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Defining the "Client" (or not) in Former Client Conflicts

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When teaching the law on conflicts of interest to students, I suggest they start by determining the relationships between the parties, lawyer-client, lawyer-lawyer and client-client, and between the matters. This starting point helps the students because knowing whether a client is a former or a current client, whether the matters are the same, related or unrelated, and whether the clients are represented by the same lawyer or lawyers at the same firm, will direct them to the norms and rules that appropriately govern the situation.

Like many helpful professorial tips, however, this advice may help the students more in the abstract than in practice. Because often the facts of a representation, whether real or hypothetical, confound easy analysis. The students cannot determine how to apply the various legal rules that govern conflicts of interest because they cannot satisfactorily determine the nature of the relationships so as determine which rules ought to apply, and with what outcome.

A recent decision by a Master Schulz of the Alberta Court of Queen's Bench in the case of *Orr v. Alook*, 2014 ABQB 141, illustrates how this sort of challenge can arise when applying the law of conflicts of interest, and also how to address it satisfactorily. Her decision demonstrates that it is crucial to get those relationships right, but that the point is to look at them in substance, not formally or technically – to determine what, in actuality, are the relevant relationships. In addition, it shows that the factual categorization cannot be separated from the legal analysis (even if it necessarily precedes it). Assessing the various relationships depends on understanding the legal principles governing conflicts of interest well enough to know what you ought to be looking for.

In *Orr v. Alook* the Plaintiff was suing various parties, including the Peerless Trout First Nation. The Plaintiff was suing on the basis of a contract between him and several parties including the Peerless Lake Band. One of the issues in the litigation was whether an action could be brought against the First Nation since it was not a signatory to the contract; the Plaintiff argued that it could. The plaintiff suggested that the term "First Nation" was simply a name change, that "the persons who are now recognized as members of the Peerless Trout First Nation were always a separate community of aboriginal persons" and that the Peerless Trout First Nation was an amalgamation including the previous signatories to the contract (para. 3, quoting para. 23 of a Master's judgment in a prior summary dismissal application, *Orr v. Alook,* 2013 ABQB 86).

The issue brought before Master Schulz was an allegation of a conflict of interest on the part of the Plaintiff's lawyer, Priscilla Kennedy and the Davis LLP firm. The basis of the claim that Ms. Kennedy and Davis LLP ought to be disqualified was that Ms. Kennedy had represented members of the Peerless Lake Band in land claim actions in 1998 and 2005, as a result of which she had confidential information in relation to the present action.

The challenge for Master Schulz was to determine the relationship between the prior representation and the current representation. In particular she had to determine whether the Defendants could properly be considered Ms. Kennedy's former clients, whether the information she received in the prior retainer was confidential, and whether it could be considered relevant to the current case. Master Schulz began by observing that the court's function in such cases is not disciplinary, but nonetheless allows the court to determine "whether a lawyer may act for a specific client" (para 7). Lawyers have a duty of loyalty to their clients, which requires lawyers not to act in cases where they have relevant confidential information from a client which may be used to the prejudice of that client in the current retainer (para 9). The governing test is "whether the reasonably informed member of the public would be satisfied that no use of confidential information would occur" (para 10).

Here the challenge was to decide whether Ms. Kennedy could be considered to be acting against her former clients in the current case in light of the fact that an outstanding issue in the underlying litigation was just that: can the defendant Peerless Trout First Nation be considered to be a continuance of the individuals for whom Ms. Kennedy previously acted? Master Schulz consequently declined to decide whether the Defendants were Ms. Kennedy's former clients; she viewed it as inappropriate to "pre-determine an aspect of that triable issue" and that doing so would "tie the hands of the trial justice" (para 12). She decided instead to rely on the point that under the Law Society of Alberta Code of Conduct a conflict may arise in relation to a client *or* in relation to a third person. Thus, even if the Defendants could not be considered to be former clients, their status as a third party could give rise to a conflict (paras 13-14).

To determine whether Ms. Kennedy had relevant confidential information about the matter at hand Master Schulz first considered the relationship between the current case and that on which Ms. Kennedy had previously acted. She relied on the (excellent) decision of the Nova Scotia Court of Appeal in *Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd.,* 2008 NSCA 22, which notes that matters are related if it is "reasonably possible that the lawyer acquired confidential information pursuant to the first retainer that could be relevant to the current matter" (para 15, citing *Brookville* para 50). Master Schulz reviewed the Affidavit of Bruce Hirsche, who appears to have been Ms. Kennedy's co-counsel in the original case (this isn't clear from the decision, but Mr. Hirsche is not at the same firm as Ms. Kennedy, and is at the firm she was at previously). Based on that affidavit Master Schulz noted that the matters raised similar legal issues about the nature of the Peerless Lake community, that the matters were therefore related and that it is reasonable to "infer that relevant confidential information was imparted to Ms. Kennedy during her retainer on the previous matter" (para 22).

Ms. Kennedy was unable to rebut this inference. The affidavits she filed were based on "information and belief" and Master Schulz viewed these as insufficient to rebut the evidence of Mr. Hirsche, which was based on personal knowledge. In his affidavit Mr. Hirsche attested that client meetings included "wide, free ranging discussions of the legal and evidentiary issues in the land claim actions and the legal strategies available to them based upon the information they had been collecting" (para 27).

Based on this, Master Schulz unsurprisingly concluded that Ms. Kennedy could not continue to act; given her duty to provide competent and resolute advocacy to her new clients, and the relevant confidential information held by her, the "risk that the confidential information will be used is very high" (para 31). She concluded that Ms. Kennedy's firm Davis LLP could continue to act only if safeguards have been in place since the time Ms. Kennedy joined the firm that would shield the information from disclosure, and that undertakings are given to maintain such safeguards.

The norms applicable to this case are thus straightforward: a lawyer must not act in circumstances where she has relevant confidential information that her new representation puts at risk of disclosure. The real work of the case is in assessing the facts to decide how that norm applies. To her credit, Master Schulz hones in on the key issue, which is the relationship between the issues arising in the two cases, and the evidence demonstrating the role played by Ms. Kennedy in both. She does not get distracted by the confusion over the technical question of whether the new clients and the former clients are the same people since, as she observes, that does not affect the underlying problem. That is, in the end it is her understanding of the norms that allows her to complete the factual analysis; she knows the relationships she needs to consider to decide whether the conflict exists and is disqualifying.

Which, of course, is why my helpful tip often helps the students less than I wish that it would. Because students beginning to learn the law governing conflicts of interest do not have the deep understanding of the purpose and norms that govern those relationships so as to allow them to distinguish between those facts that are salient and those that do not matter very much. They need to try to do it, but it is not surprising that it occasionally confounds them.

One or two other points from Master Schulz's are worth noting. First, the judgment illustrates the point that the law on conflicts of interest protects information that is confidential and not merely information that is privileged. While some of the information held by Ms. Kennedy was privileged – e.g., "free ranging discussions of the legal… issues" (para 27) – much of the information related to underlying facts, such as the "land Claim Plaintiff's genealogical [and] historical… research in respect of their ancestral and community claims" (para 27). Master Schulz correctly recognized that the law of conflicts must ensure that lawyers are not at risk of disclosing that information, even if it is not itself privileged.

Second, Master Schulz seems to suggest that once Ms. Kennedy was found to have relevant confidential information that was at risk of disclosure, one ought nonetheless to consider factors that "militate against disqualification" (para 33). Those factors include protecting a client's choice of counsel and addressing delay in bringing forward an application. While those factors can affect a disqualification decision in an appropriate case, in my view they ought to do so only rarely, if at all, when the conflict relates to a potential misuse of confidential information. The duty of confidentiality is nearly absolute, and where a risk of disclosure exists, protection of that duty should be paramount over issues such as delay or a client's choice of counsel.

Finally, Master Schulz suggests that Davis LLP may continue to act if it demonstrates that "'Chinese Walls' have been in existence around these files from the date Ms. Kennedy joined the firm until the present date" (para 42). She notes affidavit evidence suggesting that Ms. Kennedy's "aboriginal files were separated behind a 'Chinese Wall'" after Ms. Kennedy joined the Davis firm. The confusion I have in this respect is that since Ms. Kennedy herself was acting on the new case, I do not understand how a meaningful safeguard can be said to have existed from the time she joined the firm. The participation seems *prima facie* to demonstrate that safeguards did *not* exist. I would argue that, as a general rule, when a lawyer with relevant

confidential information at risk of disclosure has been acting on a matter, and is disqualified because of that information, the firm itself is also disqualified. The only time a firm would not be disqualified is where, as contemplated by *Macdonald Estate*, the lawyer was not acting on the new case, and safeguards have been in place (*Macdonald Estate v. Martin*, [1990] 3 SCR 1235).