Relevant Passages from *R. v. Neil* (S.C.C., 2002), paras. 1, 12-20, 24-28, 36-40

[2002] 3 S.C.R. 631 (Binnie J.)

1 BINNIE J.:-- What are the proper limits of a lawyer's "duty of loyalty" to a current client in a case where the lawyer did not receive any confidential information that was (or is) relevant to the matter in which he proposes to act against the current client's interest? The issue arises here in the context of a series of criminal prosecutions against the appellant. He complains that a member of a law firm, with which he had an ongoing solicitor-client relationship in respect of certain transactions that were the subject of criminal proceedings pending against him, provided to the police information about an unrelated matter which led directly to the laying of additional charges. He was eventually convicted on those unrelated charges. The appellant's position is that his lawyers violated their duty of loyalty, and on that account the conviction that grew out of their conflict of interest should be stayed.

...

A. *The Lawyer's Duty of Loyalty*

12 Appellant's counsel reminds us of the declaration of an advocate's duty of loyalty made by Henry Brougham, later Lord Chancellor, in his defence of Queen Caroline against the charge of adultery [page641] brought against her by her husband, King George IV. He thus addressed the House of Lords:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.
>
> (*Trial of Queen Caroline* (1821), by J. Nightingale, vol. II, The Defence, Part 1, at p. 8)

These words are far removed in time and place from the legal world in which the Venkatraman law firm carried on its practice, but the defining principle -- the duty of loyalty -- is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1243 and 1265, and *Tanny v. Gurman*, [1994] R.D.J. 10 (Que. C.A.). Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have

confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies: *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2; *Smith v. Jones*, [1999] 1 S.C.R. 455. As O'Connor J.A. (now A.C.J.O.) observed in *R. v. McCallen* (1999), 43 O.R. (3d) 56 (C.A.), at p. 67:

> ... the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case.

13 The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests. Other objectives, I [page642] think, can be related to the first. For example, in *MacDonald Estate, supra*, Sopinka J. speaks of the "countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause" (p. 1243). Dubin J.A. remarked in *Re Regina and Speid* (1983), 8 C.C.C. (3d) 18 (Ont. C.A.), at p. 21:

> We would have thought it axiomatic that no client has a right to retain counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client and a former one.

See also: *Teoli v. Fargnoli* (1989), 30 Q.A.C. 136.

14 These competing interests are really aspects of protecting the integrity of the legal system. If a litigant could achieve an undeserved tactical advantage over the opposing party by bringing a disqualification motion or seeking other "ethical" relief using "the integrity of the administration of justice" merely as a flag of convenience, fairness of the process would be undermined. This, I think, is what worried the Newfoundland Court of Appeal in *R. v. Parsons* (1992), 100 Nfld. & P.E.I.R. 260, where the accused was charged with the first degree murder of his mother. The Crown sought to remove defence counsel on the basis that he had previously acted for the father of the accused in an unrelated matrimonial matter, and might in future have to cross-examine the father at the son's trial for murder. The accused and his father both obtained independent legal advice, after full disclosure of the relevant facts, and waived any conflict. The father also waived solicitor-client privilege. The court was satisfied there was no issue of confidential information. On these facts, the court concluded that "public confidence in the criminal justice system might well be undermined by interfering with the accused's selection of the counsel of his choice" (para. 30).

15 Sopinka J. in *MacDonald Estate, supra*, also mentioned as an objective the "reasonable mobility in the legal profession" (p. 1243). In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs,

may promote form at the expense of substance, and tactical advantage instead of legitimate protection. 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. Yet it is important to link the duty of loyalty to the policies it is intended to further. An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests.

16 The duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship. One of the roots of the word fiduciary is *fides*, or loyalty, and loyalty is often cited as one of the defining characteristics of a fiduciary: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 149; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 405. The lawyer fulfills squarely Professor Donovan Waters' definition of a fiduciary:

> In putting together words to describe a "fiduciary" there is of course no immediate obstacle. Almost everybody would say that it is a person in whom trust and confidence is placed by another on whose behalf the fiduciary is to act. The other (the beneficiary) is entitled to expect that the fiduciary will be concerned solely for the beneficiary's interests, never the fiduciary's own. The "relationship" must be the dependence or reliance of the beneficiary upon the fiduciary.
>
> (D. W. M. Waters, "The Development of Fiduciary Obligations", in R. Johnson et al., eds., *GÈrard V. [page644] La Forest at the Supreme Court of Canada, 1985-1997* (2000), 81, at p. 83)

Fiduciary duties are often called into existence to protect relationships of importance to the public including, as here, solicitor and client. Disloyalty is destructive of that relationship.

B. *More Than Just Confidential Information*

17 While the Court is most often preoccupied with uses and abuses of confidential information in cases where it is sought to disqualify a lawyer from further acting in a matter, as in *MacDonald Estate, supra*, the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role: *Montreal Trust Co. of Canada v. Basinview Village Ltd.* (1995), 142 N.S.R. (2d) 337 (C.A.); *Enerchem Ship Management Inc. v. Coastal Canada (The)*, [1988] 3 F.C. 421 (C.A.); *Jans v. Coulter (G.H.) Co.* (1992), 105 Sask. R. 7 (C.A.); *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Ct. (Gen. Div.)); *Gaylor v. Galiano Trading Co.* (1996), 29 B.L.R. (2d) 162 (B.C.S.C.).

...

19 The aspects of the duty of loyalty relevant to this appeal do include issues of confidentiality in the *Canada Trust* matters, but engage more particularly three other dimensions:

(i) the duty to avoid conflicting interests: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599 (C.A.), and *Services environnementaux Laidlaw (Mercier) LtÈe v. QuÈbec (Procureur gÈnÈral)*, [1995] R.J.Q. 2393 (C.A.), including the lawyer's personal interest: *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663 (H.C.), aff'd (1988), 66 O.R. (2d) 350 (C.A.); *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.); *Stewart v. Canadian Broadcasting Corp., supra*.

(ii) a duty of commitment to the client's cause (sometimes referred to as "zealous representation") from the time counsel is retained, not just at trial, i.e. ensuring that a divided loyalty does not cause the lawyer to "soft peddle" his or her defence of a client out of concern for another client, as in *R. v. Silvini* (1991), 5 O.R. (3d) 545 (C.A.); *R. v. Widdifield* (1995), 25 O.R. (3d) 161 (C.A.); *R. v. Graham*, [1994] O.J. No. 145 (QL) (Prov. Div.); and,

(iii) a duty of candour with the client on matters relevant to the retainer: *R. v. Henry* (1990), 61 C.C.C. (3d) 455, [1990] R.J.Q. 2455 (C.A.), at p. 465 C.C.C., *per* Gendreau J.A.; *Spector v. Ageda*, [1971] 3 All E.R. 417 (Ch. D.), at p. 430; the Canadian Bar Association, *Code of Professional Conduct* (1988), c. 5, Commentary [page646] 4-6. If a conflict emerges, the client should be among the first to hear about it.

...

20 The present appeal involves criminal proceedings and it is in that context that I propose to review the applicable legal principles.

...

(2) The Duty of Loyalty to an Existing Client

24 The Law Society of Alberta's *Code of Professional Conduct* provides that "[i]n each matter, a lawyer's judgment and fidelity to the client's interests must be free from compromising influences" (c. 6, Statement of Principle, p. 50). The facts of this case illustrate a number of important objectives served by this principle. Loyalty required the Venkatraman law firm to focus on the interest of the appellant without being distracted by other interests including personal interests. Part of the problem here seems to have been Lazin's determination to hang onto a piece of litigation. When Lazin was asked about "the ethical issue" in acting for Lambert, he said maybe "it was a question of not

wanting to give up the file". Loyalty includes putting the client's business ahead of the lawyer's business. The appellant was entitled to a level of commitment from his lawyer that whatever could properly be done on his behalf would be done as surely as it would have been done if the appellant had had the skills and training to do the job personally. On learning that his own lawyer had put before the divorce court evidence of his further wrongdoing, the appellant understandably felt betrayed. Equally, the public in Edmonton, where the prosecution of the appellant had attracted considerable notoriety, required assurance that the truth had been ascertained by an adversarial system that functioned clearly and without hidden agendas.

25 The general duty of loyalty has frequently been stated. In *Ramrakha v. Zinner* (1994), 157 A.R. 279 (C.A.), Harradence J.A., concurring, observed, at para. 73:

> A solicitor is in a fiduciary relationship to his client and must avoid situations where he has, or potentially may, develop a conflict of interests ... . The logic behind [page648] this is cogent in that a solicitor must be able to provide his client with complete and undivided loyalty, dedication, full disclosure, and good faith, all of which may be jeopardized if more than one interest is represented.

26 The duty of loyalty was similarly expressed by Wilson J.A. (as she then was) in *Davey v. Woolley, Hames, Dale & Dingwall, supra*, at p. 602:

> The underlying premise ... is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith.

27 More recently in England, in a case dealing with the duties of accountants, the House of Lords observed that "[t]he duties of an accountant cannot be greater than those of a solicitor, and may be less" (p. 234) and went on to compare the duty owed by accountants to *former* clients (where the concern is largely with confidential information) and the duty owed to *current* clients (where the duty of loyalty prevails irrespective of whether or not there is a risk of disclosure of confidential information). Lord Millett stated, at pp. 234-35:

> My Lords, I would affirm [possession of confidential information] as the basis of the court's jurisdiction to intervene on behalf of a <u>former</u> client. <u>It is otherwise where the court's intervention is sought by an existing client</u>, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation. [Emphasis added.]

(*Bolkiah v. KPMG*, [1999] 2 A.C. 222 (H.L.))

28 In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied.

...

(4) Remedies for Breach of the Duty of Loyalty

36 It is one thing to demonstrate a breach of loyalty. It is quite another to arrive at an appropriate remedy.

37 A client whose lawyer is in breach of his or her fiduciary duty has various avenues of redress. A complaint to the relevant governing body, in this case the Law Society of Alberta, may result in disciplinary action. A conflict of interest may also be the subject matter of an action against the lawyer for compensation, as in *Szarfer v. Chodos, supra*. Breach of the ethical rules that could raise concerns at the Law Society does not necessarily give grounds in a malpractice action or justify a constitutional remedy.

38 More specifically, in the criminal law context, if the material facts surface while court proceedings are ongoing, an application to disqualify the [page653] lawyer from acting further may be brought, as in *Re Regina and Robillard* (1986), 28 C.C.C. (3d) 22 (Ont. C.A.); *Re Regina and Speid, supra*, at pp. 20-21; *Widdifield, supra*, at p. 177, *per* Doherty J.A.; *R. v. Chen* (2001), 53 O.R. (3d) 264 (S.C.J.). The conflict should, of course, be raised at the earliest practicable stage. If the trial is concluded, the conflict of interest may still be raised at the appellate level as a ground to set aside the trial judgment, but the test is more onerous because it is no longer a matter of taking protective steps but of asking for the reversal of a court judgment.

39 In *R. v. Graff* (1993), 80 C.C.C. (3d) 84, the Alberta Court of Appeal held that in a post-conviction situation, if an accused is to challenge a conviction or sentence on appeal, he or she must show more than a possibility of conflict of interest; while actual prejudice need not be shown, the appellant must demonstrate the conflict of interest and that the conflict adversely affected the lawyer's performance on behalf of the appellant. See also *Silvini, supra*, at p. 551, *per* LacourciËre J.A.; *Widdifield, supra*, at p. 173; *R. v. Barbeau* (1996), 110 C.C.C. (3d) 69 (Que. C.A.), at p. 81, *per* Rothman J.A. It is not necessary for the accused to demonstrate actual prejudice because "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial": *Glasser v. United States*, 315 U.S. 60 (1942), at p. 76.

40 If the two-part conflict/impairment test is satisfied, the court may order a new trial. The appellant is unable to meet this test because, of course, he was not represented in any court proceedings (trial or pre-trial) by the Venkatraman law firm in either the *Doblanko* or the *Canada Trust* matters. Moreover he seeks more than a new trial. The appellant seeks a stay of the *Doblanko* verdict and a stay of further proceedings in the *Canada Trust* matters on the basis he was denied his right to effective representation contrary to s. 7 and s. 11(*d*) of the *Canadian [page654] Charter of Rights and Freedoms*, and that further proceedings on these matters would be an abuse of process. So abusive, he says, that this sorry affair amounts to one of the "clearest of cases" where a stay is justified: *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 2001 SCC 19; *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21.

...

ESSENTIALS OF
CANADIAN LAW

LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

SECOND EDITION

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CHAPTER 8

CONFLICTS OF INTEREST: SCREENS AND SILENCES

It is imperative that, in entering into professional relationships with clients, lawyers do not act in such a way as to place themselves in a position where the interests of their clients might be taken advantage of or compromised. This is part and parcel of lawyers' overall fiduciary duty and their particular role as a zealous partisan for their clients' interests and affairs; lawyers' professional, economic, and personal interests can undermine their independence and judgment and threaten the integrity of the lawyer-client relationship. However, lawyers have traditionally not been as sensitive as they might to the complex and unanticipated circumstances in which conflicts of interest might arise. While there is little to suggest that lawyers have operated willy-nilly in actual or potential conflict situations, the legal profession did not take such possibilities as seriously as it might have done. However, in recent years, the need to flag and avoid conflict situations has come to the forefront of the profession's attention. Both individually and collectively, lawyers have now become much more attuned to the possibilities of conflict situations arising. Indeed, one might almost conclude that they have become overconcerned, to the extent that the full and reasonable provision of legal services is being adversely affected.

In this chapter I will survey the nature and extent of the prohibitions that have developed around conflicts of interest. There are four situations in which potential conflicts of interest might arise: acting for two current clients in related transactions; acting for two current clients in unrelated transactions; acting against former clients; and a

clash between the clients' and the lawyer's own interests. Each of these is exacerbated by the recent rise of large law firms in which lawyers are not always sure about the identity, let alone the interests, of many of their colleagues' clients. In each situation, the requirement to avoid conflicts of interest flows both from the duty to be loyal to the client and from the duty of confidentiality. As part of their fiduciary duty to their clients, lawyers must ensure that they avoid potential as well as actual conflicts. While in many cases it will be sufficient to inform clients of potential conflicts and seek their express approval to continue acting as their lawyer, there will be occasions on which lawyers will be expected to withdraw. Unfortunately, the doctrine surrounding conflict situations arose in simpler times and in simpler circumstances than the conditions of contemporary professional practice. Consequently, the doctrinal and ethical challenge is to adapt the basic principles to the more complex problems and possibilities that now arise.[1] The development of recent jurisprudence has given added pertinence to these issues. Accordingly, rather than follow a separate conceptual typology, it is more illuminating to frame the discussion around the courts' unfolding approach to the conflicts doctrine.

A. LAWYERS' OWN INTERESTS

The basic rules that frame an actual conflict of interest and what lawyers must do in such situations can be traced back to lawyers' general duty to act as a zealous partisan on behalf of their clients and their interests. As the imposition of a fiduciary on lawyers to their clients suggests, it is essential that clients are able to trust their lawyers. Without an appropriate degree of trust, the professional relationship is severely compromised. In the same way that clients should have no doubt that their lawyers will hold all communications between them in the strictest confidence, so should they be completely assured that their lawyers will not engage in conduct that jeopardizes the clients' interests or otherwise impairs their lawyers' ability to act with only their clients' interests foremost in their minds. It is clearly not in clients' interests to have their lawyers representing other clients who are adverse in interest to them and/or who

1 Two important and broad-ranging comparative analyses of the area are Susan Shapiro, *Tangled Loyalties: Conflicts Of Interest In Legal Practice* (Ann Arbor, MI: University of Michigan Press, 2002) in the United States and Janine Griffiths-Baker, *Serving Two Masters: Conflicts Of Interests In The Modern Law Firm* (Oxford: Hart, 2002) in the United Kingdom.

might benefit from their lawyers' disclosure of confidential information. Also, on the basis of the fiduciary relation between lawyers and clients, lawyers are not to take advantage of or benefit from information that is received from clients, even if it would not disadvantage the clients.

In discussing conflicts of interest, the obvious place to begin is with a sense of what might be considered a conflict. The professional rules insist that lawyers must be "as free as possible from compromising influences," which are characterized as anything that would "affect adversely the lawyer's judgment, ... advice ... or loyalty" to the clients, actual or prospective (see V, Commentary, ss. 1 and 2). When dealing with a potential conflict of interest between lawyers and their clients, it is important to remember that it is not only the lawyers' personal interests that are to be taken into account but those of associates. For these purposes, "associates" has a wide definition; it includes spouses, children, and relatives "living under the same roof," legal partners, trusts or estates in which the lawyer acts as trustee or has a "substantial beneficial interest," and corporations of which the lawyer is a director or in which the lawyer controls "a significant number of shares" (see VI, Commentary, s. 3). While the rules are silent on the issue of less formal relationships, lawyers would be wise to disclose any intimate relations they have or had with other lawyers who might have some interest or connection to the file. Also, the prohibitions on lawyer-client conflicts that implicate the personal interests of lawyers stretch to both the financial and the romantic interests of lawyers.[2]

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2 *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663 (H.C.J.).

Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
Honourable Roger Salhany, Q.C., Commissioner

TAB 7B

Prosecutors and Conflicts

CROWN ATTORNEYS CODE OF PROFESSIONAL CONDUCT

Crown Policy Manual

...not diminish the offer made by a colleague to defence counsel unless there has been a change in circumstances since the making of the first offer, or unless the matter has been discussed with the colleague and/or referred to the appropriate Senior Crown Attorney in the event of disagreement;

...if unable to attend Court, due to sickness or other like reason, provide supervisors with as much notice as possible;

...ensure that the course of a particular matter be clearly outlined on the file, in a manner that is understandable by colleagues who deal with the matter subsequently;

In Dealing with Public Attention

The Crown Attorney shall:

...take reasonable care to distinguish between public statements made and actions performed as a representative of the Crown and those done as a private citizen;

...not seek out media attention or provide unsolicited comments to the media or publicly express personal views of any verdict;

...never disclose confidential departmental information;

...defer to a supervisor if uncertain how to respond properly to media questions;

Duties to Self and the Profession

The Crown Attorney shall:

...declare any actual or apparent conflict of interest and seek written instructions through the appropriate Senior Crown Attorney, from his or her Director;

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TAB 7C

Independent Prosecutors and Conflicts

Manitoba
Department of Justice
Prosecutions

Guideline No. 5:COU:1

Policy Directive

Subject: Appointment of Independent Counsel
Date: January 2005

POLICY STATEMENT:

Public prosecutions commenced at the instance of the Province of Manitoba are normally conducted by the Province's Crown Attorneys. This cadre of Crown Attorneys is amongst the most experienced and talented group of criminal litigators in Manitoba, and the Department of Justice is fortunate to have their services.

There are, however, some cases that, if prosecuted by the Province's Crown Attorneys, might give rise to inappropriate public perceptions and raise issues of public confidence. Most commonly, these cases involve situations where those who are involved in the administration of criminal justice in Manitoba are themselves directly involved in the case. For instance, where, following a police investigation, it is proposed that criminal charges be laid against a prosecutor or a judge, there exists the need to assure the public that decisions will be made on a principled basis, free from any sort of bias.

The purpose of this policy is to ensure confidence in the justice process by providing for the appointment of independent counsel in those situations where a reasonable person would perceive that an accused person may receive differential treatment because of his/her relationship with Manitoba Justice. The likelihood of such a perception is determined, in large part, by the closeness of the relationship between the accused and the Department. The nature of the alleged offence may also be a secondary factor. The following categories describe the circumstances in which independent counsel should be appointed, as well as the method by which that decision should be made.

1. Direct Connection to the Justice System. Whenever a criminal charge is laid against a person who is directly connected to the justice system, there may be a reasonable perception that the accused could receive some kind of differential treatment if prosecuted by a staff Crown Attorney. In all such cases, the prosecution must be conducted by independent counsel.

Persons who come within this category include judges, Crown Attorneys, police officers, lawyers involved in criminal defence work (or those having regular business with the Department), as well as employees of the Department of Justice who have direct involvement in either the court process (e.g. court clerks) or Prosecutions (e.g. support staff within Prosecutions). Members of the Legislative Assembly, and their immediate staff and family are also in this category.

For greater certainty, independent counsel must be appointed where the Department has been asked by the Commissioner of the Law Enforcement Review Agency to consider whether criminal charges should be laid following an investigation under *The Law Enforcement Review Act* respecting the conduct of a police officer.

The Assistant Deputy Attorney General has delegated the authority to appoint independent counsel to the Director of Regional Prosecutions and Education. Therefore, when a case in this category arises, the Crown Attorney is expected to refer it, as soon as possible, to the Director of Regional Prosecutions and Education for the appointment of independent counsel.

2. General Connection to the Justice System. This category includes employees of Manitoba Justice who are not directly involved in the court process and, in addition, close relatives of a person with a direct connection to the justice system (provided the Crown is aware of this relationship). In these cases, independent counsel will often be appointed. However, in order to require the appointment of independent counsel, the connection of the accused to the justice system must be more than trivial. In making this judgment, consideration should also be given to the seriousness and notoriety of the alleged offence.

In cases where the accused has a general connection to the justice system, the Crown Attorney is expected to refer the case as soon as possible to the Director of Regional Prosecutions and Education along with a recommendation as to whether independent counsel should be appointed. The Director of Regional Prosecutions and Education will determine whether the circumstances warrant prosecution by a staff Crown Attorney or outside independent counsel.

3. No Obvious Connection to the Justice System. In the vast majority of cases, there will be no connection between the accused and the justice system. These cases should generally be prosecuted by staff Crown Attorneys. However, there may be unusual circumstances where facts come to light that suggest that independent counsel is appropriate. Crown Attorneys must be alert to situations where a reasonable person may perceive that the accused could receive differential treatment because of a connection between the accused and the justice system.

If the Crown Attorney, after consultation with his/her Supervising Senior Crown, believes that an accused has a connection to the justice system that might give rise to a perception of bias, the case should be referred to the Director of Regional Prosecutions and Education for a decision as to whether independent counsel should be appointed.

Other Considerations

This Policy applies to individuals who have been charged with criminal offences. However, it may be appropriate to appoint independent counsel in cases involving provincial statute offences given the closeness of the accused's relationship to the Department and given the nature or severity of the offence. Crowns Attorneys who, after consultation with their Senior Supervising Crown, are concerned about the need to appoint independent counsel in a non-criminal case should refer the matter to the Director

of Regional Prosecutions and Education for a decision as to whether independent counsel will be appointed.

It may also be appropriate to apply this Policy, where the individual is not charged with an offence but is the victim of a crime or will be called as a material witness. If the case is one in which a reasonable person would have concern about differential treatment or where the Crown Attorney is concerned that his/her decisions about the case may be influenced because of the identity of a witness or victim, the Crown Attorney should refer the case to the Director of Regional Prosecutions and Education for a decision regarding the appointment of independent counsel.

Where charges to which this Policy applies have already been laid, or an opinion is sought on whether charges are appropriate, counsel should refer the matter as soon as possible to the Director of Regional Prosecutions and Education for the appointment of independent counsel. Immediate steps are necessary to ensure that even preliminary issues such as release on bail, adjournment of the charges and disclosure to the defense are decided by the independent counsel.

Nature of Appointments

There are an infinite variety of circumstances in which it may become necessary to appoint independent counsel. In view of this, there are a number of alternative approaches that may be adopted to ensure an independent decision-making process. In ascending levels of independence from government, they are:

a) *Appointment of a Crown Attorney from within Manitoba but from another Crown Office*

In some situations, the necessary degree of independence may be achieved through this type of appointment.

b) *Appointment of a Private Practitioner from Manitoba*

Where a former Crown Attorney who has since left the Department is being considered for appointment as independent counsel, care must be taken to ensure that sufficient time has elapsed to gain a "distance" from the Department. Care must also be taken to ensure that the person selected has not had any previous dealings with the alleged offender.

c) *Appointment of a Crown Attorney from Another Province*

Informal protocols exist between this Department and many other provinces and territories to facilitate the appointment of a Crown Attorney from outside of Manitoba. This approach was judicially approved by the Alberta Court of Appeal in *Kostuch* v. *AG Alberta* (1995), 101 C.C.C. (3d) 321 Alta. C.A., at p. 333 (in which a Manitoba Crown Attorney was appointed to prosecute in Alberta to avoid a perceived conflict of interest in that province).

d) *Appointment of a Private Practitioner from Another Province*

This option gives maximum independence from the Department. It is also the most expensive option, given the need to travel to and from Manitoba to interview witnesses and conduct proceedings. This option should only be pursued in exceptional cases, and after conferring with the Deputy Attorney General.

Depending on the issues that arise in a particular case, it may be necessary to appoint independent counsel for only one aspect of the case (e.g. the examination or cross-examination of a specific witness).

APPENDIX TO THE POLICY

Upon determining that independent counsel should be appointed, the Director of Regional Prosecutions and Education will proceed to make the appointment. While individual Crown Attorneys may have relatively little involvement at this stage, it is important that the process should be as transparent as possible and it is useful for Crown Attorneys to be aware of the process.

The Process of Appointment

The principal criteria for the selection of an independent counsel are:

- independence from government and the individuals involved in the specific case;
- excellence in the practice of law;
- a track record for integrity; and
- significant previous experience in either the prosecution or defense of criminal charges in the court system.

In some cases, the Director of Regional Prosecutions and Education will consult with the Assistant Deputy Attorney General and/or the Deputy Attorney General before making a final decision. *Ad hoc* appointments will usually be appropriate as individual cases arise. In matters arising under *The Law Enforcement Review Act*, a standing appointment of the independent counsel will be made to facilitate referrals from the Commissioner of the Law Enforcement Review Agency directly to the independent counsel.

Terms and Conditions of Appointment

Where a lawyer from outside the Department is retained to act as an independent counsel, the terms of reference under which the independent counsel is retained should be reduced to writing and made publicly available upon request in order to ensure a transparent process and public accountability. A copy of this Policy Statement must also be provided to the independent counsel once retained, and be made available to the public on request.

Absent exceptional circumstances, the following should generally form a part of the terms of reference:

a) The retainer agreement, including the terms of reference and any subsequent amendments, are publicly available on request;

b) Where a legal opinion is sought, the precise question(s) for which the advice is being sought, and the person to whom it should be provided;

c) The advice and decisions in the case are final and binding on the Department of Justice for the Province of Manitoba, subject only to receiving direction from the Attorney General or the Deputy Attorney General, which direction, if given, will forthwith be made public;

d) The independent counsel has full access to all employees within, and all documents and information held by the Department of Justice for the Province of Manitoba;

e) The independent counsel is to be guided by the prosecution policies issued on behalf of the Attorney General of Manitoba, which apply to all provincial prosecutions throughout the province. This includes, for instance, the charge approval standard (see: Crown Policy on Laying and Staying of Charges), disclosure policies as well as directives from the Attorney General on the position to be taken in cases of gang-related crime, violent crime, child victims, etc.

f) In many cases, it will be appropriate to include in the terms of reference a statement to the effect that advice is also being sought on the extent to which information concerning the case, including the opinion sought, should be made available to the public. This will be especially important where the case has attracted considerable public attention and scrutiny.

Relevant Passages from the *Federal Prosecution Service Deskbook*, ch. 7, "The Role of Agents in the Delivery of Prosecution Services" (2002)

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7.5.1 Conflict of Interest

7.5.1.1 Standing Agents

The policy regarding conflicts of interest and Standing Agents is set out in the Terms and Conditions of Appointment. The guiding principle is expressed in the Terms and Conditions of Appointment as follows:

> Legal agents must avoid any conflict of interest or appearance thereof in carrying out their mandate as agent of the Attorney General of Canada. Legal agents must take all necessary steps to avoid a conflict of interest and are expected to comply with their law societies' rules regarding conflicts.

7.5.1.2 Ad Hoc Agents

With respect to ad hoc agents, government conflict of interest guidelines seek to ensure that contracting with private sector agents meets the highest ethical standards. These guidelines are outlined in the Terms and Conditions of Appointment sent to agents. If an agent cannot comply with the guidelines, the agent shall immediately notify the Agent Supervisor, who in turn will notify the Executive Director of the Agents Affairs Unit, the Assistant Deputy Attorney General (Criminal Law) and the Senior General Counsel (Criminal Law). The Department will then request another appointment from the Minister through the AAU.

7.5.1.3 Generally

An agent may not prosecute offences under federal legislation if the agent or members of the agent's firm are currently defending persons charged with offences under the same legislation which the agent was appointed to prosecute.

If an agent prosecutes federal offences and the agent or members of the agent's firm are currently defending persons charged with offences whose prosecution is a provincial responsibility, the agent should inform the Agent Supervisor in writing. The Agent Supervisor will then assess whether a conflict of interest, or the appearance of a conflict, exists or if the continued use of the agent may be inappropriate. In assessing this question, the following factors may be considered:

> * whether the cases being defended involve an attack on the conduct or policies of an investigative agency;

* whether the cases being defended involve a constitutional challenge to federal legislation;

* whether the agent or members of the agent's firm may use confidential information or documents obtained while acting as an agent;

* whether the investigating officers involved in the cases being defended are employed by an investigative agency with whom the agent has had regular contact while working as an agent; and

* generally, whether there is some reason to believe that it would be inappropriate for the agent to continue to conduct prosecutions on behalf of the Attorney General of Canada.

If the Agent Supervisor believes that a conflict, or the appearance of a conflict, exists or that it may be inappropriate for the agent to continue to act on behalf of the Attorney General, the Assistant Deputy Attorney General (Criminal Law) and the Executive Director (AAU) shall be notified in writing. The issue will then be reviewed with the Minister's office. The Minister will make a final decision on whether the agent will continue to act.

When defending present or future criminal cases or advising clients, agents shall not use confidential information obtained during employment as an agent without the written consent of the Assistant Deputy Attorney General (Criminal Law).

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