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Lawyers

Disqualification of a law firm: the Superior Court broadens the spectre of conflicts of interest

February 9, 2017

In a decision rendered on December 1, 2016, the Superior Court of Québec had to rule on a situation which, until that time, was completely novel, and to determine whether lawyers can act in a court action against former employees of a client whom they still have to work with in connection with another related proceeding. The Court declared that the lawyers were disqualified.

The dispute

The construction of a vast sports complex in Trois-Rivières, the Complexe sportif Alphonse-Desjardins ("**CSA**"), has been the source of a political and legal soap opera since 2010.

The Commission scolaire du Chemin-du-Roy (the "**School Board**") is one of the partners involved in this project, developed in phases since 1999. After the construction of the second phase, an Olympic arena, and the discovery of various problems related to the facilities' operations, in 2011, the School Board instituted an action for more than $3 million against the project engineers and certain contractors and subcontractors. The services of the law firm, Morency, Société d'avocats, were retained to represent the School Board. In the course of the proceeding, two of the School Board's employees, Michel Morin and Michel Montambeault, helped the lawyers with their preparation, were examined as representatives of the plaintiff, and attended the examinations of the adverse parties.

In the following years, the School Board learned, contrary to what it had believed, that the various phases of the CSAD were resulting in financial losses. It believed that there were irregularities in the financial picture that was being presented to it. Moreover, the Auditor General of Québec provided its insight into these irregularities. In 2016, the School Board brought an action in damages against some of its consultants and former officers, including Messrs. Morin and Montambeault (who were no longer in its employ). The claim amounted to nearly $6 million. The lawyers from the firm of Morency were once again chosen to represent the School Board.

It was in the context of this second action that Michel Morin and Michel Montambeault presented an application for a declaration of disqualification. Thus, the existence of an apparent conflict of interest was raised not by the lawyers' client, but by former representatives of the client.

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Grounds

The Superior Court acknowledged that there was a potential conflict of interest in this case which could result in the lawyers' disqualification.

In his reasons, Justice Daniel Dumais noted that the Québec legislator has codified, in article 193 of the new *Code of Civil Procedure*, the three most common situations that can give rise to a declaration of disqualification: where the lawyer has disclosed or is likely to disclose confidential information to another party or third person; the lawyer is called to testify in the proceeding on essential facts; or the lawyer is in a conflict of interest situation and does not take steps to remedy it.

The judge quickly dismissed the hypothesis that the lawyers from the firm of Morency could be called to testify. Nothing of the sort had been considered in the case. Nor was the disclosure of confidential information an issue, since it was clear that the law firm's client had always been the School Board. The confidential information which Messrs. Morin and Montambeault, as representatives of the School Board, may have disclosed to the lawyers in connection with the action in 2011, belonged to the School Board. There could be no declaration of disqualification on this ground.

The Court therefore based itself on a conflict of interest in deciding to restrict the School Board's right to counsel of its choosing. Justice Dumais wrote as follows:

> **[Translation] The Court is of the view that there is the appearance of a conflict of interest here (…) based on the combination of the following three factors: 1) the important role given to the applicants in the two cases, 2) the simultaneousness of the two actions, and 3) the connection between them.**

The judge noted that "a relationship of trust was probably forged" between Messrs. Morin and Montambeault and the lawyers from the firm of Morency during the proceeding instituted in 2011. The lawyers got to know Messrs. Morin and Montambeault. They would likely call them to testify as witnesses in the upcoming trial.

The situation [translation] "is far from reassuring", wrote Justice Dumais, if they have to face another lawyer from the same firm a few weeks later in connection with the proceeding instituted in 2016.

Since both actions dealt with the issue of financial management and the allegations made against Messrs. Morin and Montambeault in the 2016 case could affect their credibility as witnesses in the 2011 case, the Court found there was a connection. [translation] "The discomfort and apprehension (of Messrs. Morin and Montambeault) will probably be reduced if it is a new firm that is suing them," the Court noted.

In *obiter*, Justice Dumais added that even if he had concluded that there was no conflict of interest in this case, he would have declared that the lawyers from the firm of Morency were disqualified in the name of the higher interests of justice.

What do we learn from this case?

In matters involving a declaration of disqualification, each case must be considered individually. The free choice of counsel remains the principle. However, the Superior Court has indicated in this case that the scope of the search for conflicts of interest should be broadened. They can arise not only when lawyers have to act against clients or ex-clients, but also against their important representatives.

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And yet, in 2000, the Court of Appeal decided to permit a law firm to act against the former representative of one of its clients.[1] Before dismissing the motion to disqualify, Justice Forget wrote as follows: [translation] “The effect of the respondents’ submission would be that every time a law firm communicates with an employee of its client, it would never be able to act again for that client in the event of a dispute between the client and that employee.”

Justice Dumais of the Superior Court refused to reach the same conclusion given that the two files at issue in the case were connected, active and simultaneous, and that Messrs. Morin and Montambeault, as important representatives of the School Board, still had to work with the lawyers from the firm of Morency.

It will be interesting to see whether the Québec Court of Appeal also makes such a distinction, since it has agreed to hear the School Board’s appeal.

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1. *École Peter Hall inc.* c. *Fondation Eleanor Côté inc.*, 2000 CanLII 11376 (C.A.).

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