CONFLICTS FOR LAWYERS

Speaking Notes

Presented by David Phillip Jones, Q.C.

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I have been asked to address two particular issues in this presentation, as follows:[1]

a. conflicts which arise when a lawyer is acting for a corporation, and then the shareholders, directors, or senior officers end up in a dispute, and the lawyer takes the side of one individual while continuing to provide legal services for the company as a whole; and

b. conflicts which arise when a lawyer is asked to investigate disciplinary complaints against other lawyers with whom they are familiar.

In addition, I have added in some material about lawyers' conflicts when acting for estate executors who are also beneficiaries.

This paper will outline some general principles regarding lawyers' conflicts of interest and then discuss them in the context of those particular situations.

In addition, some Supreme Court of Canada authority will be discussed, as well as some recent interesting court decisions dealing with lawyers' conflicts.

1. I gratefully acknowledge the very capable assistance of Dawn M. Knowles, LL.B. from our office in the preparation of these speaking notes.

I. Disqualifying Conflicts of Interest

The concept of what does or does not amount to a disqualifying conflict of interest for a lawyer is addressed in provincial or territorial law society codes of conduct as well as in case law.

A. The Law Society of Northwest Territories Code of Professional Conduct:

Like in all provinces and territories, the Law Society of NWT has provisions regarding conflicts in its Code of Professional Conduct ("the NWT Code").

The NWT Code defines "conflict of interest" as:

> the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

Part 3, Rule 6 of the NWT Code discusses a lawyer's duty to avoid conflicts of interest. Some of the more pertinent rules for the purposes of this presentation are:

1. A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under the NWT Code.

2. A lawyer must not represent a client in a matter where there is conflict of interest unless there is express or implied consent from all affected clients and the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of loyalty to the client or another client.

3. Express consent from a client must be voluntary, given after the client is fully informed of the potential conflict and must be written or recorded in writing.

4. Consent may be inferred or implied and need not be in writing where ALL of the following apply:

    - the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

- the matters are unrelated;

- the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

- the client has commonly consented to lawyers acting for and against it in unrelated matters.

5. A lawyer must not represent opposing parties in a dispute.

6. A lawyer may act for more than one client in a matter or transaction provided that:

   - the lawyer has been asked to act for all of them;

   - the lawyer obtains the written consent of all clients;
   - no information received in connection with the matter is treated as confidential as far as the other clients are concerned; and

   - the lawyer ceases to act for all of the clients if a conflict develops that cannot be resolved.

An overriding concern expressed in the NWT Code provisions concerning conflicts of interest — and all provincial and territorial legal codes of conduct — is the need to protect client confidentiality.

B. Supreme Court of Canada decisions

MacDonald Estate

The Supreme Court of Canada decision in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 discussed what constitutes a disqualifying conflict of interest in the context of a lawyer changing law firms, but the principles set out apply in all contexts.

A lawyer who had previously worked for the law firm acting for the appellant, and who was actively involved in the particular file in question, joined the law firm acting for the respondent. The court considered whether the law firm acting for the respondent could continue to act as lawyer of record for the respondent. The Manitoba Court of Queen's Bench held that the law firm was disqualified. The Manitoba Court of Appeal allowed the appeal and held that the firm could continue to act. The Supreme Court of Canada unanimously allowed the appeal and held that the firm was disqualified.

The court identified three competing values at play in deciding whether a law firm is disqualified as a result of a conflict of interest:

- the concern to maintain high standards of the legal profession and the integrity of the system of justice;

- the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause; and

- the desirability of permitting reasonable mobility in the legal profession.

The court also noted three trends in modern legal practice that have resulted in potential conflicts of interest arising:

(1) the increasing prominence of large, multi-faceted law firms to meet the needs of large corporate clients which require firms with lawyers in every area of expertise;

(2) the increasing merging of law firms; and

(3) the movement of lawyers from firm to firm.

After a review of the English, American, Australian and Canadian authorities, the court identified the appropriate test to determine whether a lawyer or law firm should be disqualified from acting for a client due to a conflict of interest. The test has two prongs:

> (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 it will be used to prejudice the client?

With respect to the first prong of the test, the majority of the court found that once 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.

With respect to the second prong of the test, once it is determined that a lawyer has relevant confidential information, the lawyer cannot act against his or her client or former client. The disqualification is automatic and it is not sufficient for the lawyer to make assurances or undertakings not to use the information.

The court then addressed whether knowledge of confidential information of one lawyer in a firm can be imputed to other partners or associates in the same law firm. The majority of the court held that it is unrealistic to suggest that if one lawyer in a firm can't act, no member of the firm can act or that the knowledge of one lawyer in the firm is the knowledge of all. Rather, the majority held that courts should draw an inference that lawyers who work together share confidential information, unless the court is satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken within the firm to ensure that no disclosure of confidential information will occur by the disqualified lawyer to other members of the firm who are engaged against a former client. Thus, evidence of institutional efforts such as cones of silence or "Chinese walls" may rebut the inference.

However, three of the seven judges held that an even stricter test was required and stated that there is an irrebuttable presumption that lawyers who work together share each other's confidences with the result that knowledge of confidential matters is imputed to the other members of the firm and, when a lawyer has changed firms or firms merge, to members of the new firm as well.

McKercher LLP

In *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, the Supreme Court of Canada held that a law firm was disqualified from acting against CN in a class action lawsuit because it had previously acted for CN on a variety of matters. The law firm had not advised CN that it had accepted a retainer to act against it and several members of the firm then hastily terminated their retainers with CN on other files. CN applied to the court for an order disqualifying the firm from acting against it in the class action lawsuit. The Saskatchewan Court of Queen's Bench held that the firm was disqualified. The Saskatchewan Court of Appeal held that the firm had breached its duty of loyalty towards CN by terminating its retainers on other files but that disqualification from the class action lawsuit was not the appropriate remedy. The Supreme Court of Appeal allowed CN's appeal and ordered the matter to be remitted back to the Court of Queen's Bench for redetermination of a remedy.

In a unanimous decision, the Supreme Court held that lawyers owe a duty of loyalty to clients. The duty of loyalty has three dimensions:

(1) a duty to avoid conflicting interests, under which the main concerns are protecting a former or current client's confidential information and ensuring ;

(2) a duty of commitment to the client's cause, which includes a duty not to summarily drop a client simply to avoid a conflict of interest; and

(3) a duty of candour, which entails the disclosure of any factors relevant to the ability to provide effective representation and includes the duty to advise an existing client before accepting a retainer that will require him or her to act against the client.

In this case, the firm had breached the duty of loyalty. The court noted that there is a "general bright line rule" that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without first obtaining their consent. However, the bright line rule is limited in scope and applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting and it applies only to legal interests, not commercial or strategic interests. The bright line rule also does not apply where it would be unreasonable for a client to expect that a law firm will not act against it in unrelated matters.

When the bright line rule is not applicable, the question is whether the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely effected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

In this case, the law firm's conduct fell within the scope of the bright line rule and its failure to obtain CN's consent before accepting the retainer in the class action suit breached the bright line rule. However, disqualification was not automatically the proper remedy. Here, the firm did not possess any relevant confidential information that could be used to prejudice CN in the class action suit. In addition, the court noted other militating factors which suggested disqualification may not be appropriate. These included: behaviour which disentitled a party from seeking disqualification, such as a delay in bringing the motion to remove counsel, significant prejudice to the client's interest in retaining its counsel of choice, and whether the law firm acted in good faith. The court remitted the matter back to the Court of Queen's Bench for determination of remedy.

This paper will now discuss these principles in the context of the three fact scenarios discussed above.

II. Conflicts arising when a lawyer is retained by a corporation and a dispute arises between two or more directors, shareholders or officers:

When a lawyer acts for a corporation, the client is the corporation, which is a separate legal entity. However, instructions are usually given to the lawyer from the director(s), who are appointed by the shareholders. The "directing minds" of the corporation are the directors.

Several interesting questions sometimes arise with respect to whether the lawyer has a conflict of interest in representing the corporate client. For example:

- What happens if the directors of the corporation do not agree on the instructions to be given to the lawyer with respect to a matter or dispute for which the lawyer has been retained to act?
- What if the lawyer agrees with one of the directors in the dispute — does this put the lawyer in a conflict of interest?
- Can the lawyer continue to act for the corporation with respect to matters unrelated to the dispute?

The NWT Code does not have any specific provisions concerning corporate clients and conflicts of interest arising with respect to disagreements between directors. It may be the case that when two or more directors are disputing and cannot agree on what instructions to give the lawyer, that the lawyer must merely withdraw from acting for the corporation and each director has to retain his or her own legal counsel (and perhaps the corporation itself has to retain new legal counsel to represent it as an independent legal entity).

But are there other options? Can the Rules of Professional Conduct, particularly those concerning consent and joint retainers, provide some guidance to situations like this?

<u>Express Consent</u>

For example, Rule 6(2) of the NWT Code provides that:

> A lawyer must not represent a client in a matter where there is a conflict of interest unless there is express or implied consent from all affected clients and the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of loyalty to the client or another client.

If a dispute arises between two or more directors but the lawyer believes that he or she is still able to represent the corporation without having *a material adverse effect* upon the representation of loyalty to the client, can the lawyer continue to act for the corporation if the directors give their express consent?

If so, it should be noted that the consent must be given voluntarily after the directors have been fully informed and must be in writing or recorded by written communication: see Rule 6(3) and the definition of "consent" in Rule 1.

Unrelated matters

Rule 6(4) of the NWT Code states that:

> Consent may be inferred or implied and need not be in writing where all of the following apply:
>
> - the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;
> - the matters are unrelated;
> - the lawyer has no relevant confidential information from one client that might reasonably affect the other; and
> - the client has commonly consented to lawyers acting for and against it in unrelated matters.

Given Rules 6(2) and 6(4), can it be argued that when a lawyer is acting for a corporate client in which two or more directors are having a dispute, the client's consent to the lawyer continuing to act for the corporation on other, **unrelated matters** can be inferred if:

- the lawyer has no relevant confidential information from one director that might reasonably affect another;
- the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of loyalty to the client or another client; and
- the client has commonly consented to this practice in the past.

Concurrent representation

Is another possible solution having the lawyer continue to act with respect to one director (with the consent of the other director(s)) and having another lawyer from the lawyer's law firm act for the other director(s)?

Rule 6(10) of the NWT Code provides that:

> Where there is no dispute among the clients about the matter that is the subject matter of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat

> information received from each client as confidential and not disclose it to the other clients, as long as:
>
> - disclosure of the risks of the lawyers so acting has been made to each client;
> - the lawyer recommends each client receive independent legal advice, including on the risks of concurrent representation;
> - the clients each determine that it is in their best interests that the lawyers so act and consent to the concurrent representation;
> - each client is represented by a different lawyer in the firm;
> - appropriate screening mechanisms are in place to protect confidential information; and
> - all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

In essence, can the word "client" in the above rule be replaced by the word "director" so that the same rules apply when the dispute is between two or more directors of the same corporation?

Joint retainers

A similar question can be asked about the rules concerning joint retainers.

Rule 6(11) of NWT Code provides that:

> Before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that
>
> - the lawyer has been asked to act for both or all of them;
> - no information received in connection with the matter from one client can be treated as confidential as far as any of the others are concerned; and
> - if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Rule 6(12) provides that:

> If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Rule 6(13) goes on to require the lawyer to obtain the clients' consent, either in writing or evidence by written communication, in cases involving joint retainers.

Again, can the word "client" in Rules 6(11) and 6(12) be replaced with "director" so that the lawyer can continue to act?

III. Conflicts arising when a lawyer is asked to investigate disciplinary complaints against other lawyers with whom they are familiar

The second issue you have been asked to address is conflicts arising when a lawyer is asked to investigate disciplinary complaints against other lawyers with whom they are familiar. Can — and should — lawyers refuse to investigate disciplinary complaints against other lawyers with whom with have a personal or professional relationship with?

Obviously, one of the core functions of the Law Society is to investigate complaints against its members and take disciplinary action if warranted. This requires having competent and knowledgeable investigators familiar with practising law.

Rule 2(2) of the NWT Code provides that:

> A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

The commentary to Rule 2(2) provides that lawyers are encouraged to enhance the profession through activities such as filling elected and volunteer positions with the Law Society. Does this extend to performing investigative roles?

Rule 19(1) states that:

> A lawyer must encourage public respect for, and try to improve, the administration of justice.

The commentary to that rule states that lawyers are "*by training, opportunity and experience, ... in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system.*"

Does this extend to having a duty to participate in investigatory and disciplinary proceedings against peers?

Finally, Part 7 of the NWT Code deals with a lawyer's relationship to the Law Society and other lawyers.

Rule 24(3) imposes a duty on lawyers to report misconduct, including any conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer, to the Law Society.

The commentary to Rule 24(3) does not discuss whether a lawyer has a duty to assist the Law Society with investigations of complaints against other lawyers. It does, however, mention the need for lawyers to encourage peers to seek help for problems such as emotional, mental or family disturbances, and substance abuse. It notes that the Law Society supports professional support groups in their commitment to providing counselling and expressly provides that lawyers acting in the capacity of counsellors will not be called by the Law Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. However, the commentary goes on to state that a lawyer counselling another lawyer has an ethical obligation to report to the Law Society conduct by a lawyer which is or may amount to serious misconduct.

None of the above rules deal specifically with whether lawyers have an ethical obligation to assist the Law Society with investigations against other lawyers. But, do they extend to such circumstances — or should they?

IV. Conflicts arising when lawyers act for executors of estates who are also beneficiaries

A third area where conflicts of interest potentially arise is when lawyers act for personal representatives of estates who are also beneficiaries.

Executors of estates are supposed to remain neutral in disputes between beneficiaries. Therefore, when executors are also beneficiaries, they have two concurrent, and often conflicting, interests in the estate. The first, in the capacity as executor, is to administer the

estate and carry out the testator's wishes to the extent possible. The second, in the capacity as beneficiary, is a direct pecuniary interest that often is at odds with claims by third parties or other beneficiaries against the estate. It is critical that the executor is able to keep these roles separate and this usually entails obtaining separate legal counsel for each capacity.

Lawyers who act for executors must be careful to make sure that the client is not acting improperly or take instructions that are given to benefit the client in his or her capacity as a beneficiary. Preferably, one lawyer should act for the client in his or her capacity as personal representative, and another lawyer should act for the client in his or her capacity as beneficiary.

A recent Alberta example of this is the case of *Re Slager Estate*, 2019 ABQB 191 in which Justice Michalyshyn of the Alberta Court of Queen's Bench criticized a personal representative, who was also a beneficiary, for taking a position on a family maintenance and support claim made by the deceased's surviving spouse. Michalyshyn J. held that there had been a betrayal of neutrality and penalized the personal representative by relieving the estate from payment of her legal costs.

Thus, lawyers acting for personal representatives must be cautious in such cases.

V. Other recent cases

Finally, there have been a few recent cases on lawyers' conflicts of interest that are worthy of note.

Salomon

Salomon v. Matte-Thompson, 2019 SCC 14 is a recent Supreme Court of Canada case dealing with a lawyer's conflict of interest. Salomon and his law firm had been found liable for losses suffered by the respondents after Salomon referred them to his friend and financial advisor. The financial advisor had invested the respondents' money in a Ponzi scheme and they lost over $5 million.

The court dismissed the appeal, finding that Salomon's personal and financial relationship with the financial advisor had placed him in a conflict of interest. Salomon had breached the duty of loyalty and the duty to advise, and the fraud committed by the financial advisor did not break the chain of causation.

Spruce Grove Gun Club

In *Spruce Grove Gun Club v. Parkland (County)*, 2018 ABQB 364, the respondent municipality applied to have the applicant's counsel disqualified because the same law firm had previously acted for the municipality's Subdivision and Development Appeal Board("SDAB"). Feehan J. held that the municipality and SDAB were separate entities and that a solicitor-client relationship between the lawyer and the SDAB did not constitute a solicitor-client relationship between the lawyer and the municipality. Feehan J. also rejected the municipality's argument that it was a "near client" of the lawyer that justified the extension of the principles with respect to the duties of confidentiality and loyalty set out in the *MacDonald Estate* case.

Bose

In *Bose v. Bangiya Parishad Toronto*, 2018 ONSC 7639, a cultural association and religious congregation operated as a unity which shared a common board of directors whom appointed the officers of the two organizations. A conflict arose concerning the election of officers and a minority group of directors formed a new board of directors for the congregation and retained a lawyer to advise them concerning the conflict.

Litigation ensued and the lawyer acting for the new board and its individual members was threatened on social media. The lawyer commenced an action for damages against the cultural association but continued to act for both the congregation and the individual respondents. The cultural association applied to have the lawyer disqualified due to a personal and professional conflict of interest.

The court held that the lawyer was not disqualified. While he had a direct personal interest in the action he started for damages, the dispute between the congregation and the cultural association was simply a background fact that explained why he was targeted on social media. The fact that the lawyer acted for the congregation and the individual respondents did not amount to a conflict because the congregation and the personal respondents had a common interest to resist the applicant's attacks.

Whaling

In *Whaling v. Twietmeyer*, 2019 ABQB 91, Justice Phillips of the Alberta Court of Queen's Bench held that a lawyer was disqualified from acting for a respondent in an unjust enrichment claim because he was in an office sharing agreement with a law firm that had previously acted for both the applicant and respondent. Phillips J. held that the office sharing arrangement did not a have system in place to ensure identification of conflicts between the two firms.