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Conflicts Of Interest

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Today's Agenda

- ❖ **What is the legal test that governs external counsel in analyzing conflicts of interest?**
 - ❖ Duty of Loyalty
 - ❖ Three key SCC decisions and another on the way
 - ❖ CBA Task Force on Conflicts of Interest
 - ❖ Federation of Law Societies of Canada Model Code
 - ❖ New Rules of Professional Conduct

- ❖ **How do external counsel identify potential conflicts?**
 - ❖ Search

- ❖ **How do external counsel manage potential conflicts?**
 - ❖ Joint retainers
 - ❖ Multiple retainers and ethical walls
 - ❖ End of retainer letters

Three Key Supreme Court of Canada Decisions and another on the way

1. *MacDonald Estate* [1990] 3 S.C.R. 1235
2. *R v. Neil* [2002] 2 S.C.R. 631
3. *Strother v. 3464920 Canada Inc.* [2007] 1. S.C.R. 177
4. *Wallace v. Canadian Pacific Railway*, 2011 SKCA 108

Three Supreme Court Decisions - MacDonald Estate

- ❖ Transfer of lawyer from one firm to another
- ❖ Transferring lawyer involved in litigation at former firm
- ❖ Undertakings and affidavits supplied to the effect she would not be involved at new firm and had not and would not disclose confidential information

MacDonald Estate

- ❖ SCC disqualified the new firm
- ❖ Notwithstanding undertakings, court imputed knowledge to lawyers in new firm as no institutional mechanism in place at time of new lawyer's arrival
- ❖ Although decision over 20 years old now, it remains important for two reasons

MacDonald Estate

- A. Describes the three public policy considerations to be considered in dealing with conflict issues:
1. Maintain high standards of the legal profession and the integrity of the justice system
 2. Litigants should not be deprived of counsel without just cause
 3. Permitting reasonable mobility within the legal profession

MacDonald Estate

The first proposition is clearly the predominant consideration and has had an important impact on subsequent decisions of the SCC with respect to conflicts

MacDonald Estate

- B. Invited the Canadian Bar Association and governing bodies (law societies) to develop appropriate institutional devices to ensure no disclosure will take place

MacDonald Estate

- ❖ Ontario *Rules of Professional Conduct* Rule 2.05 now provides a detailed code for dealing with lawyers transferring between law firms where the new firm has a case or client file “against” a client of the old firm.

MacDonald Estate

- ❖ Rule 2.05 deals with actual knowledge, imputed knowledge does not give rise to disqualification
- ❖ When transferring lawyer has actual knowledge the new firm shall cease to act in the matter unless:
 - a) The old firm's client consents; or
 - b) The new firm establishes it is in the interests of justice and adequate screening measures are taken.

MacDonald Estate

- ❖ The Guidelines originally proposed by the CBA in 1993 (and ultimately implemented by law societies) outline screening mechanisms which include:
 - ✓ Transferring lawyer not to be part of the team handling the matter
 - ✓ Physical separation of the hard copy file so it can be accessed only by the team working on the matter and access to electronic files restricted to team members only

MacDonald Estate

- ✓ No member of the team shall discuss the matter or show any documentation to the transferring lawyer
- ✓ Written undertakings to comply signed by team members
- ✓ Communication of measures taken to the entire firm and an admonishment that violation that will result in sanctions up to and including dismissal

Three Supreme Court Decisions - Neil

- ❖ Unique fact situation involving a firm representing two accuseds in the same matter where the firm advanced the interests of one client to the direct disadvantage of another

Neil

- ❖ **Bright Line:** The general rule is that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another client – even if the two mandates are unrelated – unless both clients consent after receiving full disclosure (and preferably independent legal advice) and the lawyer reasonably believes he or she is able to represent each client without adversely affecting the other.

Neil

- ❖ Reference made to exceptional cases where consent may be inferred – governments, chartered banks, professional litigants
- ❖ Conflict defined as “substantial risk that the lawyer’s representation of the client would be materially and adversely affected”

Neil

- ❖ Duty of loyalty as formulated by *Neil* seen as a significant change in the law of conflicts
- ❖ Case law after *Neil* struggled to determine how the general bright line rule should be interpreted, but generally didn't apply it unless the matters were directly related

Neil

- ❖ Ontario *Rules of Professional Conduct* make it clear that it is not improper to act against a former client in a fresh and independent matter unrelated to previous work and where previously obtained confidential information is irrelevant (Rule 2.04)
- ❖ Ontario *Rules of Professional Conduct* do not specifically address when or if you can act against a current client, although Alberta and British Columbia do

Three Supreme Court Decisions - Strother

- ❖ Deals with conflict between a lawyer's personal interest and those of his client
- ❖ Strother represented M and gave tax advice, also represented another client in which he had an interest
- ❖ Gave the other client advice about an alternative approach but did not share that approach with M

Strother

- ❖ Court held that there are fiduciary duties in addition to the contractual obligations in a retainer and these duties include a duty of loyalty
- ❖ Duty of loyalty does not preclude acting for different clients in the same line of business where:
 - a) Not legally adverse;
 - b) Actual duty of loyalty not impaired; and
 - c) Confidentiality maintained

Strother

- ❖ There was a 5-4 split in the court, but both the majority and dissent looked to the contractual arrangements with M to modify or limit the law firm's liability

CBA Task Force

- ❖ After *Neil* and *Strother* widespread concern expressed that SCC went too far in its expression of the duty of loyalty
- ❖ CBA Task Force on Conflicts of Interest reported in August 2008 and suggested an approach that was the least restrictive interpretation
- ❖ 21 recommendations to clarify rules concerning conflicts

CBA Task Force

❖ Key recommendations included:

- ✓ Defining “conflicting interest” as an interest that gives rise to a “substantial risk of material and adverse effect on representation”
- ✓ Expanding a “conflicting interest” to include interference with the lawyer’s relationship with the client

CBA Task Force

- ✓ A lawyer may act on a matter that is adverse to the interests of a current client if:
 - a) the matter is unrelated to any matter in which the lawyer is acting for the current client; and
 - b) no conflicting interest is present

- ✓ Encouraging the use of engagement letters

- ✓ Emphasizing the need for a harmonized approach across Canada

CBA Task Force

- ❖ CBA recommendations received generally positive reaction (at least from large firms)
- ❖ Most large firms adopted a new set of forms, practices and procedures based on the CBA Task Force report

CBA Task Force

- ❖ Federation of Law Societies of Canada formed an Advisory Committee on Conflicts (the “Advisory Committee”) which issued a report in June of 2010 and proposed a rule of conduct consistent with the most restrictive interpretation of *Neil*:
 - A lawyer must not represent a client whose interests are directly adverse to the immediate legal interests of a current client – even if the matters are unrelated – unless both clients consent

CBA Task Force

- ❖ CBA responded and this response considered by the Advisory Committee. Extensive consultations and each of the CBA and the Advisory Committee obtained legal opinions
- ❖ Federation of Law Societies of Canada Model Code of Professional Conduct December 2011
Rule 2.04 – Conflicts
“ ... a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated ...”

CBA Task Force

- ❖ Ontario Rules have not been amended since *Neil* Law Society of Upper Canada is considering amendments now based on the Model Code. McMillan and other major firms made submissions in response to a call for comments
- ❖ New Code of Professional Conduct in effect in British Columbia January 1, 2013 adopts Model Code concerning duty of loyalty

Wallace v. Canadian National Railway

- ❖ Unanimous Saskatchewan Court of Appeal judgment adopted CBA's view of the duty of loyalty
- ❖ Held that the following, from the CBA Report, is the appropriate statement of the applicable approach to conflict analysis re the duty of loyalty to clients post-*Neil* and *Strother*:
 - “...absent proper consent, a lawyer may not act directly adverse to the immediate interests of a current client unless the lawyer is able to demonstrate that there is no substantial risk that the lawyer's representation of the current client would be materially and adversely affected...”
- ❖ Also held that CNR impliedly consented to the firm taking a case against it – professional litigant exception

Identifying Potential Conflicts

❖ Conflicts Search

- ❖ Needs to take place prior to accepting retainer and prior to receiving any confidential information
- ❖ Might be helpful to you, as clients, to know how the search process works

Conflict Search

- ❖ An ongoing database exists which includes the following information:
 - Date file opened
 - Matter name (name of file)
 - File number
 - Name of lawyer responsible for file
 - Description of the nature of the matter
 - Name of the client
 - Name of all adverse parties
 - Name of all other parties

Conflict Search

- ❖ Conflict search request includes:
 - Name of proposed client
 - Nature of the matter
 - Adverse parties/other parties
- ❖ When conflict search results received usually need to discuss possible conflicts with conflicts committee or other lawyers

Conflict Search

- ❖ Need to determine whether potential conflicts can be dealt with through consent and/or ethical screens
- ❖ Need to be careful what is discussed with lawyers acting on matters where a potential conflict exists

Managing Potential Conflicts

JOINT RETAINERS

- ❖ Permitted to accept employment for more than one client in a matter or a transaction under three conditions:
 - a) Requested to act for more than one client;
 - b) No information received can be kept confidential from other client(s); and
 - c) If a conflict arises that cannot be resolved, may have to cease acting for one or all clients

Managing Potential Conflicts

JOINT RETAINERS

- ❖ Even with consent, joint retainer should not be accepted where:
 - a) Firm members would have to negotiate against each other;
 - b) Firm member would make conflicting submissions in court; and
 - c) There are contentious issues between the clients

Managing Potential Conflicts

JOINT RETAINERS

- ❖ Recommending independent legal advice about a joint retainer may be appropriate

MULTIPLE RETAINERS

- ❖ Not specifically contemplated or forbidden by the Rules of Professional Conduct
- ❖ Permitted under Model Code and new B.C. Rules
- ❖ 2.04(2) – A lawyer shall not advise or represent more than one side of a dispute

Managing Potential Conflicts

MULTIPLE RETAINERS

- ❖ 2.04(3) – A lawyer shall not act or continue to act in a matter where there is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents
- ❖ Examples include acting for multiple creditors in an insolvency proceeding or acting for bidders in a sale process or financing proposal

Managing Potential Conflicts

MULTIPLE RETAINERS

- ❖ Informed client consent required
- ❖ Ethical wall put in place to protect confidential information

Managing Potential Conflicts

RETAINER LETTERS

- ❖ Becoming more common – in part because they can be helpful in dealing with conflict issues
- ❖ Can deal with a number of issues that can assist both clients and counsel on conflict matters

Managing Potential Conflicts

RETAINER LETTERS

- ✓ Who is the client
- ✓ Who is not the client
- ✓ Nature of retainer
- ✓ Carve outs from retainer
- ✓ Consent in advance to certain types of other retainers
- ✓ List of what names were searched

Managing Potential Conflicts

END OF REAINER LETTERS

- ❖ Can be critical in determining who is a client and who is a former client



Questions?

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