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Conflicts of Interest and Good Judgment

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Cases Considered:

Dow Chemical Canada Inc. v. Nova Chemicals Corporation 2011 ABQB 509

Previously on ABlawg I have suggested that outcomes in conflicts cases turn more on a judge's overall impression of the facts and the equities than on the precise articulation and application of specific rules (here). A recent judgment of the Alberta Court of Queen's Bench aligns with this perception, insofar as the outcome of the case seems closely linked to the judge's assessment of the good faith and propriety of the conduct of the law firm alleged to be in conflict. The case also, though, shows the continued evolution of the principles that govern conflicts of interest. Specifically, Chief Justice Wittmann's judgment provides new analysis of the principles governing what is necessary for a client to consent to a conflict in advance, how imputation rules operate in national firms, lawyers transferring between law firms, and the intersection between law society rules and judicial determinations in assessing conflicts. In this way the judgment may indicate that contrary to my earlier suggestion, conflicts cases are in fact like other legal judgments, with outcomes determined by a complex interplay of principles, rules, facts and, above all, the "judgment" of the judge, what in the context of moral decision-making David Luban and Michael Milleman have described as the ability to identify "which principle is most important given the particularities of the situation" ("Good Judgment: Ethics Teaching in Dark Times, (1995-96) 9 *Geo J of Legal Ethics* 31 at 39). In other words, it's not so much whether judges perceive lawyers to have been "good" or not, as it is whether judges perceive lawyers to have been good enough that the applicable principles do not require that they be removed from a file. This does mean that the interplay of fact and law matters more than the precise articulation of the law – i.e., that there is some legitimacy to my general feeling that the fights between the CBA and the Federation of Law Societies over the precise wording of conflicts rules is not a very good use of anyone's time. But it does not mean that principles are irrelevant.

The judgment of the Court arose from a fact scenario involving litigation, retention of multiple counsel, and lawyers moving from one national firm to another, and from one city to another. Andrew Little, a lawyer at the Calgary office of Osler Hoskin and Harcourt LLP worked on a file for Nova Chemicals Corporation involving litigation against Dow Chemicals Canada Inc., who were represented by Burnet Duckworth and Palmer LLP. He appeared on at least two motions, drafted memos, attended meetings, drafted Nova's pleadings and worked on document issues. In 2008 Little left Oslers and moved to the Toronto office of Bennett Jones. When he joined Bennett Jones he was provided with a copy of the Bennett Jones' conflicts policy, and signed an undertaking that he would "not disclose to Bennett Jones or use for the benefit of Bennett Jones or its clients, confidential information obtained in my prior employment" (para 12). At the time he joined Bennett Jones, the firm had no involvement with the Nova/Dow litigation. The firm had acted for Nova on some matters, and in 2009 was retained by Nova on an immigration file.

The retainer agreement on the immigration matter included a general consent to Bennett Jones acting "against Nova on matters unrelated to its current retainers" (para 17).

In December 2010 Dow sought to augment its legal team in the Nova litigation by retaining lawyers from Bennett Jones; Oslers was notified of the additional counsel, as was Nova's other counsel on the litigation, Macleod Dixon LLP. Nova objected to Bennett Jones acting for Dow given Little's presence at the firm, and his undisputed confidential knowledge about Nova and the Dow litigation. On January 6, 2011 Blair Yorke-Slater, one of the Bennett Jones lawyers sought to be retained by Dow, made a statutory declaration stating that the twelve Bennett Jones persons who were working on the Dow file would not be discussing it with anyone at the firm except each other. All electronic documents would be protected by an ethical wall, and any breach of the undertaking would be reported to the Bennett Jones conflicts committee.

Bennett Jones then brought an application seeking a declaration from the Court of Queen's Bench that it was permitted to act for Dow on the litigation. It included evidence as to the facts just noted, as well as evidence from Dow that "the only firm which met the requirements of Dow was Bennett Jones" (para 9). In response Nova emphasized the information held by Little, stating in an affidavit from one of the company's vice-presidents that

When I engage a lawyer to prosecute a dispute on behalf of NOVA Chemicals, I do not expect that lawyer to join our enemy's law firm. Similarly, when a lawyer who has been deeply involved with NOVA Chemicals in the early but very formative strategic stages of a very significant lawsuit against Dow, goes to a law firm that has not been previously involved in the lawsuit, in my opinion that law firm should not be allowed to take on representation of Dow (para 15).

Chief Justice Wittmann granted Bennett Jones' application. After reviewing the relevant case law, and the provisions of Chapter 6 of the Law Society of Alberta's Code of Professional Conduct, he set out eight principles governing conflicts in transfer situations. These principles include the general rule that a disqualifying conflict arises when one firm member has confidential information that, if disclosed, could prejudice the former client of the firm member. They also include the general values at play when a court considers an alleged conflict of interest, the curative power of client consent to the conflict, and the ability of firms to use screening devices to manage conflicts.

In setting out the general values, Wittmann CJ states that there are three that affect the analysis of conflicts – the right of clients to choose their lawyers, the right of clients to have their confidential information shielded from opposing counsel and the right of lawyers to mobility. Interestingly, Wittmann CJ does not note that in its judgment in *R v Neil*, 2002 SCC 70, the Supreme Court questioned whether lawyer mobility is a value that affects the analysis very much:

> Lawyers are the servants of the system, however, and to the extent their mobility is inhibited by sensible and necessary rules imposed for client protection, it is a price paid for professionalism. Business development strategies have to adapt to legal principles rather than the other way around (*Neil*, para 15).

He also does not note that in its decision in *Strother v 3464920 Canada Inc.*, 2007 SCC 24, the Supreme Court stated that "[t]he client's right to confidentiality trumps the lawyer's desire for mobility" (para 51). In my view Wittmann CJ's summary of the relevant values is to this extent

somewhat misleading; lawyer mobility may be a relevant consideration, all other things being equal, but it is not a value that applies in the same way or to the same extent as the others. That problem with the judgment is, though, remedied by Wittmann CJ's final point on the governing principles, where he states:

> Notwithstanding all of the foregoing, ultimately the question a court must ask is whether a reasonable member of the public, in possession of all of the facts, would conclude that no unauthorized disclosure of the confidential information has occurred or will occur.

In his summary of the governing principles Wittmann CJ suggests that the rule on imputation of knowledge from one member of a law firm to another must be analyzed in context. He states that in a large national or international firm it is a "legal fiction" to suggest that lawyers work together, such that they routinely share information (para 59). Whether or not knowledge of one lawyer in a firm can or should properly be imputed to the others requires a "close examination of the size of the firm, the number of the locations where the firm is physically located, [and] the residences of the relevant lawyers" (para 59).

In making this point Wittmann provides a helpful clarification to the application of the law of conflicts to national firms, and one that seems reasonable and sensible. It is important that client confidentiality be protected. That requires that clients not have a firm or lawyer who acted for them, and obtained confidential information, now act against them in a matter with respect to which that information is relevant. But the creation of that outcome does not require pretending that a lawyer in Toronto is routinely chatting with lawyers in Calgary about his files, particularly where doing so would be a violation of the lawyer's ethical duty of confidentiality, as it would be in this case. That additional factor is not always present – a lawyer does not breach confidentiality by talking to other lawyers in her firm where the firm is retained on a matter; but it is present here because Little's confidential information was information privy to Oslers, not to Bennett Jones, such that he would have acted unethically had he spoken to any Bennett Jones lawyer about it. Even when that factor is not present, however, Wittmann appears correct to characterize as fiction the idea that lawyers at great distances are routinely sharing confidences. When the additional factor of an existing duty of confidentiality prohibiting sharing with other firm members is present, then the information sharing fiction further requires a suspension of disbelief that protection of clients does not require.

After setting out the general principles, Wittmann CJ goes on to make some specific observations about how those principles apply to this case. He rejects Bennett Jones' suggestion that Nova had consented to the conflict through the terms of the 2009 retainer on the immigration matter. While advance consent can be given, it has to be sufficient to cover the matter to which it is now sought to be applied – that is, the specific matter must be one contemplated or "within the contemplation of the parties" when the consent was given (para 62). In making this point Wittmann CJ provides helpful emphasis to a point made in an earlier Alberta judgment that allowed an advance consent to be effective. In the earlier judgment, *Alberta Union of Provincial Employees v United Nurses of Alberta, Local 168*, 2009 ABCA 33, the Court of Appeal had allowed a law firm to act against its client for another client. In so doing the Court was clear that the consent was intended to cover the very type of matter on which the firm now sought to act – i.e., that matter was within the contemplation of the clients. Wittmann CJ's judgment highlights the centrality of that requirement; advance consent will only be effective where the matter to which it is being applied was within the contemplation of the parties at the time the consent was given.

Wittmann CJ also suggests that it is important to the analysis that Dow had considered a variety of law firms, but determined that "no other firm has the ability desired by Dow to represent it" (para 67), and that no one had questioned the effectiveness of the screening devices used by Bennett Jones. The former point is interesting if only because it is not one that often arises in conflicts cases, but is one which may give comfort to highly specialized counsel who face conflicts challenges – that they are uniquely competent to provide particular services may make them able to represent clients in a wider variety of circumstances than usual. That would be consistent as well with the Supreme Court's judgment in *Strother*, where the Court suggested that clients who choose highly specialized counsel need to recognize that that counsel will act for clients who are competitors: "It is equally basic that specialized lawyers act for many clients in the same line of business, some of whom may be competitors. Lawyers and law firms are permitted to act for multiple clients in the same line of business, provided they avoid conflicts of interest" (para 117). Of course specialized lawyers are not free to ignore the requirements of confidentiality, or the importance of taking proper steps to protect client interests, but their specialization does affect how the potentially disqualifying conflict will be assessed.

With respect to the screening devices, the importance of this point is that normally screening devices must be in place prior to there being any risk of confidential information being shared. Here, because the retainer did not arise until several years after Little joined Bennett Jones, the screening devices could not, in that sense, be in place in "advance". The lawyers representing Dow could be shielded from Little once the retainer was brought in, but Little's information was never formally shielded from other Bennett Jones lawyers, except through Little's generic undertaking. As Wittmann CJ notes in the context of imputation, however, given Little's location, his duty of confidentiality, and his additional and advance undertaking not to share confidential information from Oslers with Bennett Jones lawyers, the risk that confidential information about Nova was shared with other Bennett Jones lawyers was remote. In that context, the timing of the screening devices Bennett Jones put in place does seem sufficient. The firm at each stage did what it could to protect the improper disclosure of confidential information, and what it did appears to have been sufficient to ensure that confidential information wasn't shared. And that, more than any specific rule on the timing of screening device placement, should govern the analysis.

Wittmann CJ also considers the effect of the Law Society of Alberta's Code of Professional Conduct, and the fact that it did not have a specific rule governing post-transfer retainers. Wittmann CJ states that the Codes are "helpful, useful and may be persuasive", but that they ultimately do not bind the Court in its analysis (para 70). Thus, the absence of an applicable rule is not relevant, one way or another.

Finally, Wittmann CJ applies the general governing principle to conclude that in this case, "yes, the reasonably informed person is satisfied that no use of confidential information has occurred or will occur in the circumstances of this case" (para 72). In reaching this conclusion it might have been helpful for Wittmann to briefly indicate which parts of the preceding analysis were most important in supporting that conclusion; however, the conclusion itself seems to have been inevitable once it appeared that Bennett Jones had done what was necessary to protect Nova's confidential information and given the importance to Dow of retaining Bennett Jones. There was, in other words, no risk of compromising the client's right to confidentiality by protecting another client's right to the lawyer of its choice.