

Marmer Penner Newsletter

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The Question of Independence

The October 6, 1998 Globe and Mail headline read "KPMG in conflict: Drabinsky lawyers". The article went on to read that Mr. Drabinsky's lawyers sought an injunction to stop KPMG from releasing a report into accounting irregularities as they were "hopelessly conflicted because of their dual role of forensic auditor for Livent Inc. These same issues were raised in a recent family law decision.

In *Breda v. Breda*, Ont. Gen. Div., April 11, 1997, the husband successfully sought to restrain a Chartered Accountant ("CA") from acting for his wife in their matrimonial dispute on the basis of a conflict of interest.

The CA never acted for the husband directly. The CA acted for a group of residential real estate development corporations and joint ventures in which the wife's family and the husband held an interest. The CA also acted for some of the personal and corporate interests of the wife's family and was the personal accountant for the wife. The wife retained the same CA to act for her in her matrimonial dispute to advise about the husband's financial affairs.

This CA was her natural choice as he was familiar with the husband's financial affairs and could provide the information in an efficient manner.

However, the Honourable Justice Ferrier ("Ferrier") decided that the CA had a conflict of interest and could not act for the wife in her matrimonial dispute. Ferrier relied on the leading case on removal of a lawyer for a conflict of interest resulting from knowledge of confidential information, *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249. Although the decision dealt with the removal of lawyers, Ferrier decided this test was equally applicable to accountants.

According to the Rules of Professional Conduct set by the Institute of Chartered Accountants of Ontario, CA's are not allowed to disclose or use any confidential information concerning the affairs of any client to a third party without the client's consent. The duty to keep a client's affairs confidential should not be confused with the legal concept of privilege, as this duty does not excuse a CA from obeying an order of a court to disclose the information. However, a CA has a duty to bring to the court's attention the duty of confidentiality to the client, and let the court determine whether or not the accountant should maintain the confidentiality of client information depending on the facts of the case.

The accounting profession tests the existence of the freedom from any conflict. The second test asks whether there is a risk that the confidential

of interest against the criterion of whether a reasonable observer would conclude that a specified relationship between a CA and a client posed an unacceptable threat to the CA's independence or judgment. The test of objectivity is to be judged in the context of both real and perceived impairments. Although this test was not applied by in the Breda decision, we believe the CA in question would have failed this test as well.

For lawyers, the two tests on whether a disqualifying conflict of interest exists was formulated in the MacDonald Estate decision. The first test asks whether the lawyer received confidential information attributable to a solicitor and client relationship relevant to the matter at hand? Once it is shown that there existed a previous relationship information will be used to the prejudice of the client? A lawyer who has

which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This is a difficult burden to discharge without revealing the privileged communication.

In the Breda decision, Ferrier concluded that there is a relationship between the husband and the accountant that is sufficiently related to the CA's current retainer by the wife in the matrimonial dispute. The knowledge the CA has acquired by acting on behalf of the companies and joint ventures in which the husband holds an interest is relevant to the issues of valuation and equalization of net family property on which the CA would be advising the wife.

obtained relevant confidential information cannot act against his

disqualified. In the Breda case, although the husband was never a direct client of the CA, the fact that the CA acted for the companies in which the husband held an interest, and the inference that he obtained confidential information through this retainer, automatically disqualified him from being retained by the wife.

The exception to the disqualification would have been if the CA could prove that confidential information will not be misused. Ferrier did not believe that this could be done.

The Breda case raises a bigger issue. A more common situation occurs where a party to a litigation, such as a matrimonial dispute, retains the CA who has acted for his companies over the years to assist him in the litigation. As in the Breda case, the CA is familiar with the client's business and can obtain the information in the most

efficient manner. CA's must remain independent to perform their accounting services. However, in litigation, we believe a higher level of independence is required. According to the Canadian Institute of Chartered Business Valuators Code of Ethics, Chartered Business Valuators (CBV) or students engaged to provide professional services where there is an expectation of independence shall hold themselves free of any influence, or interest in respect of the client's affairs, which impairs their professional judgment or objectivity or which, from a public perspective, may reasonably be perceived to have that effect. A reasonable observer may perceive that the CA may have developed a loyalty to his long standing client, and depending on the fees, some degree of economic dependence which could jeopardize his or her independence. The situation is avoided by

having a new accountant, preferably one specializing in litigation support, such as a CBV, represent the client in their litigation matter. As litigation engagements tend to be of a non-recurring nature, the CBV does not have the time to develop a loyalty to the client nor is the CBV's opinion influenced by the fear of losing the client's ongoing accounting engagement if a favourable opinion is not reached in the litigation matter.

Perhaps the Breda case will pave the way for the recognition of the lack of objectivity a corporate accountant can have in a litigation matter, and the need to use a CBV to assure independence.

This newsletter is intended to highlight areas where professional assistance may be required. It is not intended to substitute for proper professional planning. The professionals at Marmer Penner will be pleased to

arise.

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