

Who's your client?

Recent court decisions shed light on some contentious conflict-of-interest questions.

By Julie Stauffer

When Allan Fineblit's phone rings, chances are good someone's about to hit him with another sticky conflict-of-interest question. "It's one of the areas where we get perhaps the greatest number of requests for advice," says the Law Society of Manitoba's CEO.

Over the past two decades, a trilogy of Supreme Court cases — *MacDonald Estate v. Martin*, *R. v. Neil*, and *Strother v. 3464920 Canada Inc.* — broadened the definition of conflicts of interest. In doing so, they introduced a host of new considerations into the day-to-day practice of Canadian law — and more than a few complications.

A lawyer's traditional duty of loyalty has expanded and standards around protecting confidential information have been raised. Now you can't act against an existing client without informed consent, for example, even on an unrelated matter. Nor can you act if there's a possibility of misusing confidential information, rather than a probability.

"The rules have become complicated," says Malcolm Mercer, litigation partner and general counsel at McCarthy Tétrault LLP in Toronto.

Complicated or not, you need to understand them, and not just because ignoring potential conflicts can cost you time, money and cases. "We have both a legal and a moral obligation to act like professionals," says Mercer. "It's fundamental to the system of justice that we participate in and to the rule of law in our society."

It's been just over a year since the CBA Task Force on Conflicts of Interest released its final report and toolkit. (A revised version of the CBA Code of Professional Conduct, incorporating the task force's recommendations, will be available on the CBA website this fall.) Here's what task force members Fineblit and Mercer advise with regard to how recent lower court rulings are clarifying the picture, what still needs to be elucidated, and how savvy lawyers can navigate the conflicts minefield.

1. Pay attention

The first step is to put systems in place to flag possible conflicts before any confidential information hits your desk. Take the 2008 case of *1964 Bay Inc.*, where a law firm involved in a significant litigation belatedly discovered that a newly hired associate used to work for the firm representing the opposing party.

The timing wasn't an issue, the Ontario Superior Court ruled, since the associate hadn't begun working on any files. The big mistake was having lawyers involved in the litigation administer the screen, thus becoming party to confidential information. The lesson? Make sure someone



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independent administers the confidentiality screens: your firm's general counsel, for example, or a member of the firm who is far removed from the potential conflict. If that's impossible, you may need to consider dropping the case in question.

2. Be clear who your client is

According to the so-called "bright line" test laid down in *Neil*, lawyers can't act against existing clients. But who, precisely, is considered a client?

In the recent *McKenna v. Gammon Gold* case, Ontario Superior Court Justice Joan Lax narrowed the definition, ruling that subsidiaries of one's corporate

Qui sont les clients?

Des décisions récentes éclairent certaines questions sur les conflits d'intérêts, tandis que d'autres restent en suspens.

Dans les deux dernières décennies, trois décisions de la Cour suprême du Canada (*MacDonald Estate c. Martin, R. c. Neil et Strother c. 3464920 Canada inc.*) ont élargi la notion de conflits d'intérêts. Les obligations de loyauté des avocats envers leurs clients ont été élargies. Dorénavant, par exemple, vous ne pouvez agir contre un client s'il y a une possibilité que vous utilisiez de l'information confidentielle contre lui, et non pas juste une probabilité.

Mais selon certains, la cour n'a rien simplifié, au contraire. « Les règles sont devenues compliquées », convient Malcolm Mercer, un associé de litige chez McCarthy Tétrault, à Toronto.

Le groupe de travail de l'ABC sur les conflits d'intérêts a publié son rapport et sa trousse d'outils il y a un peu plus d'un an, et une version révisée du Code de conduite professionnelle de l'ABC incorporant ces changements sera mise en ligne cet automne. Des membres de ce groupe, dont M^e Mercer et Allan Fineblit, président du Barreau du Manitoba, donnent quelques conseils aux avocats, à la lumière des récents développements jurisprudentiels.

1. Restez vigilants

La première étape est de mettre des systèmes en place pour détecter les conflits d'intérêts avant que des informations confidentielles ne tombent sur votre bureau. Par exemple, ça n'a pas été fait dans l'affaire de 2008, *1964 Bay Inc.*, dans laquelle un avocat junior qui avait changé de bureau avait auparavant travaillé pour la partie

client aren't automatically one's clients as well. Similarly, in the *Alberta Operative Plasterers' and Cement Masons' International Association* case, the court held that a union local is a separate entity from the national union.

And in an interesting twist, the 2009 Ontario Court of Appeal ruling in *Chang v. Shopcast Television Inc.* found that a lawyer could cross-examine a client who happened to appear as a witness in a litigation case. "The court was in effect saying, 'If we're going to give very strong protections in favour of clients, we're not going to expand what "client" means,'" explains Mercer.

To clarify upfront everyone's expectations regarding who is and isn't a client and what the exact parameters of the retainer are, engagement letters are highly recommended.

3. Get waivers

The most straightforward route to avoiding potential conflicts from unrelated matters is to obtain an advance waiver from your clients. But does that constitute the full disclosure that the *Neil* ruling demands?

According to the recent Alberta Court of Appeal decision *Alberta Union of Provincial Employees*, the answer is yes — if the document is clear and if the client is sophisticated enough to understand the implications of signing it.

4. Trust your gut

What about cases where the rules simply aren't clear? You have to weigh a number of factors, says Fineblit, from the sophistication of the client to how much is at stake. A higher conflict-of-interest standard should be required in cases where life, liberty, or child custody hang in the balance, for example.

adverse. L'erreur commise par la firme, selon le juge, avait été de faire participer des avocats impliqués dans le dossier au processus de sélection et de vérification d'informations confidentielles. La leçon : confiez cette tâche à quelqu'un d'impartial, voire à quelqu'un à l'extérieur du bureau.

2. Sachez qui est votre client

Selon le test développé dans *Neil*, les avocats ne peuvent agir contre des clients existants. Mais qui, exactement, est considéré comme étant un client? Dans la récente décision *McKenna c. Gammon Gold*, la Cour supérieure de l'Ontario a jugé que la définition excluait les subsidiaires d'une compagnie. Néanmoins, pour clarifier la question, des lettres d'engagement sont fortement encouragées.

3. Obtenez une quittance

L'un des moyens les plus simples est d'obtenir une quittance de votre client. Mais est-ce que ça satisfait au critère de pleine divulgation de l'arrêt *Neil*? Selon une récente décision de la Cour d'appel de l'Alberta, *Alberta Union of Provincial Employees*, la réponse est oui, en autant que le signataire soit outillé pour en comprendre la teneur.

4. Faites-vous confiance et tenez-vous au courant

Dans les cas plus difficiles, M^e Finnelbit recommande de se faire confiance. « C'est remarquable le bon jugement que les gens peuvent déployer quand ils écoutent leurs intuitions », dit-il.

Dans l'ensemble, il y a eu un certain progrès depuis la trilogie, notent les deux avocats, mais beaucoup de chemin reste à faire, dont un travail par les barreaux des provinces et territoires pour modifier leurs codes de conduite. « Je sais que nous n'allons pas être capable de répondre à chaque question, concède M^e Fineblit. Mais je souhaite seulement que l'on fasse du progrès. » ■

If another member of your firm is acting against your client, consider how big the firm is and how closely you work with your colleague.

Ultimately, if you have doubts about a matter, don't take it on. "It's remarkable what good judgment people have when they listen to their gut," says Fineblit.

5. Watch out for new developments

The Supreme Court trilogy left the legal profession to grapple with practical questions of how to simultaneously avoid conflicts of interest and guarantee access to legal services, especially in small communities and specialized areas of law.

To date, there has been some progress. Lower court rulings over the past year have begun to tackle some of those issues, in many cases incorporating reasoning from the CBA's Conflicts Report. At the same time, the Federation of Law Societies of Canada has been hard at work preparing a Model Code of Conduct (as part of that process, the Federation is taking the CBA report into consideration).

But consensus on conflicts of interest won't be achieved until lower court cases wind their way up to the Supreme Court and law societies across the country overhaul their provincial and territorial codes of conduct. "I think we're in the early stages of the dialogue," says Mercer.

Even when the discussion wraps up, don't expect complete clarity, Fineblit cautions. "I'm very confident that we're not going to be able to answer every question," he says. "I'm just looking for progress." ■

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