

The Adviser



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P.A.S. Staff Changes

We are pleased to welcome to the staff of the Advisory Service, Ms. Ching Yuen Deng. She was called to the bar in 1983 and was a sole practitioner in Toronto until joining us in June of this year. The staff lawyers are now Alan Marshall, Brenda Duncan and Ching Yuen Deng. We are also pleased to advise that Ms. Deng is conversant in French.

Calls to the Advisory Service

We have a process of sorting calls by topic and/or available staff person. It will assist this process and reduce unnecessary delays if callers avoid asking for a staff lawyer by name unless it is a return call.

We require particulars of the caller's name, year of call to the bar and other information to confirm that we are responding to a member or a law firm. Brief information as to the subject matter to be discussed will assist us in directing calls to our staff lawyers or the Systems Assistant. The Service is confidential. Information requested is for our own Advisory Service records.

E. & O. - Uninsured Independent Title Searchers

Many real estate practitioners use the services of independent title searchers. In the event that a search provided by the title searcher is defective or incomplete, the lawyer would be liable for the defect or omission. The Errors and Omissions Department would like to be able to place the responsibility upon the shoulders of those who made the error or omission, and to claim against the independent title searcher for damages arising therefrom. However, many lawyers neglect to inquire as to whether or not the independent title searcher is insured. Lawyers should also be concerned about the amount of coverage held by the title searcher in these times of high property values.

Conflicts of Interest - Case Law

We are experiencing an increasing number of calls to the Service in the area of conflicts of interest. This is indicative of the profession having a greater awareness of potential problems in this area.

The courts have established certain tests when deciding whether to allow a solicitor to act in a potential conflict of interest situation. The "probability of mischief" test has been applied in Ontario in 1982 in Christo v. Bevan, 36 O.R. (2d) 797. The onus is on the applicant to show that there has been prejudice and mischief.

Many other Ontario cases take a stricter view towards conflicts and require simply that the applicant show "the appearance of impropriety". Steed & Evans Ltd. v. McTavish (1976), 12 O.R. (2d) 236. In some matrimonial cases the test of fairness has been adopted. Falls v. Falls (1979), 12 C.P.C. 270; Sniderman v. Sniderman (Ontario H.C.), May 29, 1981, (unreported).

The test of fairness or appearance of unfairness approach has also been adopted in non-matrimonial cases. MTS Int. Services Inc. v. Warnat Corp. (1980), 31 O.R. (2d) 221; Lukic v. Urguhart (1984), 47 O.R. (2d) 462.

In criminal cases the court balances the individual's right to select counsel of his choice with the basic principles of fundamental fairness. Re: Regina and Speid (1983), 43 O.R. (2d) 596.

"...while the 'probability of real mischief' test survives, the trend in Ontario is to apply the less stringent 'possibility of real mischief or prejudice' test or 'the appearance of impropriety' test." Szebelledy v. Constitution Insurance Co. of Canada et. al. (1985), 3 C.P.C. (2d) 170. The Szebelledy case was followed in the recent Supreme Court of Ontario decision of Kruse v. Wiesco Canada Ltd. et. al. (1987), 58 O.R. (2d) 729.

Real Estate - Duty of Care

In the area of real estate, members' attention is drawn to the Ontario District Court decision of Family Trust Corporation v. Morra et. al., 39 R.P.R. 187, which was a successful action by a real estate broker against a vendor's solicitor for recovery of the balance of the real estate commission. The court held that the direction contained in the agreement of purchase and sale was an equitable assignment of the proceeds of sale and that once the solicitor received the proceeds of sale in his trust account the equitable assignment was then firm and binding on the solicitor.

On appeal to the Divisional Court (unreported), Mr. Justice Trainor, reversing the lower court's decision, said that the commission clause in the Agreement of Purchase and Sale added nothing to the obligation of the client/vendor under the listing agreement. "...there was no consideration from the agent for the client/vendor's irrevocable direction to his solicitor. As a consequence, in law, if not in morality, the client was free to withdraw his direction and the solicitor was bound to comply without incurring liability to the plaintiff (agent)."

A word of caution - this case involved client instructions not to pay the balance of commission. Hedley Byrne, & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 (H.L.) still lurks in the background. Client instructions in writing should be obtained.