CONFLICT OF INTEREST: THE CONTINUING SAGA OF MARTIN v. GRAY

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Martin v. Gray was handed down by the Supreme Court of Canada on December 20, 1990. It changed, and clarified, the law regarding conflict of interest of lawyers in litigation matters. We have now had three years of judicial comment on the law laid down by the Supreme Court of Canada in that case.

The purpose of this paper is to determine what "flesh" these cases have put on the "bones" of Martin v. Gray.

In order to establish the foundation of this paper, a short summary of Martin v. Gray is necessary.

The English test to determine conflict of interest was (and as far as I know still is) the "probability of mischief" test. This test involved the application of the civil burden of proof on the applicant which required him to prove that, in fact, the impugned solicitor would, on the balance of probabilities, use confidential information to his advantage. As one would surmise, this test was very difficult to meet in light of the difficulty in obtaining the necessary evidentiary proof from the lawyers involved.

On the other hand, the American test was (and I believe still is) the "possibility of mischief" test. Sopinka defined this test as:

> Once it is established that there is a "substantial relationship" between the matter out of which the confidential information is said to arise and the matter at hand, there is an irrebuttable presumption that the attorney received relevant information. If the attorney practices in a firm, there is a presumption that lawyers who work together share each others confidences. Knowledge of confidential matters is therefore imputed to

> other members of the firm. This latter presumption can, however, in some circumstances, be rebutted. The usual methods used to rebut the presumption are the setting up of a "Chinese wall" or a "cone of silence" at the time that the possibility of the unauthorized communication of confidential information arises.

in England, it was difficult to remove a lawyer from a case unless the facts were obvious. In the United States, is a "substantial relationship" between the matter out of which the confidential information arose and the matter at hand was established, the lawyer was, essentially, off the case.

My experience of the Canadian approach prior to Martin v. Gray, (which arises out of an unreported case before Mr. Justice Richard which was decided after Martin v. Gray had been argued but before it had been handed down) was that each judge tended to review the two different tests and then make his own decision based on how he saw the equities of each case. As a result, no firmly entrenched Canadian position was available for the Supreme Court justices in Martin v. Gray.

The facts in Martin v. Gray are well known. Gray, an aggrieved plaintiff, sued Martin, a lawyer, and a company. Gray retained the Winnipeg law firm of Thompson, Dorfman. Martin retain Twaddle, Q.C. Twaddle acted on the case from 1983 to 1985, at which time he was appointed to the bench. During that time, Dangerfield, his articled clerk and junior assisted him in the case. There is no question that she obtained confidential information in that capacity.

When Twaddle was appointed to the bench Dangerfield moved to the firm of Scarth, Dooley. In 1987 as this elephantine case moved through the pre-trial process, Scarth, Dooley merged with Thompson, Dorfman.

The defendant, Martin, (who we now know did bad things as a lawyer and, I would assume, was using every weapon in his arsenal) brought an action to declare that Thompson, Dorfman were in a conflict because of Dangerfield's presence in the

firm. The trial judge agreed with Martin. He felt that it didn't "look right" for Dangerfield to be in the firm that was opposing Martin.

The Court of Appeal (2-1) disagreed. There is no real evidence that Dangerfield had imparted any information to anyone at Thompson, Dorfman. In fact, Dangerfield and Thompson, Dorfman went through extreme attempts to indicate that no communication would pass. I believe that Dangerfield even agreed to work in her home, outside of the office until the litigation was concluded. The Court of Appeal felt that in the absence of any proof of real mischief, that the plaintiff's right to retain counsel should be paramount and Thompson, Dorfman should be allowed to continue.

After reviewing the evolution of the law regarding conflict of interest in most of the English speaking world, Justice Sopinka adopted the great Canadian compromise and established a test between the two competing positions. The first part of the test to be applied comes from the American approach: the "substantial relationship" test. Sopinka describes it as a two question test. I see it as a three question test.

The first step is to determine whether or not there was a "previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor". The cases reviewed below have put some substance to the phrase "sufficiently related". It will remain a concept to be fine-tuned in the future. It is clear that if the law firm acted on the same case in the past, then there is a "sufficient relationship". However, recent cases have held that acting for the aggrieved client in similar matters might establish that relationship.

The second step relates to whether confidential information was imparted in that relationship. In American law, there is an irrebuttable presumption that, having established the "sufficiently related" hurdle, that confidential information was

imparted. Sopinka allowed for an escape. He stated that if the required previous relationship was established:

> The Court should infer that confidential information was imparted unless the solicitor satisfies the Court that no information was imparted which could be relevant.

Sopinka agreed that this would be a difficult task. However, he did not want to shut the door on the lawyer.

The third step is described by Sopinka as "whether the confidential information will be misused". This is really a guise for approaching the problem of implied knowledge between partners and associates in a law firm. It is clear that if the above tests are met against an individual lawyer who is charged with being in a conflict, then he is off the case. The answer is less clear, according to Sopinka, with respect to partners or associates.

Sopinka then left the door open for the Canadian Bar Association and law firms to establish accepted practices of "Chinese walls" and "cones of silence". Sopinka comes from the large corporate law firm mentality and identified, no doubt, quite closely with the difficulties that might befall these law firms if these tests were applied too literally to these law firms, most of whom experience regular changes in personnel.

I have no knowledge at the time of writing this paper as to whether or not the Canadian Bar has effected such guidelines. My understanding is that the attempts in this regard have been found to be very difficult.

Sopinka wrote for four of the seven judges who heard the case. Mr. Justice Cory wrote for the remaining three. They were much tougher on lawyers in conflict situations. Cory's position, stated quite bluntly, was as follows:

> Where a lawyer who has had a substantial involvement with a client in an ongoing contentious matter joins another law firm which is acting for an opposing party, there is an irrebuttable presumption that the knowledge of such lawyer, including confidential information disclosed to him or her by the former client, has become the knowledge of the new firm. Such an irrebuttable presumption is essential to preserve public confidence in the administration of justice.

The minority view, which applies an irrebuttable presumption, has logical problems when applied to its extreme. Cory appreciated this and stated:

> It must be left for another occasion, when argument has been directed to the issue, to determine whether a lawyer, who has not personally been involved in any way with the client on the matter in issue and who moves to a firm acting for the opponent to the client, should also be irrebuttably presumed to have received a confidential information to his new firm.

This weakness in the minority decision was explored by Ribinowitz and Rabinovitch in "Case Comments: More About Imputing Knowledge From One Member of a Firm to Another: MacDonald Estate v. Martin:, [1992] Adv. Quarterly 370.

The cases which have considered Martin v. Gray have, essentially, considered the question, of whether or not a "sufficient relationship" existed between the former client making the application for removal and the lawyer who is the subject of the application.

As with most cases that come before the courts, the final result is most usually determined by the facts which are peculiar to that situation. Trends can only be

distilled by attempting to blend together various decisions from disparate fact situations. This is often a thankless and impossible task. To attempt to make any sweeping generalizations after only three years of cases is, perhaps, presumptuous. I feel that perhaps the best way to summarize the evolution to date is to review some of the facts of the cases which have been handed down.

Michel v. Lafrentz (1991) 120 A.R. 355 (C.A.)

Subsequent to the Plaintiff retaining a law firm, one of the firm's partners became a director of a company that partly owned and managed the defendant company. The defendant moved to remove the plaintiff's lawyer.

The Court noted that the Canadian Bar Association Code of Professional Conduct states that a client is a client of all lawyers in a law firm, whether or not the individuals handle the client's work and thus found the partner to have a significant conflict of interest.

The Court noted that the Supreme Court of Canada in MacDonald Estate declined to relax the standards of conflict of interest and disqualification to accommodate larger law firms or to accommodate more mergers and movements. The priority must be "in the maintenance of public confidence in the legal profession's integrity and preservation of secrecy". The Court noted that there are two very strong presumptions which are difficult to rebut: that the lawyer with the conflict received confidential information and that all members of a law firm share confidential information. Promises, oaths and undertakings by lawyers not to share confidences within their law firm are not enough.

Re: Robinson (May 7, 1992) unreported 328/20 (N.S.T.D.)

A bankrupt applied to have the petitioner bank's solicitors removed, as members of the firm acted in the past for him and companies controlled by him. The Court found that the solicitors had only acted for the applicant, personally, on one occasion and any information received at that time was not relevant to the bankruptcy proceedings.

Although the solicitors had likely received relevant information while acting for companies controlled by the applicant, that Court stated as follows at p.3-4:

> The parties to the prior relationship and the parties to the present relationship must be the same. Any confidential information received by the law firm arising from its involvement . . . was received from the law firm's client which was P.M. Robinson & Associates Limited or Eastland Group Limited. Robinson was not the client. Therefore, there did not exist a solicitor-and-client relationship between him and the law firm. The law firm did not receive confidential information attributable to a solicitor-and-client relationship with Robinson. Because in law a corporation is distinct from, and different than, it owners or controllers, Robinson cannot stand in the stead of the corporation he controlled with respect to the relationship between the law firm and that corporation as its client.

Widrig and Cox Downie (1992) 114 N.S.R. (2d) 320

The plaintiff applied to have Cox Downie removed because various members of the firm had acted for him in previous business dealings. Although Cox Downie had never acted for Widrig personally, except on an unrelated matter, Widrig argued that the Court should look at the general policy and must be concerned with how a reasonably informed member of the public would view the situation.

It was argued that a solicitor-client relationship existed as much as it could exist where the client, in those cases, was a corporation. The Court noted that all of the plaintiff's relevant dealings with Cox Downie resulted from his being an employee of a corporate client. As such, Widrig was not dealing with Cox Downie on a solicitor-client basis, nor in his personal capacity.

Furthermore, the Court found that there was nothing in the previous relationship which Widrig had personally with Cox Downie that was sufficiently related to the present retainer to lead the Court to infer that relevant confidential information was obtained which could be imparted to the defendant. The application was dismissed.

Canada Trust v. Corkum (1991) 105 N.S.R. (2d) 230 (N.S.T.D.)

The applicant was a guarantor and owned several of the defendant companies against whom the plaintiff claimed fraud and conversion. Several members of Patterson Kitz, who were representing the plaintiff, had acted for the defendant Corkum on business and personal matters over the years. This work involved the incorporation and financing of various companies. Patterson Kitz had not acted for Corkum or his companies for over four years.

The Court found that the requirement that the previous relationship be "sufficiently related" to the present retainer did not require an actual factual connection to the retainer in question but could include confidences imparted over the long period of their relationship.

Justice Goodfellow stated:

> A client will often be required to reveal to the lawyer retained highly confidential information. The client's most secret devices and desires, the client's most frightening fears will often, of necessity, be revealed.

> The client must be secure in the knowledge that the lawyer will neither disclose nor take advantage of these revelations.
>
> When one is dealing in litigation, an understanding of one's opponent, his strengths and weaknesses is vitally important.
>
> Here the plaintiff's law firm acted extensively for Eric J. Corkum in his personal, financial and business endeavours over such a prolonged period that, in my view, a reasonably informed person would not be satisfied that no use of confidential information would occur.

No distinction was made in this case with respect to the solicitor-client relationship which the applicant had personally, or through his companies. The application was granted.

Calgas Investments Limited v. 784688 Ontario Limited (1991) 81 D.L.R. (4th) 518 (Ont. Gen. Div.)

A solicitor, while a member of a firm of solicitors gave limited advice on a partnership agreement to one of the partners in a condominium development. Subsequently, the solicitor joined another firm of solicitors which was eventually retained by another partner who was involved in litigation with the first. The first partner moved to have the second firm removed from the record because of conflict of interest.

The solicitor argued that subsequent to her giving the initial advice she had no contact with the file and had not reviewed the draft agreements which were in her possession.

After reviewing the decision in Martin v. Gray, the Court found that the lawyer did receive confidential information attributable to the solicitor-client relationship, even though she did not remember the nature of the information. Since her advice led to a partnership agreement being prepared (by a different firm of solicitors) and she was

asked to comment on the draft of that partnership agreement, the information received by her was found relevant to the matter at hand.

Accordingly, the Court found that there existed a previous relationship as set out in Martin v. Gray which was sufficiently related to the retainer from which it was sought to remove the solicitor. As such, the Court inferred that confidential information was imparted and found that there was not sufficient evidence in the affidavits or submissions of counsel of a description of any system within the firm for managing a possible conflict of interest situation.

As the solicitor was unable to "discharge the burden" and the public represented by the reasonably informed person would not be satisfied that no use of confidential information would occur, the firm of solicitors was removed from the record.

Ramsbottom v. Morning (1991) 48 C.P.C. (2d) 177 (Ont. Gen. Div.)

The third party brought a motion to remove the defendant's solicitors who acted for the third party in all its bus litigation between 1982 and 1987 and which was working on two active files of the third party in October of 1990. The third party claim was issued in 1988.

It was argued that the solicitors would have acquired knowledge of the practice, procedures and defence strategies of the third party which knowledge would give it an unfair advantage.

The Court noted that nice questions as to what portion of such knowledge might fit squarely into a "confidentiality" rubric and questions as to who knew what, when and which partners were actively engaged on files and which were not, can never be precisely answered.

In these circumstances, the Court found that it would have granted the application, but for the question of delay on the part of the third party. Since the application was not brought until two years after the third party notice was issued, the application was dismissed.

Asian Video Movies Wholesaler Inc. v. Mathardoo (1991) 36 C.P.R. (3d) 29 (Fed. T.D.)

The defendant in a copyright action applied to have the plaintiff's firm of solicitors removed. Previously, not knowing that another solicitor in the firm had been engaged by the Plaintiff and had sent out cease and desist letters, a solicitor of the firm had met with the defendant. Evidence as to the nature of the discussions was contradictory.

The Court stated that the applicant must show that confidential information was imparted. Considering the conflicting evidence, the Court held that it must be proven that there was a probability of confidential information being imparted. It stated that the onus was on the party alleging the conflict to first prove, on the balance of probabilities, that confidential information was imparted. Since the applicant admitted that nothing was said at the meeting concerning the plaintiff's claim and his defence, but rather the meeting involved a discussion about protecting certain rights for Pakistani videos, the burden was not met.

Furthermore, the Court found that even if confidential information was imparted, there was no risk it would be used to prejudice the client.

It should be noted that this decision appears to be completely inconsistent with Martin v. Gray. The Court in Asian Video Movies appears to elevate the threshold requirement that the applicant prove a sufficient proximity between the two retainers to a burden of proof that requires the applicant to prove on a balance of probabilities

that confidential information was imparted. In so doing, it has taken a presumption contained in Martin v. Gray and turned it on its head.

Creamer v. Hergt (1991) 55 B.C.L.R. (2d) 141 (S.C.)

The plaintiff's employer agreed to guarantee the plaintiff's mortgage at the beginning of his employment. He attended at the offices of the plaintiff's solicitor to sign the guarantee. The plaintiff subsequently retained the same solicitor several months later in an action against he employer for wrongful dismissal. The defendant applied to remove the plaintiff's solicitor.

The Court found that there was no solicitor-client relationship with the defendant. This was a simple conveyancing matter and the defendant was a sophisticated business man who would have consulted his own solicitors had he considered it necessary to seek legal advice. Since no solicitor-client relationship existed, the authorities on conflict of interest were not applicable and there was no reason to deprive the plaintiff of the solicitor of his choice.

Princess Auto and Machinery Limited v. Winnipeg (1991) 73 Man. R. (2d) 311 (C.A.)

N was named co-counsel for landowners in an expropriation proceeding in 1970. Arbitration hearings were adjourned in the hope of settlement and N did little after 1975 and nothing after 1978 on the file. His services were terminated in 1982.

O represented the City of Winnipeg at the arbitration and thereafter. In 1978 O joined N's firm.

The Court held that O was disqualified from acting for the City thereafter. This decision was reached even though N had stated that, although he had received

confidential information, time had dimmed his memory to the point where all was forgotten and, in any event, he had not and would not reveal confidential information.

The Court found that appropriate measures cannot be put in place after the event and still satisfy the public concern that no breach of confidentiality has taken place. In this case there was no evidence that institutional protective measures were in place at the required time.

Kaizer Resources Limited v. Western Canada Beverage Corp. (1992) 71 B.C.L.R. (2d) 236 (T.D.)

In this case, the defendant, Western, sought an order to prohibit the solicitors for the plaintiff, Kaizer Resources, (Freeman & Company) from acting on the grounds that Freeman & Company had represented certain dissident minority directors of Western previously.

The Court held that in August, 1991, three dissident directors of Western consulted Freeman & Company in their private capacities, and not as authorized representatives of Western. Their contract with Freeman & Company did not create a solicitor and client relationship between Freeman & Company and Western. Freeman & Company owed a fiduciary duty to act in the best interests of the three directors and not in the best interests of Western. The contract of employment was between Freeman & Company and the three directors and not between Freeman & Company and Western. Whatever Freeman & Company learned about the financial affairs of Western from the three directors, they acquired it outside of any contract with Western and apart from any fiduciary duty to Western.

Accordingly, it was held that there was no conflict of interest for Freeman & Company to act for Kaizer against Western in those proceedings.

Regin Properties v. Logics Holdings Inc. (unreported Ontario Court of Justice) December 17, 1992

In this case, the defendants sought to prohibit Osler, Hoskin & Harcourt from representing the plaintiffs in two actions against an individual defendant and a number of corporate defendants (all of which were controlled directly or indirectly by the individual defendant) arising out of a lease and alleged guarantees.

Osler, Hoskin & Harcourt had never represented the individual defendant, Mr. Menkes, personally, but had been retained by Mr. Menkes to act on behalf of certain companies. It appears from a review of the decision that the main company in question was a publicly traded company of which Mr. Menkes was an officer. Oslers had been retained by Mr. Menkes on behalf of the company and, throughout, Oslers had advised Menkes that in any negotiations he was under a fiduciary duty to act in the best interests of the company and, furthermore, that his interest as principal shareholder may be different than that of the minority shareholders.

Accordingly, there was no solicitor-client relationship between Menkes and Oslers and Oslers were allowed to continue.

Canada Deposit Insurance Corp. v. Commonwealth Trust Company (unreported) February 26, 1991

Lang Michener had represented C.D.I.C. in liquidation proceedings of Commonwealth Trust Company for many years. CIS was the chief shareholder of Commonwealth Trust Company.

Robertson Ward Sutterman had represented CGT, the liquidator of Commonwealth.

On July 1, 1990, Robertson Ward Sutterman merged with Lang Michener. CIS brought an application to remove Lang Michener as solicitors for C.D.I.C. in resulting litigation.

CGT did not join in the application. The basis of CIS' application was that CGT, as liquidator, owed a duty to CIS, as the major shareholder of Commonwealth. CIS submitted that that duty gave it standing to bring the application in the same manner as if it had been brought by CGT.

The application was denied. Essentially, the Court held that the application to remove a solicitor must be made by someone who was formerly the client of the law firm which was sought to be discharged.

Provincial Tire Limited v. Uniroyal Goodrich Canada Inc. (unreported) August 19, 1992 (Ont. Gen. Div.)

The plaintiffs sued the defendants for breach of their business relationship agreements. One of the associates of Fraser & Beatty, which represented the plaintiff, had worked at Weir & Foulds, which represented the defendant in the past and on the current matter. The associate had in fact assisted in the preparation and registration of certain security documents on behalf of the defendant in the matter of an amalgamation with the plaintiff.

The president of the plaintiff corporation swore an affidavit which stressed his reluctance to change counsel because of the complexity of the matters. In his view, the current litigation did not question the validity and enforceability of the security prepared by Weir & Foulds. The essence of the current dispute related to the subsequent conduct of the defendant and its alleged breach of the terms of agreements under which they conducted their business relationship.

The application was denied. The Court held that the issues in the litigation were unrelated to the work performed by the lawyer for Uniroyal in the preparation and registration of the security documents. In other words, a "sufficient relationship" had not been established.

The United Steelworkers of America et al. v. Amherst Aerospace et al. (December , 1993, Gruchy, J., N.S.T.D.)

In this case, the plaintiffs took action against numerous defendants in relation to an allegedly improper investment in a pension plan. The plaintiffs, in the litigation, were represented by Ronald Pink, a former member of the law firm of Patterson Kitz, which he had left in June of 1989.

The corporate defendant did not enter a defence because it was, essentially, dissolved. The directors of the corporate defendant had been sued in their personal capacity. Patterson Kitz had been the general counsel of the corporate defendant for approximately two years prior to Mr. Pink leaving the firm. During that time, Patterson Kitz had advised the corporate defendants on many matters and had charged substantial fees. Numerous lawyers at Patterson Kitz had worked on various issues on behalf of the corporate defendant. The legal communications had taken place between Patterson Kitz and the personal defendants as directors of the corporate defendant.

The impugned investment in the pension plan was culminated in September of 1989, a few months after Pink had left Patterson Kitz. Pink had no direct contact with the personal defendants during the years that Patterson Kitz was general counsel to the firm. He had not worked on any of the corporate files.

The personal defendants applied to have Pink removed as solicitor for the plaintiffs in the outstanding litigation. The application was denied by Justice Gruchy on two grounds.

First, after a review of lengthy and detailed affidavit evidence, Justice Gruchy concluded that there was no evidence that anyone at Patterson Kitz was involved in, or had knowledge of, the impugned pension plan investment prior to June of 1989. Accordingly, even assuming an irrebuttable presumption that the knowledge of one lawyer in a firm is knowledge of the other, there was not a "sufficient relationship" between the issues in the litigation and the work done previously for the corporate defendant.

Secondly, Justice Gruchy held that any information which passed between Patterson Kitz and the personal defendants was in their capacity as directors for the corporate defendant and accordingly they had no claim for breach of a former solicitor-client relationship.

Costs were not awarded on the application, but rather were costs in the cause, because of the fact that the issues to be reviewed were of such a nature that "the air needed to be cleared".

CONCLUSION

The following are some rambling thoughts with respect to the evolution of the law following Martin v. Gray three years ago:

Substantial Relationship

The cases essentially come down to a determination of whether or not the previous retainer was "sufficiently related to the issues in the current litigation". Each case will depend on its own facts.

To my mind, the courts are being fairly tough on applicants when requiring them to establish a "real and substantial" relationship. The courts seem to be giving considerable weight to the right of a litigant to have his counsel of choice even though they do not refer to this principle.

The Corkum case decided by Justice Goodfellow is at one end of the spectrum. It gives credence to the principle that simply by getting to know the client, the law firm has obtained an advantage. Justice Goodfellow was not concerned with the niceties of the corporate veil or retainers.

On the other hand, cases such as Provincial Tire and United Steelworkers seem to require that the previous relationship and the issues in the litigation must be almost identical.

My prediction is that counsel will continue to attempt to apply Corkum and the courts will tread very cautiously.

Parties to the Retainer

As evidenced by the review above, a number of applications have been dismissed on the basis that one of the relationships was between the law firm and a corporation and the other was between the firm and an officer or director in his personal capacity (Robinson, United Steelworkers, Kaizer Resources). In the current litigation, the individual is named personally. In these situations, other than in Corkum, the Court has considered the corporate veil impenetrable and denied the application.

This trend causes me great concern. I will accept that a personal applicant making a conflict application against former solicitors of a company of which he was simply a shareholder, has no real cause of complaint. However, if the applicant was the operating mind of the company and taking instructions from the law firm on matters which relate to the issues in the litigation, then I feel that the observance of the corporate veil is inappropriate. The reality is that law firms give advice to living people and the discussions between officers and directors of corporations and their counsel are expected to be conducted on a confidential and privileged basis -.

This trend in the law appears to be particularly improper when the directors are being sued personally for breach of fiduciary duty (United Steelworkers). So long as fraud is not alleged, the director could well have taken legal advice in his capacity as a director of a company, the advice found to be incorrect, and find the law firm that gave him the advice be on the other side of the case when the director is sued for breach of fiduciary duty.

There are some cases when an applicant will be making the application simply as a tactical measure and these occasions must be distinguished from those occasions in which a company officer should be expected to have had privileged conversations with counsel.

Timeliness of the Application

It is important that application to hold a law firm in a conflict be made in a timely manner. At worst an application made too late can be denied simply on that basis (Ramsbottom). Alternatively, a successful applicant can be deprived of costs (Corkum).

If the facts are not in dispute, then the application should be made as soon as litigation is imminent, even if it has not been commenced.

Alternatively, if the question of the sufficiency of the relationship is in doubt, it might be more appropriate to allow the pleadings to close in order that the issues in the litigation can be firmly established. However, I see very few, if any situations, where the litigation should be allowed to continue past the pleadings stage before the application is brought.

Costs

Costs are a real issue which every solicitor contemplating making such an application should consider. Judges hearing such application (and rightfully so) often consider the motivation behind the application. Chief Justice Esson in Manville Canada Inc. v. Ladner, Downs (1992) 88 D.L.R. (4th) 208 stated:

> Since MacDonald Estate v. Martin the application to disqualify has become a growth area as it began to do twenty or so years ago in the United States where it seems to have reached the stage of being a common feature of major litigation. No doubt, some of those applications are brought to prevent a risk of real mischief. But can there be any doubt that many are brought simply because an application to disqualify has become a weapon which can be used, amongst many others, to discomfit the opposite party by adding to the length, cost and agony of litigation.

I would suggest that if a Chambers judge hearing the application felt that the application was being made for completely tactical motives, then a penalty in costs more than the normal scale would be appropriate.

In Chief Industries Inc. v. Equisource Capital Corp. (unreported July 30, 1992 Ontario Supreme Court, General Division) a successful applicant in a conflict of interest case was ordered to pay to the respondent $10,000.00 as costs which had been incurred and thrown away by the requirement to retain new counsel.

On the other hand, since the challenged law firm has decided to resist the application by the former client, and if the judge feels that the application is appropriate in the circumstances, no costs will necessarily be awarded.

Delay

There is no question that bringing of an application for a conflict tends to delay the conduct of litigation. The facts of the issues are usually sufficiently complicated that a special Chambers period is required to hear the matter. Usually, all ordinary aspects of the litigation grind to a halt while the conflict application is being pursued. In Nova Scotia, with the difficulty in obtaining special Chambers periods, this can lead to a substantial delay.

Additionally, if a written decision is called for, the total delay in the litigation process can be from six months to a year. This is something that should be considered by anyone bringing such an application.

Burden of Proof

The burden is on the applicant to show that a "sufficient relationship" existed between the previous retainer and the current litigation. This is usually the ground

upon which the battles are fought. Once that burden has been proved, the burden shifts to the respondent law firm to satisfy the Court that no information was imparted which could be relevant. Sopinka said that this would be a difficult burden to meet and he has proved correct. None of the cases reviewed involved consideration of this issue. Most have accepted the presumption that lawyers share confidences.

Mobility of the Profession

The cases seem to accept the principle that the knowledge of one lawyer in a firm is knowledge of the all of the others. The Court do not want to get involved in protestations by lawyers that they can "keep secrets". Martin v. Gray itself is the best example of this principle.

Although Justice Sopinka has allowed that the presumption that the knowledge of one lawyer in a firm is the knowledge of others, can be rebutted on the basis of "Chinese walls" or "cones of silence", these have not yet formally been instituted and no cases have relied on these as a defence. Therefore, when lawyers change firms, knowledge of which files they have been working on is an essential matter to be reviewed by the hiring law firm.

The true perameters of the restriction on movement in the profession caused by Martin v. Gray will not be known until the situation envisaged by Mr. Justice Cory has proceeded through the courts. Justice Cory put it this way:

> It must be left for another occasion, when argument has been directed to the issue, to determine whether a lawyer, who has not personally been involved in any way with the client on the matter in issue and who moves to a firm acting for the opponent to the client, should also be irrebuttably presumed to have received an imparted confidential information to his new firm.

Strangely enough, this particular fact situation has not yet, to my knowledge, come directly before the Courts. Perhaps it has simply been a matter of common sense and common decency that counsel in litigation have not attempted to ask the Court to rule on this point. However, if the minority view of Cory is accepted, the mobility of the profession will be seriously encumbered. If Sopinka's view is accepted, then we will need more cases to determine in which situations a solicitor can satisfy a court that no information was imparted to him which could be relevant.

Code of Conduct

Both the Nova Scotia and CBA Codes of Professional Conduct can be valuable tools when litigating a conflict of interest application. Although these Codes provide only guidance to the court, they are helpful if they aid your case.