

***An Update has
Arrived in Your
Library for:***

**Please circulate this notice to anyone
in your office who may be interested
in this publication.**

Distribution List

	<input type="checkbox"/>

CONFLICTS OF INTEREST

by M. Deborah MacNair

Release No. 32, December 2018

Highlights:

This release features updates to the commentary and case law in chapters 4 (Civil Litigation and Other Civil Matters: Specific Lawyer Professional Issues), 5 (Lawyers' Issues: Criminal Law), 5A (The Duty of Loyalty) and 6 (Lawyer Personal Interests) as well as updates and additions to the Words & Phrases section.

Case Law Highlights:

Civil Litigation and Other Civil Matters: Specific Lawyer Professional Issues — Changing Jobs — The Aftermath of Martin v. Gray — Confidential Information — The case of *Fereidooni v. Burnham* suggests that the court can apply principles of common sense in interpreting of what comes within the ambit of confidential information. In that case, the lawyer who was the subject of the conflict of interest allegation had

THOMSON REUTERS CANADA® Customer Support

1-416-609-3800 (Toronto & International)

1-800-387-5164 (Toll Free Canada & U.S.)

Fax 1-416-298-5082 (Toronto)

Fax 1-877-750-9041 (Toll Free Canada Only)

E-mail CustomerSupport.LegalTaxCanad@TR.com. This note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

begun his work on the file as an articling student and then moved on to several different firms. The defendant firm attempted to minimize the involvement of the lawyer in the file and argue that, in any event, the law firm had put effective screens in place to prevent the possible misuse of confidential information. The court reviewed the principles from *Martin v. Gray* and the relevant rules from the law society. Interestingly, the defendant law firm asserted that there was a difference in meaning with respect to “impart” and “possess” confidential information under the test in *Martin v. Gray*. The lawyer did not remember anything about the meeting and there were no records, including time sheets, as evidence of his participation in the meeting. The court did not agree with the distinction and concluded that “possess” is used in the rules to distinguish between when a transferring lawyer is involved in a matter from the situation where the lawyer was a member of the firm but not directly implicated in the file. However, with respect to the issue of the scope of the concept of confidential information, the court noted that a casual meeting with the lawyer during an interview process at a restaurant was not evidence of the disclosure of confidential information. The law firm was ultimately disqualified from acting further on the file; *Fereidooni v. Burnham*, 2018 CarswellAlta 991 (Alta. Q.B.).

Civil Litigation and Other Civil Matters: Specific Lawyer Professional Issues — Ineffective Assistance of Counsel — Media Tube Corporation argued that its former law firm had a divided loyalty as the firm also acted for Microsoft on an unrelated matter which thereby, according to the submission, resulted in preferential treatment for Microsoft. Media Tube Corporation claimed that there was a link between Microsoft and the technology that was the subject of a patent infringement action. With respect to the argument for the ineffective assistance of counsel, Mr. Justice Stratas of the Federal Court of Appeal acknowledged the rarity of claiming this ground in civil appeals and that it was more frequently used in an appeal from a criminal conviction. In terms of criminal appeals, Mr. Justice Stratas noted that the test for the argument for the ineffective assistance of counsel, which has a “very high” threshold to meet, is the “counsel’s acts or omissions constituted incompetence and a miscarriage of justice resulted; the appellant must also demonstrate that the conduct fell within a wide range of “reasonable professional assistance“. The court noted that the standard for incompetence is a professional responsibility matter and does not fall within the jurisdiction of an appellate court in this instance. The rationale for establishing a high threshold, according to Mr. Justice Stratas, was that the court should refrain from second-guessing professional lawyers, who should be permitted to exercise their own judgment in developing trial strategy and that there is also a principle of finality that applies to trial judgments;

Mediatube Corp. v. Bell Canada, 2018 CarswellNat 3399 (F.C.A.).

Lawyers' Issues — Lawyers' Issues: Criminal Law — Time Delays - R. v. Jordan — A stay was granted on the basis of exceptional circumstances where defence counsel acknowledged that the victim in a criminal matter was a client of his Legal Aid Office where the defence counsel was employed. The trial was adjourned so that another counsel from outside could be appointed; *R. v. Noitcho*, 2018 CarswellSask 201 (Sask. Prov. Ct.).

Legislation, Code of Professional Conduct and Related Highlights:

None.

Practice Notes:

None.

December, 2018