CBA Task Force on Conflicts of Interest

Recent Canadian Cases – Update April 2010

Since the Task Force submitted its Final Report to the CBA in August 2008 and the CBA subsequently amended its Code of Professional Conduct in August 2009, the Task Force has continued to monitor Canadian court decisions relating to conflicts of interest issues. We are pleased that our work has been judicially noted[1] and that the CBA's proposed analysis of conflicts situations has been reflected in recent judgments.

The most recent court cases have focused on disqualifications and waivers.

When may a lawyer be disqualified from acting?

In assessing whether a conflict of interest exists when an adverse party is related to another client, the courts have considered a number of factors:

- whether the client entities are independent of each other
- whether they are "professional litigants", and
- whether the relationship between the lawyer and client requires that the lawyer not act for the affiliate or associate of the client.

So, in recent cases,

- an international parent union was not successful in disqualifying the lawyers who were acting for a local union affiliate[2]
- a securities brokerage was not successful in disqualifying the lawyers who were acting for its parent bank on routine collection matters[3]
- a single-purpose company was able to disqualify lawyers who were acting for another member of a small group of private, closely-held companies all owned by one family[4].

What is the test for disqualification?

R. v. Neil articulated a "bright line" test that "a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – even if the two mandatesare unrelated – unless both clients consent after receiving full disclosure (and preferably

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1 *Insight Venture Associates III, LLC v. Rampart Securities Inc.*, 2008 CanLII 53872 (ON S.C.); *Re 1964 Bay Inc.*(2008) 2008 CanLII 54295 (ON S.C.); 50 B.L.R. (4th) 280 ; *DBP v. RDM*, 2008 SKQB 455; *Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 222 v. Alberta (Human Resources and Employment)*, 2008 ABQB 225; *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168* 2008 CanLII 51089 (AB L.R.B.); *G. Raymond Chang v. Shopcast Televsion*, 2008 CANLII 63168 (ON S.C.)

2 *Operative Plasterers'*, FN 1

3 *McKenna v. Gammon Gold Inc.*, 94 O.R. (3d) 735 (O.S.C.)

4 *Terracap Investments Inc. v. 2811 Development Corporation*, 2010 ONSC 1183

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independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other."[5]

The Task Force proposed a distinction between related and unrelated matters and suggested that the appropriate approach for assessing a conflict is the "substantial risk principle" also articulated in *Neil* – that there is a conflicting interest when there is a substantial risk that a lawyer's representation of a client would be materially and adversely affected by the lawyer's own interest or by the lawyer's duties to another current client, a former client, or a third person.

In recent disqualification cases, the courts have used a substantial risk analysis, with a focus on the nature of the parties and the nature of the matter, rather than simply looking to see if a 'bright line' has been crossed.[6]

For example, in a Saskatchewan Court of Queen's Bench decision disqualifying a law firm from acting for a new client whose interests were, the court held, directly adverse to an existing client, Popescul J. wrote:

"I conclude that a sensible and necessary balance of the competing interests can be achieved by adopting the approach taken by the CBA Task Force. It reconciles the unrelated matter rule and the substantial risk principle …"[7]

And, deciding not to disqualify a law firm representing trustees in bankruptcy in separate proceedings, a Québec court considered these factors:

- the interests of justice
- the express or implied consent of the client
- the degree of prejudice to the parties
- any delay in raising the issue, and
- the good faith of the parties.[8]

The courts have also recently ruled that a law firm's knowledge about a client that is general and generic in nature – "getting to know you" information – is not a basis for disqualification.[9]

As well, the courts have distinguished between having confidential client information and having legal experience gained working for a former client in a specialized area of law. The former may raise questions of loyalty while the latter does not.[10]

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5 Para. 29, *R. v. Neil*, [2002] 3 S.C.R. 631

6 *Belair v. McAllister*, 2008 CanLII 43577 (ON S.C.), *Wallace v. Canadian Pacific Railway*, 2009 SKQB 369, *Quibell v. Quibell*, 2010 SKQB 83 and *R. v. Dunn* (unreported) but see *Lotech Medical Systems Limited v. Kinetic Concepts Inc.*, 2008 FC 1195 in which it was conceded that the law firm had to give up one of its two clients.

7 Para. 44, *Wallace v. Canadian Pacific Railway*, 2009 SKQB 369. Note that the decision has been appealed.

8 *Roy c. Ginsberg, Gingras*, 2009 QCCS 2199, 14 mai 2009

9 *Walsh v. TRA Company Ltd.*, 2009 NLTD 9; *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168*, 2008 CanLII 51089 (AB L.R.B.) .

10 *9112-6763 Québec c. Restaurants Investcor Inc.*, 2008 QCCS 6092, 8 décembre 2008

To what extent are advance waivers valid?

While securing a client's consent and waiver of conflicts in advance is good practice, the consent and waiver may not be sufficient to cover every situation.

In 2003, in *Chiefs of Ontario v. Ontario*[11] the court assessed the validity and scope of the advance consent provided to a law firm by one First Nation client who used the firm in a general counsel role when the firm also took on representation of 134 First Nations (the Chiefs of Ontario), which included their one First Nation client. The court found the consent valid – there had been independent legal advice – but ruled the scope of the consent did not allow the law firm to act in subsequent litigation involving very serious allegations because of the consent's "brevity, informality and vagueness".[12]

More recently, the Alberta Court of Appeal has ruled that an advance waiver was effective and allowed a law firm to continue to act for one union "even if it involved a matter in respect of which the position taken by [the union] was adverse to the interests of [the other union]" (also a client).[13] It found that the conflict with the client was not so pronounced that the advance consent should be considered ineffective.

In its decision, the Court of Appeal cited the *Final Report* of CBA Task Force on Conflicts of Interest noting that the Canadian Bar Association played a "lead role" in setting ethical guidelines for lawyers. The Court concluded that advance generic, as opposed to matter specific waivers, are not contrary to any principle of public policy and that the choice of counsel is itself a value to be protected. The Court found that:

- there had been sufficient disclosure in the context of the advance waiver
- the clients were sophisticated litigants which militated against the requirement of independent legal advice, and
- potential misuse of confidential information was not a factor.

Summary

These recent cases suggest that the courts are beginning to take a less mechanical approach to the analysis of conflicts issues. Certainly, this is an area of law that is evolving.

The Task Force will continue to monitor court decisions to inform our work and yours.

Please get in touch with us if you know of any other cases we should be referencing or have any questions.

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11 *Chiefs of Ontario v. Ontario*, (2003), 63 .O.LR. (3d) 335

12 Para. 92, *Chiefs*

13 *Alberta Union of Provincial Employees*, FN 8

Recent Conflicts Cases – April 2010

9112-6763 Québec Inc. c. Restaurants Investcor Inc.	2008 QCCS 6092, 8 décembre 2008
9124-4160 Québec Inc. c. 6892965 Canada Inc.	2010 QCCS 70
Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168	2008 CanLII 51089 (AB L.R.B.)
Belair v. McAllister	2008 CanLII 43577 (ON S.C.)
Blanchet c. Rioux	2008 QCCQ 11894, 8 décembre 2008
CanPages Inc. c. 9152 7945 Québec Inc.	2009 QCCS 2151, 14 mai 2009
Cewe Estate v. Mide-Wilson	2009 BCSC 975
Chiefs of Ontario v. Ontario, (2003)	63 .O.LR. (3d) 335
D.B.P. v. R.D.M.	2008 SKQB 455
G. Raymond Chang Ltd. V. Shopcast Television	2008 CanLII 63168 (ON S.C.)
Insight Ventures Associates III, LLC v. Rampart Securities Inc.	2008 CanLII 53872 (ON S.C.);
Lotech Medical Systems Limited v. Kinetic Concept Inc.	2008 FC 1195
McKenna v. Gammon Gold Inc.	94 O.R. (3d) 735 (O.S.C.)
Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 222 v. Alberta (Human Resources and Employment)	2008 ABQB 225
Quibell v. Quibell	2010 SKQB 83
Re 1964 Bay Inc.	(2008) 2008 CanLII 54295 (ON S.C.); 50 B.L.R. (4th) 280
Roy c. Ginsberg, Gingras	2009 QCCS 2199, 14 mai 2009
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Walsh v. TRA Company Ltd	2009 NLTD 9