

# THE Professional

A BULLETIN ON PROFESSIONAL LIABILITY ISSUES BY GARDINER ROBERTS LLP

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## TOO MUCH KNOWLEDGE CAN BE A DANGEROUS THING

by Gavin Tighe and James Cook

A recent decision demonstrates that too much knowledge can hurt you; even in litigation. The case is bound to send a chill through the current wave of electronic discovery and curb the eagerness of some counsel to discover more than they may be entitled to about their opponents.

In this case opposing counsel reviewed email from a server some of which was solicitor and client communication and therefore privileged. The result was that Justice Scanlan of the Nova Scotia Supreme Court ordered a number of counsel (including in-house instructing counsel) removed from the file because they failed to “do the right thing” by properly respecting solicitor/client privilege.

*National Bank Financial Ltd. v. Potter* stemmed from a number of claims arising from the bankruptcy of a publicly-traded company.

The collapse of the company resulted in large deficits in a number of margin loan accounts held with National Bank Financial Ltd. The bank subsequently commenced proceedings against the company, several principals including the former CEO, and the law firm of Stewart, McKelvey, Stirling and Scales, alleging that the defendants engaged in a scheme to manipulate the price of the company’s common shares.

During the course of the action, National Bank’s counsel obtained a computer server that had belonged to the company prior to its bankruptcy. The server contained e-mail accounts for 138 people who were employees, officers or directors with the company.

The bank’s lawyers then took it upon themselves to review the e-mails rather than alerting the e-mail account holders that the e-mails had been acquired. Contained in the server were 186,000 e-mails, many of which had been exchanged between the principals of the company, including the former CEO, and their lawyer. Some of the e-mails had titles such as “Re: need for legal advice” and “Re: wise counsel required”.

When access to the server was discovered, an application was made to strike National Bank’s claim, stay the proceedings, and remove its counsel from the record. The basis for the application was that National Bank’s counsel wrongfully accessed and reviewed solicitor/client communications.



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# BEWARE OF NON-CLIENTS

by Jane Sirdevan

As always, lawyers and other professionals need to be cautious with respect to representations made to non-clients.

In *Windstar Equities Ltd. v. Sentinel Hill Sales Corp.*, a lawyer brought a motion to strike a third party claim made against him by non-clients on the basis that the claim did not disclose a reasonable cause of action. The sole issue for determination was whether the lawyer owed to the non-clients a duty of care in the particular circumstances.

In the main action, the plaintiff sought damages against defendants for an alleged breach of a pooling agreement. But the pleadings revealed that prior to the start of the action, the parties had entered into a “settlement agreement”. The defendants believed that this agreement fully resolved all issues outstanding with respect to the pooling agreement.

Nonetheless, since the defendants were now facing potential liability, they issued a third party claim against the plaintiff’s lawyer.

While it is not clear from the court’s judgment, it is our understanding that the defendants had retained, at least to some extent, their own counsel with respect to the conclusion of the agreement.

The defendants in their claim against the plaintiff’s lawyer contended correspondence from him in regard to the negotiation of the agreement contained a negligent misrepresentation. The alleged negligent misrepresentation was as follows:

Payment by you of the aforementioned will, when added together with amounts already paid to [the plaintiff], constitute full settlement of the outstanding amounts due in connection with [the plaintiff’s] co-selling arrangement with you for 1999.

The defendants further alleged that the lawyer:

(a) “expressly represented to [them], orally and in writing”, that the settlement agreement fully concluded all outstanding issues between the parties in connection with the pooling agreement;

- (b) the representation was made negligently, carelessly, and without regard to its truthfulness; and,
- (c) the lawyer knew or ought to have known that the defendants would rely on the representation.

In order to be successful in their third party claim for negligent misrepresentation, the defendants had to establish, among other things, that despite the non-existence of a solicitor-client relationship between them and the plaintiff’s lawyer, he owed them a duty of care based on a special relationship. The lawyer submitted that he did not owe any duty of care to the defendants, and therefore the claim as against him disclosed no reasonable cause of action.

Although Justice Day specifically recognized that there was no solicitor-client relationship between the defendants and the lawyer it was not “plain and obvious” that the claim against the lawyer was untenable. The judge considered that there could be circumstances where a lawyer might reasonably foresee that a non-client would reasonably rely on his representation. This case was one of those circumstances.



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# WARNING SIGNS

by Stephen A. Thiele

Since the seminal decision in *R. v. Stinchcombe*, Canadian law has embraced the need for full disclosure of information in the possession of prosecutors. Full disclosure is seen as being in the public interest because it ensures that those facing punishment are afforded a fair trial and given the utmost opportunity to defend themselves.

The requirement of full disclosure is not confined to criminal law. Administrative bodies that have the authority to investigate and prosecute persons for statutory offences can also be required to provide full disclosure to those persons facing possible punishment. In some instances, the information gathered by these bodies will consist of reports prepared by third parties, like accountants or auditors, in response to enquiries made by investigators.

These parties have often complained that information they provide is confidential and should not be disclosed.

As recently determined in the decision of *Deloitte & Touche LLP v. Ontario (Securities Commission)* the public interest in providing full disclosure prevails over purported claims to confidentiality, especially where the third party is told beforehand that the information gathered is subject to disclosure.

In this case, an auditor produced to the Ontario Securities Commission (“OSC”) documents related to audits of a corporation that was under investigation. As part of the process, interviews of the auditor were conducted in writing. The OSC then ordered the disclosure of the auditor’s responses to the officers and directors of the corporation against whom the OSC had initiated proceedings.

The auditor protested that disclosure of its responses were not in the public interest and were privileged.

But OSC staff had warned the auditor that its responses might have to be disclosed in the proceedings.

Section 17(1) of the *Ontario Securities Act* permits the OSC to order disclosure of material that is in the public interest.

The OSC weighed the desire of the auditor to keep its responses confidential against the interests of those against whom proceedings were started to make full answer and defence, and concluded that the injury of non-disclosure outweighed the interests of the auditor. The auditor’s expectation of privacy and confidentiality was minimal because the corporation was the auditor’s client.

The auditor’s responses failed to fall within a recognized class of privilege and did not originate in confidence since OSC staff had warned that they could be disclosed.

The warning also defeated the auditor’s contention that its rights to procedural fairness and natural justice had been violated.

The warning signs sent by this judgment suggest that third party professionals will be unable to prevent the disclosure of information provided to regulatory bodies where someone is facing possible punishment. The right of the person exposed to punishment to defend himself or herself fully will generally outweigh interests of confidentiality.

Given the trend, third parties, such as auditors, should familiarize themselves with the processes of regulatory and administrative bodies and pay close attention to any warnings concerning disclosure. ♦

(*Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2005] O.J. No. 1510 (Div. Ct.))



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In his decision, Scanlan J. focused on the fundamental importance of solicitor/client privilege. He stated that as soon as the bank's counsel knew or reasonably should have expected that they had acquired the opposing party's solicitor/client communications, they should have stopped any review, notified the potential privilege holders, and if necessary taken the matter to court to determine whether privilege applied. Instead, the e-mails were not only read but some of the information gleaned from the e-mails was used to re-draft National Bank's pleadings.

The decision is noteworthy for its discussion of the widespread use of e-mail communications and the storage of e-mail on computer servers. Scanlon J. commented that solicitor/client communications via the Internet have or will become as common place as any solicitor/client communications via mail or telephone.

In response to National Bank's submission that privilege was lost because of a lack of expectation of privacy for e-mails contained on a server, Scanlon J. compared a server to a filing cabinet in a solicitor's office. What is important is the nature of the communication which affords the special protection of privilege, not where the filing cabinet is located.

Scanlon chose not to stay the bank's action because there was no bad faith on the part of its lawyers. Rather, the judge determined that a sufficient sanction for the conduct of National Bank's counsel was their removal as a "punitive measure" and the consequential cost consequences for National Bank. This included the in-house counsel who was responsible for instructing the offending lawyers. The portions of the pleadings that were drafted in reliance upon the materials on the server were also ordered removed. Scanlon J. said that

this would send a clear message to other counsel that the type of activity that had occurred would not be condoned by the Court.

As is evident from the decision, in situations where counsel have any basis to suspect that they may have obtained access to an opposing party's privileged communications, they ought to tread extremely lightly or be faced with a motion for removal or worse. As Scanlon J. noted, any lawyer who appropriates the function of determining whether a communication is privileged runs the risk, almost certainly, of being removed from the file if it is later determined the communications were relevant and privileged.

The cost consequences for the client could be massive. Where those consequences ultimately fall remains to be seen. ♦

*(National Bank Financial Ltd. v. Potter, [2005] N.S.J. No. 186 (S.C.))*

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The threshold that the lawyer had to meet to dismiss the action was high. However this does not detract from the lessons that can be learned from this case.

The decision of Justice Day serves as a good example of how far the court is prepared to extend the breadth of parties to whom a professional owes a potential duty of care. Professionals therefore should beware of what they say and what they do, particularly where a non-client may rely on their conduct and actions. ♦

*(Windstar Equities Ltd. v. Sentinel Hill Sales Corp., [2005] O.J. No. 1516 (S.C.J.))*

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