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The Practice (not theory) of Avoiding Conflicts of Interest

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Cases Considered:

Novotny v. LePan, 2011 ABQB 205, *R. v. Lewis*, 2011 ABQB 227

As I have written about previously on this blog (e.g., here), the question of how disqualifying conflicts of interest should be identified has divided the profession and caused tension between it and the judiciary. The result has been not only dissensus, but also on occasion increasingly complicated ways of articulating when a conflict should be disqualifying, and when it should not be. The Canadian Bar Association's Model Code of Professional Conduct, for example, has conflict of interest rules and commentaries that extend for some 27 pages (CBA Model Code).

I have sometimes wondered, though, about how much relevance these disputes about the rules have in practice for courts trying to decide whether a lawyer should be removed from a file. Will a judge truly be motivated by whether the test is that set out by the Supreme Court in *R. v. Neil*, 2002 SCC 70 (that a lawyer should not be permitted to represent any client whose interests are directly adverse to the legal interests of another current client) or whether it is that proposed by the CBA (that the lawyer should not be permitted to represent two clients where the representation of one might materially and adversely affect the representation of the other)? Or will a judge be motivated by her overall sense of the equities, of the right resolution on the particular facts given the need to ensure that clients have properly zealous advocates, the rights of clients to choose their own lawyers, the need to avoid future problems in the litigation that would arise from an unaddressed conflict, and the importance of discouraging frivolous and vexatious actions for disqualification?

Two recent cases of the Alberta Court of Queen's Bench suggest that in actual cases judges are less concerned with carefully articulating the applicable rules, and more concerned with reaching the right outcome on the facts, all things considered. The rules matter, but more in general terms than in specific ones. Neither of these cases addresses the particular *Neil*/CBA dispute, but they may suggest that that dispute is of more theoretical than practical significance.[1]

[1] As an aside, in Chapter 8 of *Understanding Lawyers' Ethics in Canada* (LexisNexis Canada, 2011), pp. 270-272, I argue that the post-*Neil* cases suggest that the courts are generally following *Neil*, but that they do not do so rigidly or unthinkingly, and that the emphasis of the courts is similar to that desired by the CBA – i.e., on the effect of the conflict on the adequacy of the representation received by the clients.

The Cases

In *Novotny v. Lepan*, 2011 ABQB 205, Novotny brought forward two cases (with distinct styles of cause) in a single statement of claim, one a divorce and matrimonial property action against LePan, and the other a matrimonial property action against LePan, his new girlfriend and his new girlfriend's business. Ultimately LePan, the girlfriend and her business were represented by a single lawyer. Novotny objected to this representation. Her argument was, in essence: a) lawyers who jointly represent clients are ethically required by the Code of Conduct to share information between those clients; b) under the implied undertaking rule materials produced by the opposing party during discoveries cannot be shown to anyone else; c) therefore, materials produced by her for LePan in the first matter cannot be shown to the other defendants, yet the lawyer's ethical obligations require that the lawyer share information between jointly represented parties; d) therefore the joint representation should not be permitted.

Justice Paul R. Jeffrey rejected this argument and refused to disqualify LePan's counsel. He noted that Codes of Conduct do not govern the court (para. 16) but that, in any event, the ethical obligation in the Code did not appear to require sharing information between clients here. The ethical obligation only arises with respect to "material" information (para. 22). If information disclosed in discoveries by Novotny in the first action is not relevant to the second action, then it is not "material" to that action, and the lawyer is not ethically obligated to share it (para. 22). If the information is relevant in the second action then the parties to that action will obtain it "in the normal course" in any event, thereby removing any problem with respect to compliance with the implied undertaking rule (para. 22).

Justice Jeffrey also emphasized the importance of allowing parties to employ the lawyer of their choice, and the high standard that should be applied for disqualifying a counsel. He could not see a basis for saying that standard was satisfied here: "I have been given no reason to apprehend the Defendants' counsel shall not abide [by] his professional and legal obligations as conscientiously as any other member of the Law Society of Alberta" (para. 26).

In *R. v. Lewis*, 2011 ABQB 227, the Court (Justice June M. Ross) did disqualify a lawyer from representing a criminal accused where another lawyer at the lawyer's firm had previously represented a co-accused in the trial, and there was a possibility that the co-accused would testify and need to be cross-examined by the lawyer for the accused. Since that lawyer was in a firm that had confidential information about the co-accused, he was necessarily disqualified from acting in a case where he would have to cross-examine the co-accused. That the lawyer stated he did not have any information was irrelevant; the case law requires that such information be imputed, and there was no basis for rebutting that imputation on the facts (para. 9-10). Further, it violates the principle of loyalty to a client for a lawyer from the firm that formerly represented the co-accused to cross-examine the co-accused. The lawyer had proposed using an independent counsel to cross-examine the co-accused in the event it was necessary to do so, but Justice Ross did not view this solution as satisfactory. Unlike the prior Alberta case in which that solution was adopted (*R. v. Dix*, (1998), 218 A.R. 18) it could not be said that the conflict here was unrelated to the conduct of the clients or the lawyers, or that they have been deprived of their choice of counsel. Since the clients "must be aware" that when they consent to joint representation that representation cannot continue in the event of a conflict, "their choice of counsel has not been affected by matters beyond their control, but by their own actions" (para. 16).

Justice Ross also expressed concern about the ability of the co-accused to consent to this conflict in advance of the decision to testify, which would be the effect of allowing the lawyer to

continue to act, and about how an independent counsel could be prepared to do the cross-examination without creating the same risk of misuse of confidential information that existed with respect to the conflicted lawyer.

Ultimately Justice Ross held that the "realistic risk that a conflict of interests may develop during the trial" meant that the counsel had to be disqualified (para. 21).

Analysis

In both of these cases the judges spent time identifying and analyzing the applicable rules and principles. In *Novotny* the judge had to assess the relationship between the lawyer's duties of confidentiality in the implied undertaking rule and in relation to jointly represented clients, and in *Lewis* the judge had to consider the scope of the rule in relation to the imputation of knowledge of confidentiality, the appropriate way to address potential conflicts, and the proper balance between concerns for the fair administration of justice and the right of clients to choose their lawyer. Yet I would suggest that that articulation of the rules and principles was less significant for the outcome of the case than the general sense of the judges as to what would be a fair and appropriate outcome on the facts.

Take *Novotny*. In that case the principles could have been articulated somewhat differently. It could, for example, have been noted that the obligation to share information can be waived by consent in certain circumstances. Or, alternatively, the Court could have seen the obligation of sharing information between jointly represented clients as more general, and as requiring anything that one client tells the lawyer in the context of a joint retainer to be shared with the other client. Yet had the court done so, I think the result would nonetheless have been the same. Because the result seems to have arisen in large part from the specific facts: because matrimonial actions which seek to involve the new partner of the ex-spouse seem facially dubious, because the plaintiff seems to have been attempting to delay discovery and to impose costs on the other side (i.e., not obviously to be acting in good faith) and because the information kept confidential by the implied undertaking rule is only in one sense confidential (i.e., it is not privileged or confidential, and is otherwise compellable and disclosable). In such circumstances to require each defendant to independently retain counsel just seems like the wrong thing to do. The principles were used to explain that result, but they did not entirely dictate it.

In *Lewis*, the result if anything seems at odds with the ordinary principles of conflicts, in which a client can consent to a representation that may lead to a conflict. The accused and co-accused appeared to have similar interests. The risk with respect to the confidential information was slight, since the lawyer involved seems not especially likely to have actually known confidential information about the co-accused, despite the imputation of such knowledge. The accused and co-accused appear to have consented to the conflict. There was a mechanism to protect the co-accused in the event the conflict materialized. But the representation was still prohibited by the Court. This could be because the judge did not understand the applicable principles but seems more likely to have been because on the facts the change in counsel did not appear to cause significant prejudice, and if the counsel stayed on and the conflict materialized, there was a real risk that the whole proceeding could be derailed. The accused and co-accused whose counsel was in a conflict could appeal a conviction on the basis of ineffective assistance of counsel, and if new counsel was required at a late point in the trial considerable delay could have resulted. These systemic risks were undoubtedly a concern to the Crown, and also likely motivated the Court's result, regardless of what the ordinary principles of conflicts would predict.

This argument should not be taken too far. I am not suggesting that principles and rules are irrelevant to determining the outcome in cases. I am not arguing that all cases turn solely on the facts. But I am saying that endless arguing about the principles that apply, particularly around the margins, is unlikely to provide anyone with much useful information about what is likely to happen in a particular case. Instead, one needs to look at broader factors such as the overall merits, the risks to the interests of all affected parties in any decision the court makes and the potential costs to the efficient administration of justice. Those broader factors, more than the specific articulation of certain principles, will be what determine the outcome, most of the time.