:

> The problem that gives rise to this application entirely by Davies and Finkelstein by their agreement by which Finkelstein became a partner in Davies. Their agreement contemplated that Finkelstein would bring with him their clients, the NHL parties, and that he would continue acting for them against Baker for whom Davies had previously acted (albeit through a form of continuing association with his former firm).

The second finding appears at p. 4 of his reasons:

> From the perspective of Baker in particular, and the public in general, there is an unsavoury air about Davies wishing to terminate its relationship with Baker, from whom it has already received substantial fees, because of its desire to accommodate Finkelstein and its opportunity to secure the NHL parties as clients. It is self evident that the fees that would be generated by acting for the NHL parties would greatly surpass the additional fees that would be generated solely for providing expert opinion evidence at trial for Baker.

14 There is no evidentiary support in the material for either of these findings, and Mr. Lenczner made no effort to support them in his submissions. These findings, expressed in strong language, clearly figured into the ultimate conclusion that Matlow, J. reached and, to that extent, his decision must be viewed as flawed. Davies is entitled to judicial recognition that there was no warrant for either of these findings in the evidence that was before the court.

The disposition of the application

15 There remains for determination the question whether, disabused of the errors we have found in Matlow, J.'s reasoning, he was correct in his conclusion that Davies' application should be dismissed. In our view, he was not.

16 All counsel argued the appeal on the basis of the principles set out in MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235. Although the factual circumstances of the present case are different, these principles provide helpful guidance. The issue in MacDonald Estate v. Martin, as in the present case, raised three competing values: the concern to maintain the high standards of the legal profession and the integrity of our system of justice; the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause; and the desirability of permitting reasonable mobility in the legal profession: MacDonald Estate v. Martin, at p. 1243. The test, as noted above, is whether the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur: MacDonald Estate v. Martin, at pp.

1259-1260. Typically, cases like MacDonald Estate v. Martin and the present case require two questions to be answered: (1) did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? and (2) is there a risk that it will be used to the prejudice of the client?: MacDonald Estate v. Martin, at p. 1260.

17 The task before this court is made easier by concessions made, correctly in our view, by Ms. Block and Mr. Lenczner. Ms. Block conceded that Davies, in the person of Mr. Cullity, received confidential information from Baker attributable to a solicitor and client relationship. Mr. Lenczner conceded that the elaborate screening procedures established by Davies before Mr. Finkelstein's arrival at that firm were comprehensive and effective.

18 In our view, having regard to all of the relevant circumstances, including the good faith of the parties, the adequacy of the measures taken to avoid disclosure of any confidential information and the extent of prejudice to the respective parties, Davies met the legal test enunciated by Mr. Justice Sopinka. A reasonable member of the public, in possession of the facts and aware of the screening procedures set in place, would conclude that no unauthorized disclosure of confidential information had occurred or would occur: MacDonald Estate v. Martin, at p. 1263.

Disposition

19 The appeal is allowed and the order of Matlow, J. is set aside. In its place, an order will issue granting the relief asked by Davies on its application. None of the factums filed on behalf of the parties to the appeal sought costs and, accordingly, there will be no order respecting costs of this appeal for or against any of the parties.

CATZMAN J.A.
OSBORNE J.A.
WEILER J.A.