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The True Bright Line Conflicts Rule

By Alice Woolley

Cases Considered:
Kovac v. Opus Building Corp., 2010 ABQB 366

That a "lawyer must not represent opposing parties to a dispute" (Alberta Code of Professional Conduct, Ch. 6, Rule 1) may be the most obvious, best understood and least frequently violated rule on conflicts of interest. Sometimes lawyers have problems when a joint representation properly undertaken with consent, develops unanticipatedly into a dispute. One cannot readily imagine, however, circumstances in which a lawyer would file a statement of claim that seeks relief for a party, and from a party, both at the same time.

Remarkably, however, a recent Alberta case had two lawyers who did just that. *Kovac v. Opus Building Corp.* arose out of a dispute between the shareholders of Opus Building Canada Inc. ("OBCI"). Kovac owns 45% of the shares in OBCI. Olauson and Shannon, through their corporation Opus Building Corp., own 44% and 11% of OBCI. Olauson and Shannon had started OBCI, hired Kovac who became President and Chief Executive Officer, and eventually sold a portion of the business to Kovac, who continued to serve as President and CEO.

In the first part of 2009 Kovac, Olauson and Shannon sought to wind up OBCI. While some matters were resolved through negotiation, a number were disputed. Eventually Kovac filed an action against Olauson, Shannon and their companies on his own behalf and on behalf of OBCI (the "First Action"). The same counsel purported to act for Kovac and for OBCI in the First Action, even though in the First Action Kovac also made claims against OBCI. Specifically, Kovac claimed that OBCI was acting in a way that was oppressive to Kovac and sought an order liquidating and dissolving OBCI.

Not surprisingly, Olauson and Shannon sought to have an independent representative for OBCI in the First Action on the basis that Kovac's lawyer was violating the requirement that "[c]ounsel cannot, without more, act both for and against the same party, particularly within the same action" (para. 20). Before Olauson and Shannon did so, however, they filed both a statement of defence and a counterclaim in the First Action and, as well, commenced an independent action (the "Second Action"). The Second Action incorporated the statement of defence and counterclaim in the First Action. It made claims against Kovac and OBCI on behalf of Olauson and Shannon. It also made claims on behalf of OBCI against Kovac.

The question of appointing an independent representative for OBCI in the First Action was brought before Justice Paul Jeffrey, who also considered whether OBCI required independent counsel in the Second Action. At the hearing before Justice Jeffrey, counsel for Olauson and Shannon conceded that the Second Action had been brought in part to challenge the joint

representation of Kovac and OBCI by a single lawyer. Justice Jeffrey expressed strong disapproval for this approach. He noted that it was a clear and obvious conflict of interest to have joint representation for Kovac and OBCI, and that OBCI required independent counsel in the First Action. However, he held that there was no reason to commence the Second Action to make that point. Further, it was "offensive" for counsel for Olauson, Shannon and OBCI in the Second Action to "knowingly" put himself into a conflict in order to challenge the joint representation of Kovac and OBCI in the First Action (at para. 23). According to Justice Jeffrey:

> I have great difficulty with the way that action [by Olauson and Shannon] was brought to the Court, admitted before me to have been done in part in order to lend weight to a conflict argument against Kovac's counsel, when the legal basis for that argument was breached in its very filing. Moreover, that action was entirely unnecessary for O & S to succeed in moving to have Kovac's counsel precluded from acting for OBCI. They were already acting for Kovac against OBCI. (at para. 22)

In sum, "[t]his is the pot calling the kettle black, but first hopping onto the burner to do so" (para. 21).

Justice Jeffrey required that OBCI have independent representation in both the First Action and the Second Action.

Justice Jeffrey's judgment is obviously correct. What seems surprising is that counsel on this case, both of whom appear to have come from large Calgary law firms (or at least had lawyers from those firms appearing on the application), either did not see, or were prepared to ignore, perhaps for tactical reasons, the obvious impropriety of asserting claims on behalf of a party, and against that party, within the same action. As noted in the Alberta Code of Professional Conduct, in the commentary to Chapter 6, Rule 1 (cited above), acting for opposing parties to a dispute prevents a lawyer from properly acting for one or both of the parties, and also brings the administration of justice into disrepute. It violates the most basic loyalty obligations of the lawyer. Specifically, here, how can it possibly have served OBCI's interests to claim that it had acted oppressively? How does that possibly constitute resolute advocacy for OBCI?

The OBCI lawyers' mistake (or tactical willingness to ignore the rules) may highlight the importance of ensuring that lawyers have helpful guidance on the rules against acting in certain circumstances of conflicts of interest. Currently all Canadian law societies are considering adoption of the model rules of professional conduct drafted by the Federation of Law Societies. In the current draft, the Federation's model rules contain highly complicated provisions on conflicts of interest. In my view, the rules are in fact over-complicated, much like the Law Society of Upper Canada and Canadian Bar Association rules on which they rely. I suggest that they are as likely to confuse a practitioner consulting them as provide meaningful guidance to her. In considering the adoption of those rules it may be worthwhile for the provincial law societies to reflect on whether more attention should be paid to first principles, to ensure that practitioners do not make the type of mistakes evidenced by this decision.

The problem with my argument though is that the Law Society of Alberta has excellent rules on conflicts of interest that, as noted, clearly and unambiguously identify the impropriety of acting both for and against a party in an action. Yet those rules appear not to have helped avoid the conduct by the lawyers in this case. Perhaps the lesson is, then, that no rule, however well drafted, can help lawyers who choose not to see or abide by it.