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Still Just the Facts: Applying the Bright Line Rule

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Case Commented On: *Statesman Master Builders v Bennett Jones LLP,* 2015 ABCA 142

In a unanimous judgment the Alberta Court of Appeal has reversed a decision by Justice Macleod removing Bennett Jones LLP as counsel for its longstanding client Matco Investments Ltd. on the basis of a conflict of interest (Justice Macleod's decision is here). In a blog on that earlier judgment I suggested that the decision indicated the importance of the facts to the outcome in conflicts cases. While the firm had taken significant steps to manage the conflict, the case management judge may have been influenced by the fact it had not been as absolutely candid as it could be:

> The unfortunate thing for the firm here is that in many ways it had been candid with Statesman. Its e-mail regarding the advance consent was pretty blunt as to what it was trying to do. But the lesson may be that there is very little judicial tolerance for an absence of candour in situations of conflict; a little bit of candour won't do ("The more things change...")

The Court of Appeal (Justices Berger, Veldhuis and Wakeling) has now reached a different result, ruling that the firm ought not to be disqualified. That result appears, however, not to be because the Court of Appeal has adopted a tolerant attitude to an absence of candour. Rather, the Court of Appeal seems simply to have assessed the firm's conduct differently, viewing the advance consent obtained by the firm as sufficient to make it unreasonable for the client to now assert a conflict. The Court of Appeal also relied on its finding that by the time of the alleged conflict the affected client "had already terminated its limited retainer" (at para 23) which was a different interpretation of the facts than that of the case management judge.

The conflicts issue arose from a dispute between Matco Investments Ltd. and the Statesman Group of Companies, which had been in a joint venture to develop some condominiums through the General Partner, in which they held equal shares. Matco was a longstanding client of Bennett Jones, and the firm acted for the company in relation to the joint venture. It also, however, acted for the General Partner in a builders' lien dispute against a third party. Before it took on that case the firm sent a conflicts waiver to the Statesman Group general counsel saying:

> Matco is an important client of our firm, and I want to be careful that by this retainer we do not disqualify ourselves from assisting Matco in what I trust is the unlikely event of disagreement between it and the Statesman group in future. I confirm our

> agreement that this retainer is sufficiently limited in scope that you will take no objection to our continued freedom to act for Matco in such event (at para 5).

In 2010 a disagreement did arise between Matco and Statesman, and Matco retained Bennett Jones to pursue an oppression action against Statesman. Statesman found out that Bennett Jones was acting on the oppression matter on June 21, 2010 (at para 10). The last activity on the builders' lien file occurred on June 24, 2010, at which point the file was transferred to another law firm.

The Court of Appeal noted that Bennett Jones said that the retainer had in fact been ended by the General Partner in May 2010, but the letter terminating the retainer was not introduced in evidence. The Court of Appeal did observe though that from late May the billings on the file were only for "non-substantive services" (at para 8). Ultimately the Court of Appeal concluded that by June 2010 "the Statesman Group itself had already terminated its limited retainer with Bennett Jones" (at para 23). In the original case management decision Justice Macleod, by contrast, said "Apparently, the Law Firm became aware that the Statesman group was in the process of terminating the Law Firm but nonetheless they acted for those entities up until June 24, 2010." (ABQB, at para 12).

Based on these facts the Court of Appeal held that Bennett Jones ought not to have been removed as counsel for Matco. In its view it was not reasonable for Statesman to object to Bennett Jones's conduct. Matco was a long-standing client of the firm; the builders' lien matter was very specific and only accepted by Bennett Jones "on the express condition that it would not be prevented from acting for its continuing client, Matco, in any future disputes"; Statesman had terminated the retainer prior to that action beginning; and, there was no factual connection between the oppression action and the builders' lien dispute (at para 23).

The Court of Appeal expressly rejected Justice Macleod's conclusion that the consent did not cover the dispute that had arisen between Matco and Statesman, staying that that conclusion was "contrary to the express words of the consent which refer to any future disagreement between Matco and the Statesman Group" (at para 24). The Court further noted that there was no substantial risk to Bennett Jones' representation of the General Partner given the "short overlap" between when Matco raised the oppression issue and when Statesman terminated its retainer (at para 27). Further, Bennett Jones did not act without commitment to its client given that "the Statesman Group terminated its limited retainer with Bennett Jones on its own volition" (at para 28). Also, contrary to the conclusion of the case management judge, Bennett Jones did not violate its duty of candour given that from the outset it was clear with Statesman that it would continue to represent Matco (at para 30).

Finally, the Court held that the disqualification remedy was not appropriate. It could not be justified to protect confidential information or to avoid impaired representation, and it was also not necessary to "maintain the repute of the administration of justice" (at para 32). Statesman had delayed a year before seeking to remove Bennett Jones, disqualification would deprive Matco of the law firm it had used for over 25 years, and Bennett Jones was acting on a good faith belief "that its continued representation of Matco did not contravene any duty of loyalty" (at para 34).

In the end the difference between the case management judge and the Court of Appeal seems largely to come down to two things: the Court of Appeal saw the advance consent as sufficient to give Matco notice of the conflict, and relied on Statesman having terminated its relationship to Bennett Jones at or around the time that the conflict arose. Given those different assessments of the facts, the different legal conclusions naturally follow.

The focus for firms managing conflicts of interest remains on acting with as much good faith and candour with affected parties as they can. The additional thought, however, is that a firm may also need to hope for good fortune in being able to convince a reviewing court of that good faith and candour in the first instance.