

MINUTES

COMMITTEE: Ethics Committee

DATE: July 10, 2003

4. CHAPTER 6, RULE 7: WHETHER CONFLICT CAN BE CREATED THROUGH INFORMATION LAWYER HAD BEFORE HE WAS A LAWYER

A lawyer acts for a First Nations client in negotiations with the provincial and federal governments with respect to the allocation of revenue from oil and gas reserves that lie beneath the land owned by the First Nations client. There is no dispute that the subsurface oil and gas resources belong to the province and the land belongs to the First Nations client. The negotiations concern the amount the province is prepared to pay to the First Nation to permit third party access on the Indian reserve to allow for the oil and gas development, and the terms of that access.

Beginning 12 years ago the lawyer acted for the province in general negotiations involving the provincial and federal governments and his current First Nations client. Those negotiations related to the provision of lands from the province, to be transferred to Canada for the use and benefit of the lawyer's current First Nations client, as Indian reserve lands. The negotiations did not relate to the sharing of oil and gas revenues.

The lawyer also acted for the province approximately 10 years ago in a set of negotiations involving the sharing of oil and gas revenues, but with different First Nations involved. The reserve lands and the circumstances were different in those negotiations, although the substance of what was being negotiated (access by third party developers and the amount to be paid by the province) was the same. At that time the lawyer was not called to the bar and was not acting as a lawyer. Legal advice on the matters were provided by the Ministry of the Attorney General.

The lawyer says he has no confidential information from the former representations that is relevant to the current issue on which he acts for the First Nations client. The lawyer for the province advises that the lawyer likely possesses confidential information and is in a position of conflict, given his previous responsibilities on behalf of the province.

The Committee noted the conflicting views about whether the lawyer possesses confidential information as a result of his former representation of the province. The Committee was unable to resolve that discrepancy and expressed no view on whether the lawyer has confidential information arising out of the former representation. However, given the similarity of the current issue on which the lawyer proposes to act for the First Nations client to those that he formerly acted on for the province, the Committee was of the view that it could not be said that the current matter is substantially unrelated to the former representations. His current client was a party adverse in interest in the first matter and, in the second matter, where he represented the province against First Nations other than his current client, the issues at stake were the same as in the current matter.

It was the Committee's view that the fact that the lawyer was not called to the bar at the time he represented the province was not material to his current ethical obligations. He acted in a senior capacity for the province in a relationship of trust and substantial responsibility. His current

status as a lawyer cannot permit him to act toward the province in any way inconsistent with the obligations flowing from such a relationship. It follows from this conclusion that the lawyer would be acting in a conflict should he act for the First Nations client with respect to this issue, unless he has the consent of the province to do so.

JO/
July 2003