Citation: Ostrowski v Weinstein et al, 2023 MBCA 3
Date: 20230116
Docket: AI22-30-09748

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

B E T W E E N *:*

STANLEY FRANK OSTROWSKI	) ***T. G. Frohlinger****,*
	) ***D. L. Robins*** *and*
(Plaintiff) Appellant	) ***J. D. H. King***
	) *for the Appellant*
- and -	)
	) ***J. A. Baigrie*** *and*
HYMIE WEINSTEIN and MYERS LLP	) ***T. Yakimchuk***
	) *for the Respondents*
(Defendants) Respondents	)
	) ***A. L. Pledger*** *and*
- and -	) ***B. L. Barnes Trickett***
	) *for the Defendants*
THE ATTORNEY GENERAL OF CANADA, PETER MICHAEL KREMER, JUDITH MARJORY WEBSTER, PAMELA CLARKE, ROBERT HENRY DE GROOT, MITCHELL DAVID MCCORMICK, JACOBUS HAASBEEK also known as JACK HAASBEEK and JAKE HAASBEEK, THE CITY OF WINNIPEG, HERBERT B. STEPHEN in his capacity as CHIEF OF POLICE and DANNY SMYTH in his capacity as CHIEF OF POLICE	) *R. H. de Groot, M. D. McCormick, J. Haasbeek, The City of Winnipeg, H. B. Stephen in his capacity as Chief of Police and D. Smyth in his capacity as Chief of Police*
	) *Appeal heard:*
	) ***November 9, 2022***
	)
	) *Judgment delivered:*
(Defendants)	) ***January 16, 2023***

On appeal from 2021 MBQB 269

BEARD JA

I. THE ISSUES

[1] The plaintiff, Stanley Frank Ostrowski (Mr. Ostrowski), is appealing the dismissal, by way of summary judgment, of his claim in negligence against the defendants Hymie Weinstein (Mr. Weinstein) and Myers LLP (together, the Weinstein defendants).

[2] The one ground of appeal referenced by Mr. Ostrowski is that the motion judge erred in failing to find that Mr. Weinstein, a lawyer, owed a duty of care to him, as a non-client. That one ground raises three separate issues, which are set out at para 13 herein.

II. THE FACTS AND BACKGROUND

[3] In 1987, Mr. Ostrowski was convicted of first degree murder in the shooting death of Robert Nieman (Mr. Nieman). In 2018, this Court quashed the conviction and entered a stay of proceedings after the provincial Crown agreed that the failure to disclose two pieces of evidence, referred to as the Jacobson report and the Lovelace deal (together, the undisclosed evidence), to the defence led to a miscarriage of justice (see *R v Ostrowski*, 2018 MBCA 125) (the reference decision). Mr. Ostrowski has now sued the defendants in this matter for damages arising out of that wrongful conviction.

[4] In 1986, Mr. Ostrowski was a high-level cocaine trafficker and Matthew Lovelace (Mr. Lovelace) was one of his dealers. On September 13, 1986, Mr. Lovelace was arrested for, and charged with, cocaine trafficking. He quickly became a police informant, giving the police information about

Mr. Ostrowski's drug operations. With that information, the police searched Mr. Ostrowski's home and found cocaine hidden in two secret compartments.

[5] Mr. Ostrowski was convinced that someone had informed on him. Mr. Lovelace believed that Mr. Ostrowski had put a hit out on a friend, and, on September 24, 1986, he so advised the police, speaking to Sergeant Nels Jacobson. Sergeant Jacobson's personal notes from the conversation and his report are referred to as the "'Jacobson' report" (at para 4). Later that night, Mr. Nieman was shot, and Mr. Ostrowski and others were charged with his murder. Mr. Lovelace was a key witness for the provincial Crown, linking Mr. Ostrowski to the murder.

[6] Later in the fall of 1986, Mr. Lovelace retained Mr. Weinstein to represent him on his drug charge. While Mr. Weinstein was not involved in Mr. Lovelace's discussions with the police related to either his being an informant or the murder trial, he became aware of that involvement and he approached the defendant, Judith Webster (Ms Webster), who was a federal Crown, about Mr. Lovelace getting consideration on his drug charge if he testified in the murder trial. Ms Webster made a note, dated December 12, 1986 (Ms Webster's note), of her discussion with Mr. Weinstein, indicating that, "[s]ubject to confirmation with [the] provincial crown", the federal Crown would stay Mr. Lovelace's drug charge "[i]f [Mr.] Lovelace 'comes thru with the goodies'". This is referred to as the "Lovelace deal".

[7] Ms Webster's note also indicated that Mr. Weinstein did not want Mr. Lovelace to know about the deal "so as not to taint his evidence" (at para 5). A police officer, the defendant Jacobus Haasbeek also known as Jack Haasbeek and Jake Haasbeek (Mr. Haasbeek), was also privy to the Lovelace

deal, but the provincial Crown was never consulted about the deal and knew nothing about it.

[8] Mr. Lovelace testified at Mr. Ostrowski's murder trial and gave key evidence linking him to the murder. When cross-examined, he denied that there was any deal in exchange for his testimony. In November 1988, after the appeal of Mr. Ostrowski's conviction was argued, but before this Court released its decision, Mr. Lovelace's drug charge went to trial. The federal Crown did not call any evidence, so the charge was dismissed.

[9] Mr. Ostrowski's appeals to this Court and to the Supreme Court of Canada were dismissed. Sometime in 2001, the then Association in Defence of the Wrongly Convicted (the AIDWYC) became involved in Mr. Ostrowski's case. It obtained a copy of Mr. Lovelace's drug file from the federal Crown in May 2004 and then discovered the undisclosed evidence.

[10] In 2009, Mr. Ostrowski applied for a ministerial review of his conviction under section 696.1 of the *Criminal Code*. The Minister of Justice referred the matter to this Court. After receiving evidence from 12 witnesses (not including Mr. Weinstein), the provincial Crown conceded that there had been a miscarriage of justice because the non-disclosure of the Lovelace deal and the Jacobson report violated Mr. Ostrowski's right to make full answer and defence. The parties agreed that the conviction should be set aside, and the only issue to be determined was the appropriate remedy—an acquittal or a new trial. This Court set aside Mr. Ostrowski's murder conviction but declined to order an acquittal, finding that, even taking the non-disclosure into account, there was evidence upon which a jury could reasonably convict Mr. Ostrowski. This Court ordered a new trial and a judicial stay of those

proceedings due to the length of time since the events occurred and the amount of time that Mr. Ostrowski had already spent in custody.

[11] Mr. Ostrowski then filed this claim for damages against all of the defendants based on the non-disclosure of the Lovelace deal and the Jacobson report (the negligence claim). He alleged that there was an agreement and a conspiracy among Mr. Weinstein, police officers Mr. Haasbeek and Anton Cherniak (Mr. Cherniak), and federal Crown attorneys Ms Webster, Peter Kremer (Mr. Kremer) and Marley Dash (Mr. Dash) to withhold the existence of the Lovelace deal and that the non-disclosure gives rise to a claim in negligence. Specifically, Mr. Ostrowski alleged that Mr. Weinstein owed him a duty of care and breached that duty by not disclosing the Lovelace deal to the provincial Crown. This caused Mr. Lovelace to give false evidence and prevented Mr. Ostrowski from challenging Mr. Lovelace's credibility, breaching his right to make full answer and defence and leading to a miscarriage of justice.

[12] The Weinstein defendants applied for summary judgment dismissing the negligence claim against them, arguing that Mr. Weinstein did not owe a duty of care to Mr. Ostrowski. The parties agreed that the underlying facts were not contentious, that the only issue involved a question of law, and that there was no need for a trial to determine those issues. The motion judge agreed that summary judgment was an appropriate means of determining the issue (see r 20.03(4) of the MB, *Court of King's Bench Rules*, MR 553/88).

[13] As noted earlier, while Mr. Ostrowski is alleging only one ground of appeal, that ground raises three separate issues:

- whether the motion judge erred by failing to find that the requisite proximity element of Mr. Ostrowski's negligence claim arose because Mr. Ostrowski was a third party beneficiary of a contract among Mr. Weinstein, Ms Webster, Mr. Kremer, Mr. Dash, Mr. Haasbeek and Mr. Cherniak, referred to as the Lovelace deal (explained at para 6 herein); that Mr. Weinstein breached that contract; and that that breach was the proximate cause or materially contributed to Mr. Ostrowski's wrongful conviction and resulting damages (the third party beneficiary argument);

- whether the motion judge erred by failing to find that Mr. Weinstein had a duty of care to Mr. Ostrowski arising out of his duty as an officer of the court and/or the exceptional duty of a lawyer to a non-client (the duty to a non-client argument); and

- whether the motion judge erred by failing to find that Mr. Weinstein owed a duty of care to Mr. Ostrowski following Mr. Lovelace's acquittal on the drug charge (the duty arising after Mr. Lovelace's acquittal argument).

III. THE LAW AND THE STANDARD OF REVIEW

[14] The standard of review of a decision granted on summary judgment is well known. The decision to grant or deny a motion for summary judgment is a discretionary decision, reviewed on a deferential standard, and will only be set aside if there is a material error as to the law or the facts, or if the

decision is so clearly wrong as to be unjust (see *Business Development Bank of Canada v Cohen*, 2021 MBCA 41 at para 32).

[15] Where a motion judge applies an incorrect principle of law or errs with regard to a purely legal question such as the elements that must be proven for the plaintiff to make out the cause of action, the decision will be reviewed on a correctness standard (see *Housen v Nikolaisen*, 2002 SCC 33 at para 8).

[16] As the motion judge stated, there is no dispute that lawyers owe a duty of care to their clients. The issue in this case is whether they owe a duty of care to those who are non-clients and, if so, in what circumstances (see para 12).

[17] Mr. Ostrowski states that the facts are not in dispute and that the motion judge correctly set out the applicable law regarding a duty of care under the *Anns/Cooper* test (see *Anns v Merton London Borough Council*, [1978] AC 728 (HL (Eng)), adopted in *Cooper v Hobart*, 2001 SCC 79); his position is that she erred in its application.

[18] The following is a brief summary of the law regarding duty of care, as explained by the motion judge:

- whether or not a duty of care exists is a question of law (see para 11; see also *Rankin (Rankin's Garage & Sales) v JJ*, 2018 SCC 19 at para 19);

- the onus is on the plaintiff to establish a duty of care based on the *Anns/Cooper* test (see para 12; see also *Rankin* at para 17);

- an *Anns/Cooper* analysis to determine duty of care is not required if the case at issue clearly falls within a relationship previously recognized in the jurisprudence as giving rise to a duty of care (see para 19; see also *Rankin* at para 18);

- there are two parts to the *Anns/Cooper* test: (i) the plaintiff must establish a prima facie duty of care, being (a) that damage to the plaintiff was a reasonably foreseeable consequence of the defendant's act; (b) that the relationship between the plaintiff and the defendant was of sufficient proximity that it would be just and fair to impose a duty of care; and (c) whether, notwithstanding proximity, there are policy considerations that militate against finding a duty of care; and (ii) if a prima facie duty of care is established, the defendant has the onus of showing that there are residual public policy reasons why the duty should not be recognized (see para 12);

- to establish a duty of care by a lawyer to a non-client, more is required than foreseeability of loss to the plaintiff—there must also be evidence of a relationship of proximity (see para 16); and

- the fact that the plaintiff has suffered damage as a result of the actions of a lawyer does not itself establish a duty of care (see para 18).

IV. THE MOTION JUDGE'S DECISION

[19] Established duty of care: The motion judge stated that the narrow categories of cases where a lawyer was found to have a duty of care to a non-client arose where a lawyer either undertook an act for a non-client or the non-client relied on an act or advice given by the lawyer. (See *Tracy et al v Atkins* (1979), 105 DLR (3d) 632 (BCCA); and *Esser v Luoma*, 2004 BCCA 359.) She found that those cases were not analogous to the present case. She concluded that the claim of a duty of care owed by Mr. Weinstein was a novel one that must be established by applying the *Anns/Cooper* test (see paras 20-21).

[20] Foreseeability of the risk of injury: In framing the foreseeability issue, the motion judge relied on *Rankin*, wherein Karakatsanis J, for the majority, stated (at paras 25-26):

> The facts of this case highlight the importance of framing the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff's situation. Here, the claim is brought by an individual who was physically injured following the theft of the car from Rankin's Garage. The foreseeability question must therefore be framed in a way that links the impugned act (leaving the vehicle unsecured) to the harm suffered by the plaintiff (physical injury).
>
> . . . The proper question to be asked in this context is whether the type of harm suffered — personal injury — was reasonably foreseeable to someone in the position of the defendant when considering the security of the vehicles stored at the garage.

[21] The motion judge stated that the foreseeability issue was not whether Mr. Weinstein could see that Mr. Lovelace would give false evidence

that there was no deal and therefore foresaw the consequences to Mr. Ostrowski, as argued by Mr. Ostrowski, but whether he could foresee that the false evidence would cause damage to Mr. Ostrowski (see paras 22-23). More specifically, the motion judge said that the proper question to be asked in this case was not whether it was reasonably foreseeable that Mr. Lovelace would deny the deal, given that it was conceded that there was no evidence that he knew about the deal, but whether it was reasonably foreseeable that Mr. Lovelace's not knowing about the deal would affect his credibility as a witness (see paras 23-25).

[22] The motion judge noted that, as stated in the reference decision, the Lovelace deal was relevant to Mr. Ostrowski's murder trial in two ways. If Mr. Lovelace knew about the deal but denied it, his denial would be untruthful, which would affect his overall credibility as a witness. Further, the fact of receiving consideration for his testimony, if known to him, would raise the question of whether he was testifying untruthfully against Mr. Ostrowski in exchange for a deal on his drug charge, again raising credibility issues (see para 25).

[23] The motion judge stated that Mr. Lovelace's credibility could only have been affected by the Lovelace deal if he knew about it; however, Mr. Ostrowski conceded at the hearing that there was no such evidence. She concluded that, because Mr. Lovelace did not know about the deal, he did not knowingly give false evidence and it could not be suggested that he had a motive to lie. She found that this is what Mr. Weinstein wanted, according to Ms Webster's note.

[24] The motion judge concluded that, because Mr. Weinstein believed that Mr. Lovelace did not know about the Lovelace deal, it was not reasonably foreseeable to him that the deal could affect Mr. Lovelace's credibility and, therefore, the outcome of the trial, thereby causing damage to Mr. Ostrowski. Thus, the harm to Mr. Ostrowski was not reasonably foreseeable to Mr. Weinstein (see paras 26-27).

[25] Proximity: The motion judge found (at para 28):

> The relationship between [Mr.] Ostrowski and [Mr.] Weinstein was not such that it would establish proximity. [Mr.] Weinstein never had any contact with [Mr.] Ostrowski or his counsel. He never made any representations to him, nor is there any suggestion that [Mr.] Ostrowski placed any reliance on anything [Mr.] Weinstein said or did.

[26] Mr. Ostrowski filed a report by Gavin MacKenzie (Mr. MacKenzie), a lawyer experienced in lawyers' professional responsibilities, that provided an opinion on Mr. Weinstein's ethical obligations. Mr. Ostrowski argued that those obligations formed the basis of a duty of care. The motion judge stated that, while Mr. MacKenzie provided an opinion as to Mr. Weinstein's professional duties to Mr. Lovelace and to the court, he did not offer an opinion on whether Mr. Weinstein owed a duty to Mr. Ostrowski (see paras 29-30).

[27] The motion judge found that "whatever duty [Mr. Weinstein] owes to his client or the court does not give rise to a cause of action by [Mr.] Ostrowski" (at para 30). She also stated that, while those ethical obligations may be relevant to the standard of care, they are not relevant to

the duty of care, which are two separate concepts (*ibid*; see also *Esser* at para 30; and *Scott v Valentine*, 2012 ONSC 6349 at para 34).

[28] Policy considerations: The motion judge found that imposing a duty of care that required Mr. Weinstein to disclose the Lovelace deal to others would require him to breach his duty of confidentiality to his client, and would also put him in a conflict of interest between representing his client and representing the interests of a non-client. As she noted, both of these would lead him to breach the same code of conduct that Mr. Ostrowski was relying on to establish a duty of care to him, as a non-client (see para 32).

[29] Residual policy considerations: The residual policy concern referenced by the motion judge is that of creating "the spectre of unlimited liability to an unlimited class" (at para 33, citing *Cooper* at para 37).

[30] The motion judge explained that, while the parties focused on the failure to disclose the Lovelace deal, the details of the offending conduct relate to whether there was a breach of the standard of care. She said that the "existence of a duty is based on a broader or more general obligation of care for the benefit of the other. Focusing on the proper issue reinforces the need to establish proximity" (at para 34).

[31] She found that (at para 35):

> [Mr.] Ostrowski's argument suggests that a duty of care is established on the basis of foreseeability alone, that is to say, [Mr.] Weinstein owed a duty of care because he should have foreseen that failure to disclose the Lovelace deal would cause harm to [Mr.] Ostrowski. But if foreseeability is enough, where would recognition of a duty of care lead? Would a lawyer have to consider the interests of a co-accused in determining the steps taken in his client's interests? Would a lawyer have to be satisfied

> that a client does not pose a risk to the public before seeking judicial interim release?

[32] On this basis, she concluded that the duty of care alleged by Mr. Ostrowski would “turn the practice of law on its head. How do lawyers fulfil their ethical obligation to represent their clients resolutely if they must also consider the interests of non-clients?” (at para 36).

[33] The motion judge concluded that Mr. Weinstein did not owe a duty of care to Mr. Ostrowski, so she dismissed the claim against him in negligence and the claim against Myers LLP based on vicarious liability (see para 37).

V. ANALYSIS

Third Party Beneficiary Argument

[34] Mr. Ostrowski’s third party beneficiary argument is as follows:

- in relation to the proximity branch of the first part of the *Anns/Cooper* test, Mr. Ostrowski argues that Mr. Weinstein had a contractual duty, as evidenced by Ms Webster’s note, to inform the provincial Crown of the Lovelace deal and to seek its approval;

- Mr. Weinstein’s failure to do so constituted a breach of the Lovelace deal;

- Mr. Ostrowski was a third party beneficiary of the Lovelace deal because, had the provincial Crown been advised of the Lovelace deal, it would have been required to disclose that

information to the defence, who could have used it to challenge Mr. Lovelace's credibility;

- Mr. Weinstein's breach of the Lovelace deal materially affected Mr. Ostrowski's right to make full answer and defence; and

- proximity is established because Mr. Ostrowski derived a benefit from the terms of the Lovelace deal as a third party beneficiary.

[35] Mr. Ostrowski's counsel agreed at the appeal hearing that the argument that Mr. Ostrowski was a third party beneficiary to a contract was not raised either in the statement of claim or at the summary judgment hearing. Thus, if this Court is to consider this argument, it must do so as an issue raised for the first time on appeal.

[36] This Court has addressed the criteria for raising a new issue on appeal in several recent decisions. In summary:

- the general rule is that, where an issue was not raised in the pleadings or considered by the trial judge, it should not be considered for the first time on appeal;

- the Court has discretion to consider a new issue if three requirements are met:

    1. there must be "no doubt" that further evidence would not have been adduced had the new issue been raised at the hearing (*Sawatzky v Sawatzky*, 2018 MBCA 102 at para 23);

2. the new issue must not cause "procedural prejudice" to the opposing party (*ibid*); and

3. a refusal to permit the new issue to be raised must not result in an injustice or "undue process" (*ibid*).

[37] The burden of establishing these requirements lies with the party raising the new issue, and the test is a stringent one. (See *The Rural Municipality of St Clements v Zucawich*, 2013 MBCA 65 at paras 92-98; *Samborski Garden Supplies Ltd v MacDonald (Rural Municipality)*, 2015 MBCA 26 at para 27; *Guindon v Canada*, 2015 SCC 41 at paras 19-23; *R v Beaulieu*, 2015 MBCA 90 at paras 60-68; *Wolfe et al v Taylor et al*, 2017 MBCA 124 at paras 6-8; *Sawatzky* at paras 23-25; *Dakota Ojibway Child and Family Services v KRF et al*, 2018 MBCA 104 at para 29; and *Davis et al v Her Majesty the Queen in Right of the Province of Manitoba*, 2019 MBCA 78 at paras 15-17.)

[38] In my view, the test is not met in this case. On the first requirement, while Mr. Ostrowski states in his factum that the facts are "not in dispute", the facts necessary to establish this issue are in dispute. It is clear from Mr. Weinstein's statement of defence that there is no agreement between the parties that the Lovelace deal constituted a contract, who was a party to that contract, the terms of that contract or whether Mr. Weinstein breached the contract by failing to disclose the Lovelace deal to the provincial Crown or to seek its approval.

[39] These are important factual findings and findings of mixed fact and law that should be determined by a trial judge, after hearing evidence.

[40] On the second requirement, proceeding with this issue would prejudice Mr. Weinstein because he has not had the opportunity to call evidence on issues like contractual intention, what, if any, discussion there was about who would speak to the provincial Crown, etc. He did not give evidence at the reference hearing and he was not a party to it, so he did not have any opportunity to make representations.

[41] On the third requirement, the other defendants would also be prejudiced. Mr. Ostrowski alleges that the parties to the Lovelace deal, in addition to Mr. Weinstein, are three federal Crowns and the named police officers. In their statements of defence, all deny the existence of a contract or even of a deal. Not only have they had no opportunity to call evidence on this issue, they have not even been given notice of this argument or the opportunity to address it.

[42] Fourthly, if the other defendants are not bound by the finding of a contract and third party beneficiary rights in this matter, there is a risk of inconsistent findings to the extent that those issues are revisited when those defendants' claims are considered separately.

[43] Finally, given that this contractual claim is not raised in the statement of claim, it could require the filing of an amended statement of claim in order for it to proceed, and Mr. Weinstein's counsel stated that he would raise a limitation defence to any amendment that alleged a new cause of action, such as in contract.

[44] As noted, Mr. Ostrowski's counsel agreed, at the appeal hearing, that this argument was not raised or argued at the summary judgment hearing. He also agreed that some of the facts required to establish this claim had not

been agreed between the parties, and he acknowledged that, in hindsight, this case was probably not suitable for determination by way of summary judgment.

[45] Therefore, this being a new issue raised for the first time on appeal, I am of the view that this Court should not exercise its discretion and allow it to proceed. I would dismiss this argument.

Duty to a Non-Client Argument

[46] Mr. Ostrowski argues that the motion judge also erred as follows:

- by treating the established duty of care between a lawyer and non-client as if it did not exist;
- in her application of the principles of foreseeability, as set out in *Rankin*, to the facts;
- in failing to find that Mr. Weinstein's duty as an officer of the court and as a lawyer to a non-client made him Mr. Ostrowski's "neighbour", thereby establishing proximity; and
- in failing to recognize the well-established policy concern against wrongful convictions as supporting the finding of a duty of care.

[47] In my view, these arguments were all raised at the summary judgment hearing and the motion judge gave a well-reasoned decision explaining her findings. I agree with her analysis and her findings, which I

would adopt. Having found that none of the alleged errors have been established, I would dismiss this argument.

Duty Following the Lovelace Acquittal Argument

[48] Mr. Ostrowski argues that the motion judge erred by failing to consider whether Mr. Weinstein's duty to Mr. Ostrowski and to the court to correct the misleading testimony and avoid a miscarriage of justice would prevail after Mr. Lovelace's drug charge was dismissed. He explained his position in the brief that he filed for the summary judgment motion as follows:

> . . .
> By the time the Lovelace deal was completed on November 16, 1988, [Mr.] Weinstein's duty to [Mr.] Lovelace had been discharged. There was no policy reason for his failure to disclose the existence, terms and completion of the Lovelace deal to avoid the wrongful conviction of [Mr.] Ostrowski.
> . . .

[49] In my view, there are several reasons why this ground of appeal cannot succeed.

[50] First, according to the argument on appeal, this ground rests on a finding that a duty of care has been established by Mr. Weinstein's contractual obligation to notify and seek approval of the Lovelace deal from the provincial Crown. As stated earlier, the factual finding of such a contract was not part of the agreed facts and has not been established; therefore, it cannot serve as the basis for a finding of proximity or a duty of care, either before the dismissal of Mr. Lovelace's drug charge or after.

[51] Second, this ground rests on the alternative finding of a duty of care arising out of the breach of Mr. Weinstein's duty as an officer of the court and/or as a lawyer to a non-client. These have been rejected as bases for a finding of proximity and a duty of care before the dismissal of Mr. Lovelace's drug charge, and that does not change after the dismissal.

[52] Finally, Mr. Ostrowski argued before the motion judge that Mr. Weinstein's duty to Mr. Lovelace was "discharged" upon the dismissal of Mr. Lovelace's drug charge. The motion judge referenced two ethical duties imposed on Mr. Weinstein as a lawyer: (1) the duty of confidentiality and (2) the duty to avoid a conflict of interest (see para 32). It is clear from the former Canadian Bar Association, *Code of Professional Conduct*, Ottawa: CBA, 1974 (relevant to these proceedings, but since revised) (the *1974 Code*) that both of these duties continue, unchanged, after the lawyer has ceased to act for the client. In relation to the duty of confidentiality, the rule clearly states: "The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client whether or not differences may have arisen between them" (at ch IV, commentary 4; see also The Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg: Law Society of Manitoba, 2011, ch 3.3-1, commentary 3, re-adopting the *1974 Code* without substantive changes).

[53] For these reasons, even though the motion judge did not specifically address this as a separate basis for finding either proximity or a duty of care, I am of the view that the argument has no merit. Thus, I would dismiss this argument.

VI. DECISION

[54] For these reasons, I would dismiss Mr. Ostrowski's appeal in its entirety. I would order one set of costs, under the tariff, to the Weinstein defendants.

Beard JA

I agree: leMaistre JA

I agree: Simonsen JA