COMMITTEE: **Ethics Committee**

DATE: **April 6, 2006**

2. CHAPTER 6: WHETHER COUNSEL WHO AGREED TO ACT AS ARBITRATOR CAN LATER ACT AS COUNSEL

A lawyer acts for a client ("the administrator") in an action she commenced in October 2005 in her capacity as administrator of her mother's estate for damages against a Tribal Council ("the Council") for taking her mother's land on an Indian reserve in 1976.

The lawyer for the administrator and the lawyer for the Council in a joint submission asked the Ethics Committee whether it is proper for the lawyer to continue to act for the administrator in this matter, given that in 2004 he was approached by the administrator and the Council to act as an arbitrator in the matter in which he now acts as counsel.

Although the lawyer was not ultimately retained as arbitrator, he had a number of telephone conversations with the parties which related to defining the issue to be arbitrated, the place and estimated length of the arbitration and the time for delivery of the retainer. The Council Chief sent the lawyer a two-page letter dated September 29, 2004 in which he set out the history of the dispute between the Estate and the Council, the offers that had been made, the status of documents and the position of the Department of Indian Affairs.

The Committee noted, in particular, Rules 8 and 9 of the Code of Ethics of the British Columbia Arbitration and Mediation Institute. Those Rules state:

8. A Member shall conduct all proceedings fairly and diligently, exhibiting independence and impartiality.

9. A Member shall be faithful to the relationship of trust and confidentiality inherent in the office of arbitrator or mediator.

Although the Committee was of the view that the lawyer could not be expected to keep information provided to him by the Council confidential from the administrator, the lawyer's dealings with the Chief may have permitted him to understand the Council's strengths and weaknesses, apart from any strictly factual information imparted. That understanding could give the administrator an advantage in the ensuing litigation and could reasonably be expected to undermine the Council's confidence in the integrity of both the arbitration and the litigation processes. In the Committee's opinion, the Council might well have declined to entrust the lawyer with any information in his capacity as arbitrator had the Council known there was a risk the lawyer might act against it as counsel for the administrator if the arbitration did not proceed.

It was also the Committee's view that the confidence of the public in arbitration as a process to resolve disputes, generally, may suffer if it is perceived that arbitrators may later act as counsel for one of the parties if an arbitration does not proceed.

For these reasons, a majority of the Committee were of the opinion that it would be improper for the lawyer to continue as counsel for the administrator.

One member of the Committee dissented from the view of the majority. That member noted that the arbitration process had not formally commenced and that the arbitrator had a clear obligation to share all information provided to him with both parties. It follows that it could not be said the Council was in any way prejudiced by him acting as counsel for the administrator and he would not be acting improperly by continuing the representation.

JO/
April 6, 2006.