

IN THE MATTER OF: The *Law Enforcement Review Act*
Complaint # 2008/28

AND IN THE MATTER OF: An Application to have counsel for the
respondent Officer removed.

BETWEEN:

J. A. D.,)	
Complainant)	Complainant unrepresented
)	
- and -)	
)	
Sgt. S.A.G.)	Mr. Paul McKenna
Cst. C.E.Z.)	For the Respondents
Respondent Officers.)	
)	Mr. Sean Boyd
)	For the Commissioner
)	
)	Mr. John Harvie
)	for Mr. Paul McKenna
)	
)	April 12, 2010
)	

NOTE: These reasons are subject to a ban on publication of the respondents' names pursuant to s. 13(4.1).

KELLY K. MOAR, P.J.

[1] This matter initially comes before the court on an application by the complainant to review the decision of the *Law Enforcement Review Act* (LERA) Commissioner to decline to take further action on a complaint.

[2] However, prior to that motion being heard on its merits, a preliminary motion has been introduced by the complainant to have Mr. Paul McKenna removed as counsel for the respondent officers.

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

[3] By way of background, Mr. McKenna is counsel for the respondent officers. It is suggested that as a result of his outside community involvement, Mr. McKenna is now in a conflict of interest and in breach of Chapter 6(c) and Chapter 7 of the Code of Professional Conduct. It is on this basis that J.A.D. alleges Mr. McKenna is in a conflict of interest and should be removed as counsel of record for the respondent officers.

[4] Mr. McKenna has denied any suggestion that he is in a conflict and opposes the motion.

[5] Mr. John Harvie appeared on behalf of Mr. McKenna to argue the merits of the motion.

[6] This matter originated by way of an Affidavit filed by J.A.D. which counsel took no issue in being filed. There was no cross-examination on the Affidavit nor was any material filed in response by Mr. McKenna or the respondent officers.

[7] The factual underpinning of this motion comes from the uncontested Affidavit of J.A.D. and can be summarized as follows.

[8] On March 1, 2009, J.A.D. learned that an organization entitled Le Cercle Moliere Inc. was the recipient of a quantity of federal funding. The announcement of that funding was made by the now turned Member of Parliament and Parliamentary Secretary for Official Languages, S.A.G., who is one of the respondent officers in the complaint filed by J.A.D. under the Law Enforcement Review Act.

[9] Further inquiries revealed that Le Cercle Moliere Inc. is a registered charity organization and at the time of the federal funding award, Mr. McKenna was the President of that organization. I am told that he has been in the capacity for more than seven years. The mailing address for the firm was noted to be Myers Weinberg LLP, 724 – 240 Graham Avenue, Winnipeg, Manitoba, which is the law firm of Mr. Paul McKenna.

[10] Other directors of note included Madame Justice Keyser and Mr. Justice Joyal, both of the Manitoba Court of Queen's Bench.

[11] It is surmised by J.A.D. in her Affidavit that Le Cercle Moliere Inc. would seem to have a financial dependence on government funding.

[12] It is suggested that this dependence on government funding by this organization, of which Mr. McKenna is the President, may hamper his independence to the respondent officer, who is now a client.

[13] J.A.D. relies on Chapters 6(c) and 7 of the Code of Professional Conduct in support of her motion.

[14] J.A.D. suggests that upon an analysis, a conflict, or potential conflict of interest ought to be found and McKenna then ought to be removed as counsel of record to ensure the integrity, fairness, independence and impartiality of the parties to this process.

[15] Mr. Harvie opposed the motion on behalf of Mr. McKenna. He began by indicating that it was his opinion that there is no perception of a reasonable apprehension of bias before this, and I will use the term “tribunal”.

[16] Although Mr. Harvie initially questioned whether there exists jurisdiction to have Mr. McKenna removed as counsel of record, that issue was not advanced any further in argument.

[17] To put it succinctly, Mr. Harvie takes the view that nothing raised by J.A.D. should cause this hearing any concern.

[18] Acknowledging the Professional Code of Conduct, Mr. Harvie suggests none of the Chapters are contravened by the matter at bar.

[19] Under Chapter 6, Mr. Harvie suggests that it must be the client who raises the issue of conflict. That not being done, it is suggested that there is can be no basis for any intervention pursuant to this section of the Code.

[20] As for Chapter 7 of the Code, Mr. Harvie points out that it involves “outside interests.” With respect to this, it is suggested by Mr. Harvie that Mr. McKenna is in a solicitor/client relationship. He is to act as an advocate and has a fiduciary duty to his client.

[21] Chapter 7, suggests Mr. Harvie, is geared to addressing those situations where there may be a potential abuse of a client/solicitor relationship where it is not clear in what capacity counsel is acting. In other words, is counsel acting on his own behalf or is he acting in his capacity as counsel for a party.

[22] With respect to both of these Chapters, Mr. Harvie suggests that there has been nothing put forth that could support a breach or a perception of a breach of Mr. McKenna’s professional obligations of his solicitor/client relationship.

[23] It is on this basis that Mr. Harvie suggests that the motion ought to be struck as not disclosing a reasonable basis of action.

[24] The *Law Enforcement Review Act* is a vehicle upon which a private citizen may have the alleged misconduct of a police officer examined to see if it falls within a category known as a “disciplinary default.”

[25] The Act itself is self-regulating and self-contained by way of jurisdiction and procedures.

[26] The issue of removing counsel from the record was discussed by Mr. Justice Sopinka in the case of *MacDonald Estate v. Martin* [1990] 3 S.C.R. 1235, at pp. 1245-46:

“...the courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy...”

[27] Later, Mr. Justice Sopinka adds to this by indicating that the rule is not designed to protect the client’s interest but rather to protect the administration of justice. It is the integrity of the justice system that takes centre position over the rights of the litigants.

[28] Section 24(4) of the *Act* states that unless otherwise provided, the rules of procedure in summary conviction proceedings apply to all hearings. In my view this would import the ability to deal with counsel issues, in the manner suggested by Mr. Justice Sopinka, to ensure that the hearing itself is fair and impartial. As this issue was not argued further, I rely on this statement to permit myself the jurisdiction to adjudicate the concerns raised by J.A.D.

[29] Initially it should be stated that generally Codes of Conduct are statements in reference to public policy. In the context of lawyers, the Code is a statement that is to serve as a guide for lawyers and their subsequent conduct.

[30] A situation of conflict of interest occurs when there is a “substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyers own interests or by the lawyers duties to another current client, a former client or a third person.” [Restatement (Third) of the Law Governing Lawyers s. 121, cited with approval in *R. v Neil*, 2002 SCC 70, 2002 3 S.C.R. 631 @ para. 31].

[31] I note for the record that the scenario before myself is somewhat unusual as it has not been alleged or suggested that Mr. McKenna has ever represented S.A.G. in any prior matter.

[32] An application to have counsel removed usually has as its basis the allegation that counsel of record, or a member of the firm, is in possession of

information concerning the adverse party that was obtained through a prior solicitor-client relationship. That is not the case in this application.

[33] Any application brought to remove a lawyer from a case is a serious motion of competing interests. It is a balancing act between a person's right to choice of counsel and the integrity of the system.

[34] In *MacDonald Estate*, supra, at page 4, Mr. Justice Sopinka summarizes Hanssen J's. comments as follows:

“ Hanssen J., the motions judge, observed that the respondent's right to retain counsel of his choice is not an absolute right, but rather, it is subject to reasonable limits. In his view, the court has a duty not only to the parties to the litigation but also to the public ‘to ensure that lawyers observe the highest standards of professional conduct with respect to cases before the court.’”

[35] Chapter 6 of the Code of Professional Conduct is entitled ‘Conflict of Interest between Lawyer and Client’. I accept, as an arguable point, that someone other than the actual client of the lawyer at issue can allege a conflict of interest. [*Pasmatzoglov v. Boissevain Motor Hotel Ltd.* [2005] M.J. No. 247 @ para. 16].

[36] Going further however, it appears that it is not open to allege a conflict of interest in cases where the client is not willing to adopt such a conflict. In essence, until it is adopted by the party who has retained the lawyer in question, it is a non-issue. [*Pasmatzoglov*, supra, @ para. 23]

[37] In the case at bar, Mr. McKenna has been retained to represent the respondent officers with respect to a complaint filed about their conduct. That is the sole basis of their relationship that I have been informed. There is no other related business interest or ongoing business transaction between the parties as it relates to the matter now before the courts.

[38] The relationship between Mr. McKenna and S.A.G., the respondent officer now turned Member of Parliament, in the context of this litigation is unrelated in law and does not attract the sanctions of the Professional Code of Conduct.

[39] Chapter 7 of the Code of Professional Conduct is entitled “Outside interests and the Practice of Law.” The rule simply states:

“The lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.”

[40] The aim of the section is to clarify the role of the lawyer at the time he is interacting with the client to ensure that roles do not overlap. It is an attempt to ensure that nothing presents itself that may affect the lawyer's professional judgment. [*Law Society of British Columbia v. Coglon* [2001] L.S.D.D. No. 88, at paragraph 40.]

[41] In this regard it is important to categorize the prior relationship. I am advised that Mr. McKenna is the President of charitable organization which has been the subject of government funding for a significant period of time. The last time that funding was awarded, I am told that the respondent officer S.A.G., now turned Member of Parliament, made the announcement for the funding.

[42] It is on this basis that J.A.D. suggests that this relationship may hamper Mr. McKenna's independence in the matter now before us.

[43] Chapter 7 is designed to ensure that it is clear to all in what capacity the lawyer is acting. The fact he is the President of a charitable organization, and designates himself as such, is not related whatsoever to the litigation concerning the respondent officers. In fact, it is somewhat gratuitous that it happened to be that the respondent officer, S.A.G., now turned Member of Parliament, who made the announcement for the last funding.

[44] In addition there is no evidence before us to suggest that Mr. McKenna's role as President of Le Cercle Moliere Inc. is in any way connected with his practice of law. There is no evidence to suggest that Mr. McKenna's involvement in that organization could impair his competence as a lawyer or bring himself or the profession into disrepute.

[45] Given the above, I am of the view that there is no cause shown to have Mr. McKenna removed as counsel of record and he will therefore be permitted to act for the respondent officers.

[46] Counsel may contact Ms. Marilyn Baron to have the continuation of this matter scheduled.

Original signed by:

Kelly K. Moar, P.J.