

Docket: 90-3235(IT)
91-509(IT)G
91-1816(IT)G
91-1946(IT)G

BETWEEN:

TED J. HOCHBERG,
LINDA LECKIE MOREL,
and GEOFFREY D. BELCHETZ

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on April 28, 2004, at Kitchener, Ontario,

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellants: David M. Goodman and
Howard Winkler

Counsel for the Respondent: Peter M. Kremer and
Rosemary Finchman

ORDER

Upon motions by the Appellants for an Order that their counsel, Howard Winkler, and his firm, Aird & Berlis, are not disqualified by reason of conflict of interest from acting for them in these appeals;

And upon reading the affidavits of Michael Spivak, Howard Winkler and Einar Bellfield, filed;

And upon hearing counsel for the parties;

It is ordered that the Appellants are entitled to continue to be represented before this Court by Mr. Howard Winkler and the firm Aird & Berlis.

The Appellants are entitled to costs of this motion, with a counsel fee which I fix at \$1,000.

Signed at Ottawa, Canada, this 7th day of July, 2004.

"E.A. Bowie"

Bowie J.

Citation: 2004TCC487
Date: 20040707
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TED J. HOCHBERG,
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REASONS FOR ORDER

Bowie J.

[1] The motions before me are unusual ones. The Appellants move for an Order declaring that their counsel, Mr. Howard Winkler, and his firm, Aird & Berlis, are not disqualified by reason of conflict of interest from acting for them in these income tax appeals. It is an issue that more usually takes the form of an application by one party to have the counsel representing another party disqualified from acting.

[2] The Appellants invested some years ago in one or more of several limited partnerships that were being promoted at that time by a Mr. Bellfield and an associate of his. The partnerships suffered substantial losses, which the Appellants and others sought to apply in reduction of their incomes under section 3 of the *Income Tax Act*. The Minister of National Revenue has taken the position that the partnerships in question were not partnerships at all, because they carried on no business, and consequently has disallowed the deductions claimed. The present Appellants are said to be representative of a large number of other investors. Over the years, they have been represented by a number of different counsel. In June 2003 they changed

counsel once more, appointing Mr. Winkler. The Respondent is represented by the Attorney General of Canada.

[3] Some years ago, the Attorney General of Canada decided to prosecute Mr. Bellfield and his associate for fraud and uttering false documents in connection with their promotion of the limited partnerships. In December 1999 they were convicted on two charges of fraud and two charges of uttering. Since then they have appealed those convictions to the Court of Appeal for Ontario, unsuccessfully, and they have applied for leave to appeal to the Supreme Court of Canada, again without success. Mr. Winkler represented Mr. Bellfield in his application for leave to appeal to the Supreme Court, which was filed on February 25, 2004. The Attorney General of Canada responded by opposing the application for leave, and by moving to have Aird & Berlis and Mr. Winkler disqualified from acting for the Applicant on grounds of conflict of interest. Briefly stated, the Attorney General's position was that Mr. Bellfield had defrauded the investors in his partnerships, and that Mr. Winkler therefore could not act for both the promoter and the investors, as they had conflicting interests. The Reasons for Judgment of the Court of Appeal contain this statement:

The Crown alleged that the investors were defrauded of approximately \$22,000,000 and that approximately \$118,000,000 in fraudulent tax losses were claimed.

The day after I heard this motion the Supreme Court of Canada dismissed Bellfield's application for leave to appeal. It made no disposition of, nor even mention of, the motion before it to disqualify Mr. Winkler and Aird & Berlis.

[4] Although Mr. Bellfield is now not a client but a former client of Mr. Winkler, it is not impossible for there to be a conflict of interest that would prevent him acting for the Appellants in these appeals. The interests that are protected by the conflict of interest rules include the entitlement of a former client to the continuing loyalty of his former counsel, as well as the client's right to have maintained the confidentiality of information passing between them to which solicitor and client privilege applies. The over-arching concern is that public confidence in the legal system not be impaired by actual or reasonably perceived conflicts of interest.¹

¹ *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; *R.W. Neil*, [2002] 3 S.C.R. 631.

[5] On the material before me, I see no cause for concern in the present case. Michael Spivak is knowledgeable as to the many appeals that are pending in this Court in connection with Mr. Bellfield's enterprises, and in particular as to the three in which these motions are brought. He is authorized by all the Appellants to speak on their behalf. His affidavit is unchallenged, as are those of Howard Winkler and Einar Bellfield.² Those affidavits establish that it was the Appellants who proposed to Mr. Bellfield that he be represented by Mr. Winkler before the Court of Appeal, and later the Supreme Court, on appeal from his conviction. They did so, and Mr. Bellfield agreed to the proposal, because they were all of the view that their interests completely coincided, and that the highest probability of success, both in Mr. Bellfield's appeal from conviction and in the appeals from income tax assessments before this Court, lay in arguments that Mr. Winkler had outlined to them. The Appellants were sufficiently convinced of this that they were willing to pay Mr. Winkler's fees for representing Mr. Bellfield. The affidavit evidence also establishes that both the Appellants and Mr. Bellfield had the benefit of independent legal advice before they concluded that no conflict of interest would arise from Mr. Winkler representing all of them. Finally, the affidavits also establish that Mr. Winkler has not received any confidential communication from either the Appellants or Mr. Bellfield.

[6] On the motion before me, counsel for the Attorney General of Canada did not submit that Mr. Winkler is barred from representing the Appellants by an existing conflict. His position was that while no conflict necessarily exists now, one may arise in the future, because Mr. Bellfield will inevitably be a witness when these appeals are heard, and Mr. Winkler, as counsel for the Appellants, will have to cross-examine him, and he may then be in a position of cross-examining a witness from whom he has received confidential information as a client. This submission, of course, assumes that sooner or later the Appellants will take the position in this Court that Mr. Bellfield's interest and theirs no longer coincide. It also flies in the face of uncontroverted evidence that Mr. Winkler has received no confidential information from Mr. Bellfield. Moreover, it is a probability that the Appellants, Mr. Winkler and Mr. Bellfield can readily foresee. The Attorney General could have cross-examined Mr. Bellfield as to this prospect, but chose not to.

[7] I am satisfied, on the basis of the material before me on this motion, that no disqualifying conflict of interest presently exists by reason of Mr. Winkler's

² Mr. Bellfield's affidavit was sworn on March 9, 2004 to be filed in the Supreme Court of Canada in opposition to the Attorney General's motion there.

representation of these Appellants and his previous representation of Mr. Bellfield in the Supreme Court. Mr. Goodman made it clear that he was not asking for any declaration that would extend into the future, but simply one to the effect that no conflict now exists.

[8] I was not referred in argument to any authority for the proposition that this Court may make what amounts to an interlocutory declaration of the right of a party in an appeal before the Court to be represented by a specific counsel, nor do I know of any. Mr. Goodman did refer me to the decision of Barry J. in *R. v. Desjardins et al.*,³ where such a declaration was made in the context of a criminal prosecution. However, it is clear to me that the Court may deal with the issue of removal of counsel by reason of a conflict of interest under the *General Procedure Rules*. In *Groupe Trenca Inc. v. Techno Bloc Inc.*, the Federal Court Trial Division made such an Order.⁴ Although neither Blais J. nor the Prothonotary whose decision⁵ he reversed makes specific reference to the *Rule* under which the motion was brought, it is clear that the application was an interlocutory one. *The Federal Court Rules*, like the *Rules* of this Court, make no specific provision for such an application. Both have provisions dealing with the appointment and change of solicitors; although not identical in language, there is no significant difference between them. I have no doubt that the subject matter of disqualification of counsel for conflict of interest is one that I can deal with on an interlocutory motion. If it can be dealt with in the negative, then it only makes sense that it can also be dealt with in the positive. That said, motions to declare the absence of conflict of interest are certainly not to be encouraged. Another party, or a former client, may, of course, seek a disqualification order on appropriate grounds, but subject to that a client is free to choose counsel, and it is up to counsel to be satisfied that no conflict exists.

[9] However, the peculiar facts of this case justify the application for a declaration that there is no conflict. The Attorney General of Canada is on record in the Supreme Court of Canada as asserting a conflict that would disqualify Mr. Winkler and Aird and Berlis from representing both Mr. Bellfield and the Appellants, and yet has not put forward the same argument here. The parties, after much delay, are about to embark on discoveries that will be time-consuming and expensive. The Appellants are entitled to know that they will not be confronted later with an attempt to

³ (1990) 86 Nfld & P.E.I.R. 206 (NFTD).

⁴ (1998) 159 F.T.R. 1; aff'd (1999) 253 N.R. 320 (FCA).

⁵ (1998) 158 F.T.R. 68.

disqualify Mr. Winkler on essentially the grounds that were advanced in the Supreme Court. I shall therefore make the Order sought, limited to the facts as they are established by the affidavits before me on this motion. The Appellants will have the costs of the motion, with a counsel fee which I fix at \$1,000.

Signed at Ottawa, Canada, this 7th day of July, 2004.

"E.A. Bowie"

Bowie J.

CITATION: 2004TCC487

COURT FILE NO.: 90-3235(IT), 91-509(IT)G,
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STYLE OF CAUSE: Ted J. Hochberg, Linda Leckie Morel and
Geoffrey D. Belchetz
and Her Majesty the Queen

PLACE OF HEARING: Kitchener, Ontario

DATE OF HEARING: April 28, 2004

REASONS FOR ORDER BY: The Honourable Justice E.A. Bowie

DATE OF ORDER: July 7, 2004

APPEARANCES:

Counsel for the Appellants: David M. Goodman and
Howard Winkler

Counsel for the Respondent: Peter M. Kremer and
Rosemary Fincham

COUNSEL OF RECORD:

For the Appellants:

Name: David M. Goodman and
Howard Winkler

Firm: Goodman, Solomon & Gold and
Aird & Berlis

For the Respondent: Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada