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# Conflicts of Interest for New Hires

## Alberta Crown Prosecution Service - Practice Protocol

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**EFFECTIVE: June 14, 2023**

This Practice Protocol provides guidance and direction in relation to conflicts of interest that may arise when new employees join the Alberta Crown Prosecution Service (ACPS).

### Background

When ACPS hires a new employee from private legal practice, the new employee may possess confidential information that gives rise to a conflict of interest. New employees and ACPS must work together to proactively identify any potential conflicts, and to ensure that steps taken on conflict files uphold the public interest and promote the integrity of the administration of justice.

### Protocol

#### ***Duty to Avoid Conflicts of Interest***

As lawyers, prosecutors have a duty to avoid conflicts of interest.<sup>1</sup> The main duty owed to a former client is to refrain from misusing confidential information obtained from the solicitor-client relationship.<sup>2</sup> A prosecutor is in a potential position of conflict when in possession of confidential information obtained through the representation of a former client, and cannot act in a matter where that confidential information could be used to the detriment of that client.<sup>3</sup> They cannot prosecute former clients in the same matter, any related matter, or in any other matter which might be affected by confidential information that the lawyer has about the former client.<sup>4</sup>

#### ***Other Prosecutors***

Other prosecutors in the same office are also conflicted out of the related prosecution, unless adequate and timely measures are taken to ensure that there has been, and will be, no disclosure of the former client's confidential information to any other ACPS employee.<sup>5</sup> Measures to prevent disclosure of the former client's confidential information must be

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<sup>1</sup> Law Society of Alberta, *Code of Conduct*, (2023) at Rule 3.4-1, online: (pdf) *Law Society of Alberta* <[www.lawsociety.ab.ca/2017/01/14211909/Code.pdf](http://www.lawsociety.ab.ca/2017/01/14211909/Code.pdf)> [*Code of Conduct*]; *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 at para 19 [*McKercher*].

<sup>2</sup> *McKercher*, *supra* at para 23.

<sup>3</sup> *Code of Conduct*, *supra* note 1 at Rule 3.4-6; *McKercher*, *ibid*; *MacDonald Estate v Martin*, [1990] 3 SCR 1235 at 1261 [*MacDonald*].

<sup>4</sup> *Code of Conduct*, *supra* note 1 at Rule 3.4-6, Rule 3.4-7.

<sup>5</sup> *Code of Conduct*, *supra* note 1 at Rule 3.4-7; *MacDonald*, *supra* note 3 at 1262.

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proactively implemented and properly documented to ensure that this information is not shared. After the fact assurances that no confidential information has been, or will be, shared are not sufficient. Instead, as soon as the employee joins ACPS, objectively verifiable steps must be taken to ensure confidential information is not disclosed to any other ACPS employee.<sup>6</sup>

### **Support Staff**

The Law Society's rules regarding conflicts of interest apply only to lawyers and students-at-law. However, ACPS must take the same approach with support staff.<sup>7</sup> Lawyers have a duty to supervise non-lawyer staff and ensure that they comply with the duty of confidentiality related to prior employment at a law firm.<sup>8</sup>

### **Judicial Enforcement**

The Law Society has primary responsibility for regulating the legal profession, but courts have jurisdiction to disqualify prosecutors – and entire prosecution offices – where they are acting in a conflict of interest.<sup>9</sup> When confronted with these issues, the courts ask themselves two questions:<sup>10</sup>

1. Did the prosecutor receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand?
2. Is there a risk that it will be used to the prejudice of the client?

### **Related Prosecutions**

In answering the first question, courts normally rely upon an evidentiary presumption. Once an accused shows that a previous relationship was “sufficiently related” to a prosecution, the court will presume that confidential information was imparted unless the court is satisfied that no information was imparted that could be relevant.<sup>11</sup> A previous retainer may be “sufficiently

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<sup>6</sup> *MacDonald*, *supra* note 3 at 1240, 1263-1264; *R v Skye-Davis*, 2022 ONCJ 378 at paras 16-17 [*Skye-Davis*]. See *contra Canada Southern Petroleum v Amoco Canada Petroleum Company Ltd*, 1997 ABCA 71 [*Canada Southern Petroleum*].

<sup>7</sup> *Chern v Chern*, 2006 ABCA 16 at para 17; *R v Le*, 2001 ABQB 195 at paras 32-39.

<sup>8</sup> *Code of Conduct*, *supra* note 1 at Commentary to Rules 3.4-8 – 3.4-10, para 6.

<sup>9</sup> *MacDonald*, *supra* note 3 at 1245; *McKercher*, *supra* note 1 at para 62; *Skye-Davis*, *supra* note 6 at para 18.

<sup>10</sup> *MacDonald* *supra* note 3 at 1260; *McKercher* *supra* note 1 at para 24.

<sup>11</sup> *MacDonald*, *ibid*; *McKercher*, *ibid*.

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related” even if it dealt with a different subject matter. The issue is simply whether confidential information learned in the previous retainer is relevant to a prosecution.<sup>12</sup>

Conflicts commonly arise when former defence counsel join ACPS. However, other practice areas may also overlap with prosecutions. For example:

- Personal injury retainers may be relevant to criminal driving prosecutions;
- Family law retainers may be relevant to Intimate Partner Violence or family violence prosecutions; and
- Real estate retainers may be relevant to fraud prosecutions.

### ***Risk of Prejudice***

In answering the second question, risk of prejudice is assessed differently for the conflicted employee and other employees.

The new employee is conflicted out of the related prosecution. No assurances, undertakings, or institutional efforts can address the resulting conflict of interest.<sup>13</sup>

Other employees in the same office may also be in a conflict of interest, depending on the circumstances. Courts will normally draw the inference that the conflicted employee has shared confidential information with other employees, unless clear and convincing evidence establishes that ACPS employed all reasonable institutional safeguards to ensure that the conflicted employee would not disclose confidential information to anyone at ACPS.<sup>14</sup>

The commentary to Rule 3.4-10 of the [Law Society of Alberta's Code of Conduct](#) provides guidance as to possible institutional safeguards. Appropriate safeguards must be implemented from the outset of the conflicted employee's employment with ACPS.<sup>15</sup>

### ***Identifying Former Clients***

In some cases (such as where legal advice has been provided to a person in advance of a criminal charge being laid), the very existence of a solicitor-client relationship may be

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<sup>12</sup> *Brookville Carriers Flatbed GP Inc v Blackjack Transport Ltd*, 2008 NSCA 22 at para 50; *Hong v Hong*, 2022 ABQB 555 at para 32.

<sup>13</sup> *MacDonald*, *supra* note 3 at 1261.

<sup>14</sup> *Ibid* at 1262.

<sup>15</sup> *Ibid* at 1240, 1263-1264; *Skye-Davis*, *supra* note 6 at paras 16-17. See *contra Canada Southern Petroleum*, *supra* note 6.

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confidential.<sup>16</sup> Nonetheless, the Law Society allows a lawyer to disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest from a lawyer's proposed transfer to a new law firm, as long as the disclosure does not prejudice the former client.<sup>17</sup> This normally means that a lawyer may disclose identifying information about past clients for the purpose of conducting a conflict check.

### **Consent**

A former client may consent to a conflicted prosecutor acting on their matter.<sup>18</sup> Consent should only be sought in cases in which the conflicted prosecutor is able to proceed without a material and adverse effect on the accused or the ACPS. Consent will only be valid where it is:

- 1) expressly provided;
- 2) fully informed;
- 3) voluntary; and
- 4) provided after receiving full disclosure of all information relevant to the accused's decision.

The conflicted prosecutor should also:

- 1) recommend that the accused obtain independent legal advice;<sup>19</sup>
- 2) advise the court about the conflict of interest; and
- 3) ensure that the accused's consent is provided on the record.

For example, it may be appropriate for a conflicted prosecutor to seek the accused's consent where no other prosecutor is available to speak to an uncontentious issue on a conflict file, and the accused would be prejudiced by an adjournment.

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<sup>16</sup> *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, 2002 SCC 61 at para 28.

<sup>17</sup> *Code of Conduct*, *supra* note 1 at Rule 3.3-7.

<sup>18</sup> *Code of Conduct*, *supra* note 1 at Rules 3.4-7(a), 3.4-9(a).

<sup>19</sup> *Code of Conduct*, *supra* note 1 at Commentary to Rule 3.4-1, paras 7-11.

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### Practice

The following steps must be taken when ACPS hires a new employee from private legal practice:

1. The new employee must prepare a “conflict list” that identifies all clients where a conflict of interest is known to exist. At a minimum, this list should identify:
  - a. any clients who the new employee was actively representing on a criminal charge being prosecuted by the office where the new employee will be working; and
  - b. clients the new employee previously represented on prosecutions that are still ongoing and are being handled by the office where the new employee will be working.
2. The Chief Prosecutor (or designate) will identify ongoing prosecutions of any of the individuals named on the “conflict list”. Such prosecutions are “conflict files”.
3. The Chief Prosecutor (or designate) will determine how to proceed on each conflict file. The conflict may be addressed by referring the file to another ACPS office for prosecution,<sup>20</sup> or by taking adequate steps to prevent disclosure of confidential information related to each of the conflict files. Such steps may include the following:<sup>21</sup>
  - a. Ensuring that the conflicted employee is not involved in the conflict file.
  - b. Instructing the conflicted employee, in writing, not to discuss the conflict file, or the past representation of that individual, with anyone in ACPS.
  - c. Instructing other members of the office, in writing, not to discuss or share documents regarding the conflict file or the previous representation with the conflicted employee.
  - d. Instructing the employees working on the conflict file, in writing, to discuss the matter only within the limited group that is working on the matter.
  - e. Segregating information regarding the conflict file and making that information accessible only to the employees who are working on the conflict file, or who require access for other specifically identified and approved reasons.
  - f. Ensuring that the conflicted employee’s workstation is located away from the workstations of the employees working on the conflict file.
  - g. Ensuring that the conflicted employee uses different support staff from those working on the conflict file.

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<sup>20</sup> *Skye-Davis*, *supra* note 6 at para 16; *R v Mandamin*, 2017 ONSC 418 at para 19; *R v Fleming* (2000), 193 Nfld & PEIR 68, 2000 CanLII 28349 (NLSC) at paras 34-42.

<sup>21</sup> *Code of Conduct*, *supra* note 1 at Commentary to Rules 3.4-8 – 3.4-10, paras 11-14.



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- h. Obtaining undertakings, in writing, that the relevant prosecutors will adhere to the institutional safeguards employed pursuant by ACPS.
  - i. Advising relevant employees, in writing, that violations of the institutional safeguards will result in sanctions, up to and including dismissal.
  - j. Advising the former client of the measures ACPS has taken to prevent disclosure of confidential information.
4. Where the Chief Prosecutor (or designate) determines that adequate steps are feasible, all relevant prosecutors must provide appropriate undertakings and comply with the institutional safeguards.

Conflicts of interest may also arise, or be identified, at later stages. Where this occurs, the employee must notify their Chief Prosecutor (or designate) who will determine whether it is still possible to implement adequate and timely measures to address the risk of misuse of confidential information. In most cases, such files will need to be referred to another office for prosecution.