CITATION: Konjevic and Coventry Connections v. Uber, 2016 ONSC 5832
COURT FILE NO.: CV-16-546307-CP
DATE: 20160930

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Dominik Konjevic and Coventry Connections Inc., Plaintiffs

AND:

Uber Technologies Inc., Uber Canada Inc., Uber B.V. and Rasier Operations B.V., Defendants

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Awanish Sinha and Ryan MacIsaac* for the Defendants / Moving Parties

Kirk Baert and Celeste Poltak for Sutts Strosberg LLP / Responding Party

HEARD: September 19, 2016

MOTION TO DISQUALIFY CLASS COUNSEL

[1] The Uber defendants in this proposed class action ask that Sutts Strosberg LLP be removed as class counsel because of a disqualifying conflict of interest. They say Sutts Strosberg failed to install the required internal screens when they hired a lawyer who had previously acted on behalf of Uber in a related litigation.

[2] For the reasons set out below, the removal motion is dismissed with costs.

The context

[3] There are three Uber-related proceedings that provide the context for the removal motion. The first is the proposed class action brought by taxidrivers against Uber that I am currently case-managing.[1] The plaintiff retained Sutts Strosberg. Uber is represented by McCarthy Tetrault LLP. The action has not yet been certified. For ease of reference, I will refer to this putative class action as the Taxidriver Class Action or simply Class Action.

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[1] Originally filed as separate actions, the *Konjevic* and *Coventry Connections* actions were recently consolidated on consent as one action with the court file number shown above.

[4] Last year, Uber defended a high-profile injunction application brought by the City of Toronto. Uber was represented by Goodmans LLP. The matter was heard on June 1 and 2, 2015, and, as is well known, Uber prevailed.[2] I will refer to this injunction application as the Toronto Application.

[5] The third proceeding is an application that was brought on behalf of taxidrivers in March 2016. Uber was represented by Goodmans and the taxidrivers by Sutts Strosberg. The Taxidriver Application was abandoned as moot on May 6, 2016 a few days after Toronto passed a bylaw legalizing Uber in Toronto.

[6] It is against this backdrop that a young lawyer named Nicholas Cartel ("NC") found himself first at Goodmans and then at Sutts Strosberg and is now at the centre of this removal motion.

The background facts

[7] NC joined Goodmans as an associate in its competition and business law group on March 30, 2015, at a time when Goodmans litigators were representing Uber in the Toronto Application. Ten months later, NC left Goodmans and on February 22, 2016, joined Sutts Strosberg, a Windsor-based law firm, to open and staff their new Toronto office.

[8] Before he was hired, NC told hiring partner Jay Strosberg ("JS") that he worked in the competition group at Goodmans, had no involvement in the Toronto Application, and had acquired no confidential information. Nonetheless, JS, who was also the lead counsel in the Taxidriver Class Action, made it clear to NC that NC would not be involved in any Uber-related litigation while at Sutts Strosberg.

[9] When NC joined Sutts Strosberg, in February 2016, the Taxidriver Class Action had already been filed by the Windsor office, and the Taxidriver Application was about to be filed. Indeed, just two weeks after being hired, and while he was still busy setting up the new Toronto office, NC received an email from the Windsor office asking if he would take a moment to commission two affidavits for the Taxidriver Application. NC did so on March 11 (it took all of a minute), and the Taxidriver Application was filed the same day.

[10] The Goodmans litigators reviewed the Taxidriver Application and discovered that NC had commissioned the two affidavits. In a letter dated March 21, 2016, Goodmans represented to JS (incorrectly) that NC had been "actively involved" in the Toronto Application. They alleged a disqualifying conflict of interest and demanded that Sutts Strosberg withdraw as legal counsel.

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[2] *City of Toronto v. Uber Canada Inc. et al.*, 2015 ONSC 3572.

[11] JS responded the next day. In his view, there was no basis for the allegation of conflict of interest. Based on what he had been told by NC, there was no risk of confidential disclosure because NC had no confidential information to disclose and certainly none that was relevant to the Taxidriver Application. JS knew that NC would not be working on any Uber matter. Indeed, in accordance with Sutts Strosberg's internal procedures which were then in place, electronic access to files was provided only to the lawyers who were actually working on the file. As far as JS was concerned, NC was effectively "shut out" from accessing any Uber-related files. JS advised Goodmans that Sutts Strosberg would not be removing itself as counsel on the Toronto Application.

[12] Nonetheless, after receiving the Goodmans letter, JS immediately set up a full screen – that is, in addition to the existing internal safeguards that prevented NC from electronically accessing an Uber-related file, JS also spoke to the lawyers involved in the Uber matters and confirmed that none of them had discussed either the Taxidriver Application or Class Action with NC. NC had already been denied electronic access to the files in question. In addition, as a result of the Goodmans letter, the Uber-related paper files, which were physically based in Windsor, were moved into the law firm administrator's office and locked in a cabinet. Access to these paper files was limited to the two or three Windsor lawyers that were actually working on the matter.

[13] In their reply letter of March 23, Goodmans pointed to the two affidavits commissioned by NC some ten days earlier and added: "[I]t is apparent that the appropriate measures to prevent disclosure of Uber's confidential information either were not established or are not effective." In short order, Goodmans filed a removal motion. However, the motion did not proceed because, as already noted, the Taxidriver Application was abandoned on May 6, 2016.

[14] The Class Action, however, continued to move forward. Uber's legal counsel, McCarthy Tetrault, recycled much of the evidentiary material that would have been used by Goodmans in their removal motion and decided to bring their own removal motion – this time, to remove Sutts Strosberg as class counsel in the Taxidriver Class Action.

[15] The focus of this motion is quite narrow. There is no suggestion that the full screen established after JS received the letter from Goodmans was in any way deficient or inadequate. The complaint is that Sutts Strosberg should have installed the full screen on February 22, when NC joined the firm, and not a month later when they received the Goodmans letter. The focus of this removal motion is therefore on the 30 days before the full screen was set up.

The applicable law

[16] There is no dispute about the applicable law. The decisions of the Supreme Court

in *MacDonald Estate*[3] and the Court of Appeal in *Chapters*[4] provide the basic jurisprudential framework for the analysis herein.

[17] The *MacDonald Estate* decision, the seminal authority on disqualifying conflicts of interest, made clear that the overriding policy concern is whether a "reasonably informed person would be satisfied that no use of confidential information would occur."[5] Two questions have 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 [the confidential information] will be used to the prejudice of the client?[6] If the answer to either question is "no," then no conflict exists and removal of counsel is not warranted.

[18] The party who raises the conflict of interest is not expected to disclose the actual confidential information that was shared with the lawyer in question. Rather, the moving party need only show that there was a "previous relationship" with the lawyer, which is "sufficiently related" to the present matter:

> [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.[7]

[19] In *Chapters*,[8] the Court of Appeal noted that the onus is on the client claiming a conflict to prove that the matters are sufficiently related. But, the "sufficiently related" hurdle can be cleared fairly easily by simply showing that it was "reasonably possible" in the circumstances "that the lawyer acquired confidential information" through "the first retainer that could be relevant to the" second retainer.[9]

[20] Once the court has determined that the transferring lawyer received confidential information relevant to the present matter, it must then consider whether there is a risk

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[3] *MacDonald Estate v. Martin*, [1990] 3 S.C.R., at 1235.

[4] *Chapters Inc. v. Davies, Ward & Beck LLP*, [2001] O.J. No. 206 (Ont. C.A.).

[5] *MacDonald Estate*, *supra*, note 3, at 1260.

[6] *Ibid*, at 1260.

[7] *Ibid*, at 1260.

[8] *Chapters*, *supra*, note 4.

[9] *Ibid*, at para. 30.

that the information will be used to the prejudice of the former client. In considering that issue, the court will infer that such a risk of misuse exists (there is "a strong inference that lawyers who work together share confidences"), unless the new law firm proves, by clear and convincing evidence, that all reasonable measures have been taken to prevent disclosure of confidential information.[10]

[21] The "reasonable measures" to protect confidential information must include institutional mechanisms that can be verified objectively. Conclusory and self-serving affidavits from lawyers, promising to guard against any misuse of confidential information, "without more," will not suffice.[11]

[22] Although the judicial approach to conflict of interest is understandably rigorous, the case law also recognizes that litigants have the right to select counsel of their choice and that the removal of legal counsel should be a remedy of last resort. "[I]f the integrity of the justice system can be protected with a remedy short of removal, that lesser remedy should be employed."[12] Ultimately, as Chief Justice Strathy noted in *Mallory*,[13] "[t]he test on a motion to remove counsel is whether a fair minded and reasonably informed member of the public would conclude that the proper administration of justice compels the removal."[14]

Analysis

[23] The law is clear that removal motions are "very fact-specific"[15] and the removal order itself is "discretionary."[16] Nonetheless, the approach set out in *MacDonald Estate* and *Chapters* provides the template that must be followed. It is also helpful to consider the applicable *Rules of Professional Conduct* ("the *Rules*") and commentaries. Although not binding on the court, the *Rules* provide "some insight into the standard of conduct expected as between lawyers and their clients."[17]

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[10] *MacDonald Estate, supra,* note 3, at 1262.

[11] *Ibid,* at 1263.

[12] *Stewart (Litigation Guardian of) v. Humber River Regional Hospital* (2009), 95 O.R. (3d) 161 (C.A.), at para. 56.

[13] *Mallory v. Werkmann Estate*, 2015 ONCA 71.

[14] *Ibid,* at para. 28, citing *Matfoun v. Banitaba,* 2012 ONCA 786, at para. 4.

[15] *Performance Diversified Fund v. Flatiron GP Group,* 2016 ONSC 1133 (Div. Ct.), at para. 42.

[16] *Ontario v. Chartis Insurance Company of Canada,* 2016 ONSC 43 (Div. Ct.), at para. 11.

[17] *Al Bidery v. Cazzola,* 2016 ONSC 3126, at para. 36.

[24] I will consider both the case law and the *Rules* as I assess and answer the two questions set out in *MacDonald Estate*.

(1) Did NC receive confidential information relevant to the Class Action?

[25] I agree with the moving parties that the core issue in both the Toronto Application and the Taxidriver Class Action is the alleged illegality of Uber's operation. I am therefore persuaded that the two matters are sufficiently related and that it was "reasonably possible" that NC may have acquired some confidential information that "could be relevant" to the Class Action.

[26] I am satisfied, however, on the evidence presented, that in actual fact "no information was imparted which could be relevant."[18] I make this finding based on the following uncontroverted evidence.

[27] While at Goodmans, NC worked with the competition group that was located on a separate floor. He was not a member of the litigation group, and he swears he acquired no confidential information relating to the Toronto Application that could be used to Uber's prejudice in the Class Action.

[28] NC billed 13.1 hours to the Uber file for the time he spent preparing a paper with slides that the head of the competition group would present at an upcoming OECD conference in Paris. There is no indication that NC considered or used any confidential information when drafting this paper, and there is no suggestion that information contained in a paper that was being prepared for public presentation could somehow be confidential. According to NC, he was researching issues of transparency and predictability in countries where these issues were "problematic compared to the norms in Western Europe, Canada and the United States." NC was told by Goodmans to "just focus on making sure your paper is an excellent paper and your slides are well done. We're not going to bill the client." Indeed, as it turned out, his 13.1 hours working on the conference paper and slide presentation were not billed to Uber.

[29] It is true that NC attended the court hearing of the Toronto Application, but he did so as a member of the public "on [his] own volition" and not as part of the litigation team. NC wanted "to provide a summary to [his competition] colleagues which may be related to competition law issues."

[30] The moving parties made much of the fact that NC was copied on court documents and was also copied on dozens of Uber-related emails during his time at Goodmans. But, the court documents in question had already been filed and were thus in the public

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[18] *MacDonald Estate*, *supra*, note 3, at 1260.

domain. As for the emails, none of the emails in question were described with any precision or presented to the court (even heavily redacted) for review or evaluation.

[31] This brings me to an important point. In *Celanese Canada*,[19] the Supreme Court noted that "the contents" of the confidential information "and the degree to which [it is] prejudicial" are factors that should be considered in deciding a removal motion.[20] No one, of course, expects the moving party to disclose the actual information that it seeks to protect, "but some particulars are warranted, given the remedy sought."[21]

[32] Here, apart from broad generalities, theoretical possibilities and frankly, bald assertions, the Uber defendants made no effort to adduce any meaningful evidence – even heavily redacted evidence – to support their submission that NC was privy to confidential information: no evidence about the content of the docket items relating to the 13.1 hours that NC had billed to the Uber file; no evidence about any of the emails; and no evidence from anyone who, along with NC, was part of any meeting or teleconference where confidential information had been disclosed or discussed. Instead, the moving parties rely on broad generalities and bald assertions.

[33] The closest that the moving parties come to providing a meaningful example that would arguably support their submission that confidential information may have been acquired, is found on the second to last page of their factum. They refer to the possibility that NC may have acquired confidential information relating to the damages issue. The thrust of the submission, however, comes down to the following syllogism:

1. Both the Toronto Application and the Taxidriver Class Action involve issues of marketplace competition (between the taxi industry and Uber).

2. While at Goodmans, NC worked in the competition law group on some competition matters.

3. Therefore, it follows that NC acquired confidential information and Sutts Strosberg must be removed as Class Counsel.

[34] This cannot be a serious submission.

[35] Based on the uncontroverted evidence that is before me, I have no difficulty concluding that the likelihood that NC acquired confidential information while working

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[19] *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189.

[20] *Ibid*, at para. 59.

[21] *Stoneman v. Gladman*, [2003] O.J. No. 2676 (Ont. Div. Ct.), at paras. 26-27.

as an associate in Goodmans' competition group, that could be prejudicial to Uber in the Taxidriver Class Action, is minimal to non-existent.

[36] I therefore answer the first-prong of the *MacDonald Estate* test in favour of NC and Sutts Strosberg. I am satisfied that it is highly unlikely that confidential information was imparted to NC while at Goodmans which could be relevant to the Class Action.

(2) Is there a risk that the confidential information will be used to Uber's prejudice?

[37] If I am wrong in making this finding, and if NC did acquire some confidential information that could be prejudicial to Uber in the ongoing Class Action, I am persuaded that the second-prong of the *MacDonald Estate* test should be answered in favour of the responding party. That is, I am satisfied that the risk that such confidential information was or could have been conveyed to Sutts Strosberg during the first 30 days before the full screen was established is minimal to non-existent.

[38] I make this finding based, again, on the uncontroverted evidence.

[39] In doing so, I acknowledge the "strong inference that lawyers who work together share confidences."[22] But, as in any removal motion, one must consider the evidence.

[40] Even before he was hired, JS made clear to NC that he would not be involved in any Uber matter. He was unable to access the Uber files electronically because of the internal procedures already in place. He was unable to access the paper files because he was geographically removed (by some 400 kilometres) from the Windsor office where they were located. As NC put it:

> I was an island unto myself. I was in Toronto by myself. The other lawyers were in Windsor. So we were just getting the paint on the walls, the pictures on the wall, the desks … literally no desks at the time. So I was still operating sort of on a stool and just getting photocopies and stuff … just getting the office set up literally from scratch.

[41] The only potential for harm was if NC decided to contact one of the Windsor lawyers, by telephone or email, to encourage a discussion about the Uber litigation and share whatever confidential information he had acquired while at Goodmans. But, as NC explained, he would never do this: "I'm also a lawyer, so professionally I'm not going to go about saying 'Hey guys let's talk about a file' knowing full well that I have a duty of confidentiality to my former clients even if it's non-billable."

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[22] *MacDonald Estate, supra*, note 3, at 1262.

[42] In any event, Sutts Strosberg filed explicit affidavit evidence from the handful of lawyers working on the Uber matters that no such contacts or discussions ever occurred. I am, of course, mindful of what was said by the Supreme Court in *MacDonald Estate* that conclusory and self-serving lawyer "affidavits without more" will not suffice.[23] Here, however, there is "more" – namely: the clear decision made by JS, before NC was hired by the respondent law firm, that NC would not be involved in any Uber matter; the geographic separation from the Windsor office; NC's understanding of his professional obligations as a lawyer; and the law firm's pre-existing internal procedures that effectively walled off NC from any electronic access to the files in question.

[43] This is not a case like *MacDonald Estate* where the entirety of the evidence consisted of "trust me" affidavits from self-interested legal counsel. Here, there is evidence of "independently verifiable steps"[24] that, in combination, amounted to at least a partial screen. In my view, given the uncontroverted evidence about the nature and extent of the so-called "confidential information" allegedly acquired by NC, the respondent law firm's actions during the 30 days before the full screen was implemented, and in particular when NC joined the firm, were completely reasonable.

[44] The Windsor office should not have asked NC to commission the two affidavits, but on the facts herein, the error was *de minimis*. No confidential information was obtained (the affidavits were filed the same day) and this misstep alone cannot amount to a disqualifying conflict of interest. As the Supreme Court noted in *Celanese Canada*,[25] in modern litigation "[m]istakes will be made" and "[t]here is no such thing ... as automatic disqualification."[26] And, as noted by a judge of this court, "[I]t is not every case where a potential conflict of interest arises that the court will come to the conclusion that a reasonable person would conclude that confidences will be breached."[27] Indeed, "a technical conflict which is minor in nature should not be taken so seriously as to deprive a party of its choice of counsel."[28]

[45] To track the language in *MacDonald Estate*, I am satisfied on the basis of clear and convincing evidence that when NC joined Sutts Strosberg all reasonable measures were taken to ensure the non-disclosure of confidential information. Given that JS

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[23] *Ibid*, at 1263.

[24] *Ibid*, at 1264.

[25] *Celanese Canada, supra*, note 19.

[26] *Ibid*, at para. 56.

[27] *A Big Mobile Sign Company Inc. v. Curbex Ltd. et al*, 2016 ONSC 2053, at para. 38.

[28] *Standard Life Assurance Co. v. Cineplex Odeon Corp.*, [2001] O.J. No. 1321 (S.C.J.) at para. 27.

reasonably believed that NC had not been involved in the Toronto Application and had acquired no such information, the partial screen that was set in place when NC first joined his new firm was completely reasonable in the circumstances. Nothing more had to be done.

[46] The "full screen" that was established upon receipt of the Goodmans March 21 letter continues in place. Nothing more needs to be done.

[47] I am reassured in this analysis by the Law Society's *Rules of Professional Conduct* and the related commentaries. The *Rules* require that the "risk" that confidential information may be disclosed must be "substantial" and "serious"[29] and more than "a mere possibility that the impairment will occur;"[30] that the new law firm "must exercise professional judgment" in deciding what is required by way of confidentiality screens;[31] that the "institutional structure" of a firm, including "reporting relationships, function, nature of work, and geography" can require relatively fewer measures to ensure the non-disclosure of client confidences; and that if "lawyers in separate units, offices or [departments] do not 'work together' with other [lawyers] in other units, offices or departments, this will be taken into account in the determination of what screening measures are 'reasonable.'"[32]

[48] Each of these comments or guidelines apply here. The alleged conflict of interest, even if one can be established, does not amount to a disqualifying conflict that justifies the removal of Sutts Strosberg on the Class Action. In my view, no fair minded person would suggest otherwise.

Conclusion

[49] Tracking the language in *MacDonald Estate*, I am persuaded on the facts that a reasonable member of the public, who is in the possession of these facts, would conclude that no unauthorized disclosure of confidential information had occurred or would occur.[33]

[50] As already noted, this is not a case like *MacDonald Estate* where the lawyer in question "actively worked on the very case" at hand and "was privy to many

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[29] Rule 1.1-1.

[30] Rule 3.4-1, Commentary, at para. 3.

[31] Rule 3.4-20, Commentary, at para. 1.

[32] Rule 3.4-20, Commentary, at para. 2.

[33] *MacDonald Estate, supra,* note 3, at 1263.

confidences."[34] The moving parties in this case, tried hard to advance the same dramatic allegation. But, in doing so, they were confronted by uncontroverted evidence to the contrary. Rather than providing the court with meaningful, even heavily redacted, evidence (which was readily available if indeed it existed), they elected to rely instead on highly generalized and theoretical assertions.

[51] Counsel for Uber was adamant that this removal motion was not simply a tactic to derail or delay the proposed class action but was brought in good faith and out of a genuine concern that confidential information prejudicial to Uber may have been imparted to Sutts Strosberg. I am prepared to accept that the motion was brought in good faith. I find, however, for the reasons set out above, that the motion is without merit and does not succeed.

Disposition

[52] The motion to remove Sutts Strosberg as Class Counsel in this proposed class proceeding is dismissed with costs.

[53] The parties have agreed that a fair and reasonable costs award is $20,000. Costs are therefore fixed at $20,000 all-inclusive, payable forthwith by the Uber defendants to Sutts Strosberg LLP.

Belobaba J.

Date: September 30, 2016

[34] *Ibid*, at 1240 and 1264.