# IN THE COURT OF APPEAL OF MANITOBA

***B E T W E E N :***

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| ***THE CITY OF WINNIPEG*** | ) ***M. T. Green*** *and* |
| | ) ***L. W. Bowles*** |
| *(Respondent/Appellant by Cross Appeal)* | ) *for the Applicant* |
| *Respondent* | ) |
| | ) ***J. A. Jurczak*** *and* |
| *- and -* | ) ***E. J. B. Day*** |
| | ) *for the Respondent* |
| ***THE NEIGHBOURHOOD BOOKSTORE AND CAFÉ LTD.*** | ) |
| | ) *Chambers motion heard:* |
| | ) ***August 9, 2018*** |
| *(Appellant/Respondent by Cross Appeal)* | ) |
| *Applicant* | ) *Decision pronounced:* |
| | ) ***January 21, 2019*** |

## STEEL JA

[1] The Neighbourhood Bookstore and Café Ltd. (Neighbourhood) operates a bookstore and café in the City of Winnipeg (the City). It was charged under the City of Winnipeg, by-law No 92/2010, *Sewer By-law* (1 January 2011), section 46(1), which requires it to have a grease interceptor because it is a food service establishment. A grease interceptor is a device that prevents grease from entering the City's sewer system.

[2] A relatively minor offence notice issued by the City against Neighbourhood has blossomed into a complex legal argument involving concerns related to jurisdiction and conflict of interest. The matter has turned into a time-consuming and costly exercise for all parties.

[3] Neighbourhood appears in this Court on a motion for leave to appeal from a decision of the Court of Queen's Bench acting as a summary conviction appeal court.

## FACTS

[4] Neighbourhood was issued an offence notice by a special constable in January 2014. In October 2014, Neighbourhood pled guilty to the charge and a compliance order was issued requiring them to install a grease interceptor within 60 days. When Neighbourhood was late in complying with the order, the City issued and served a second offence notice in January 2015, again by a special constable.

[5] Markus Buchart (Buchart) was a lawyer employed by the City from 2009 to December 2014. Approximately two months after leaving that job, in February 2015, he began acting as Neighbourhood's lawyer. Accordingly, Neighbourhood's first charge would have been disposed of while Buchart was employed with the City's Legal Services Department. Despite letters from the City to him and to his law firm that he was in a conflict of interest, Buchart continued to act for Neighbourhood on this matter.

[6] In February 2016, approximately one year after Buchart was retained as counsel, Neighbourhood pled guilty to the second charge. Sentencing was adjourned. In June 2016, four months after the guilty plea was entered, Buchart filed an application to quash the guilty plea on the basis that the offence notice was invalid because a special constable, who was not a peace officer, had served it and only peace officers can issue offence notices. Before that application could be heard, the City brought an application to have Buchart removed as counsel due to a conflict of interest.

[7] Buchart argued that it was only after the guilty plea was entered that he realised the potential illegality of the offence notice served on his client. The City responded that, during the time Buchart was employed by the City, he discussed the issue of the status of special constables with other lawyers in its legal department and he therefore obtained confidential information that he was now using in his defence of Neighbourhood.

[8] When this matter first appeared in the Provincial Court, the judge (the application judge) agreed with the City and ordered Buchart to be removed as Neighbourhood's counsel, but did not grant an order preventing Neighbourhood from using Buchart's work product or striking out its application to quash its guilty plea.

[9] Both Neighbourhood and the City appealed to the Court of Queen's Bench. That Court not only upheld the removal order, but also held that, if Neighbourhood retained new counsel, he or she could not use any of Buchart's work product, including any research that Buchart had done on this issue.

**Decision of the Provincial Court**

[10] The matter came before the Provincial Court by way of an application by the City to have Buchart removed as counsel of record for Neighbourhood. Neighbourhood resisted the application on two grounds: first, that Buchart did not have knowledge of the information that the City alleges and, in any case, all of the information that the City alleges is privileged was actually contained in readily accessible public documents.

[11] In coming to his decision, the application judge relied on the leading case in this area, *MacDonald Estate v Martin*, [1990] 3 SCR 1235, as well as The Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg:

Law Society of Manitoba, 2011. He also referred to *Canadian Pacific Railway Co v Aikins, MacAulay & Thorvaldson* (1998), 157 DLR (4th) 473 (Man CA), which deals specifically with in-house counsel.

[12] The application judge held that Buchart's five years of service in the City's Legal Services Department do not preclude him from acting against the City in appropriate matters. However, in this case, Neighbourhood's offence notice was ongoing while Buchart was still working for the City. Moreover, the affidavits filed by the City confirm that the City has been aware of the status issues surrounding its compliance officers, special constables and/or peace officers since 2010. The affidavits also confirm that Buchart was consulted on this very issue. The Court specifically rejected the evidence of Buchart that he was never consulted with and did not have knowledge of this issue. The Court found Buchart's evidence on this point "incredible". The Court stated that:

> While it is completely feasible that Mr. Buchart's collection of information through statute and other publicly accessible documentation may have been possible this does not negate the potential information that Mr. Buchart would have had to the City's position on these issues, to their strategies or of their plans. It is difficult to prove or disprove the actual knowledge but there is sufficient evidence to lead a reasonably well informed member of the public to this conclusion. This, when factored with the other two competing values, leads the court to conclude that Mr. Buchart's duty to his former employer has been breached and that he should be removed as counsel.

[13] The Court refused to quash Neighbourhood's application to withdraw its guilty plea and ordered the matter to be heard on its merits.

**On Appeal to the Court of Queen's Bench of Manitoba**

[14] However, the matter was not heard on its merits.

[15] Instead, Neighbourhood appealed the order removing Buchart as its counsel. The City filed a cross appeal of the application judge's refusal to grant an order striking out Neighbourhood's application to quash the offence notice and guilty plea and refusal to grant an order prohibiting any future lawyer for Neighbourhood from using Buchart's materials or work product.

[16] The summary conviction appeal judge (the appeal judge) dismissed Neighbourhood's appeal, holding that the application judge was entitled to deference with respect to his findings of fact and the inferences drawn and weight given to those facts. She held that the application judge did not err in his assessment of the evidence, including the weight he assigned to the affidavits of the City's lawyer, Krista Boryskavich.

[17] The appeal judge also dismissed the City's cross appeal with respect to the refusal of the application judge to strike out Neighbourhood's application to quash the offence notice. She held that the application judge's decision on this issue was entitled to deference. The application judge had considered all the factors, but decided that the remedy would impose upon Neighbourhood the unnecessary step of filing a new application. The application itself did not contain privileged information.

[18] However, the appeal judge did allow the City's cross appeal as to an order that any counsel retained by Neighbourhood in the future not be permitted to use Buchart's materials or work product. While the application was allowed to remain before the Court, the appeal judge ordered that any other materials that Buchart may have prepared or assisted in preparing in

relation to this matter, such as briefs, memoranda or notes, may not be used or relied upon in any way.

[19] The appeal judge disagreed with the conclusion of the application judge that he did not have the authority to grant injunctive relief. Instead, she held that the application judge did have the authority to make the requested order as part of his authority to control the court's process and oversee the conduct of counsel.

## DOES THIS COURT HAVE JURISDICTION TO HEAR THIS LEAVE TO APPEAL MOTION?

[20] An appeal court has no inherent jurisdiction to hear appeals in criminal matters. Appeals are a creature of statute and, in order for this Court to take jurisdiction to hear this motion, the jurisdiction must be found in a statute (see *R v Deschamps*, 2003 MBCA 116 at para 27).

[21] When the City commenced enforcement against Neighbourhood and when the application to remove Buchart as counsel of record and the subsequent appeal were argued, the governing legislation was *The Summary Convictions Act*, CCSM c S230 (the *SCA*), which is an *Act* that has since been repealed by *The Provincial Offences Act and Municipal By-law Enforcement Act*, SM 2013, c 47, Sch A, section 145, and replaced with *The Provincial Offences Act*, CCSM c P160 (the *POA*). The *POA* was proclaimed into force on November 20, 2017, which was in the time between the argument of the appeal and the issuance of the appeal judge's decision.

[22] Given that this matter was pending before the Court of Queen's Bench when the *POA* came into force, this matter is now proceeding in conformity with the *POA*, as set out in sections 140-41, which state:

***Definition of "former Act"***
**140** *In sections 141 to 144,* ***"former Act"*** *means* ***The Summary Convictions Act*** *as it read immediately before the coming into force of this Act.*

***Act applies to existing proceedings***
**141** *Subject to sections 143 and 144, proceedings commenced under the former Act that are not finally disposed of before this Act comes into force are to be taken up and continued under and in conformity with the provisions of this Act.*

[23] The *POA* contains the following relevant provisions in respect of appeals:

**Right to appeal — defendant**
**79(1)** A defendant may appeal the following to the Court of Queen's Bench:

(a) a conviction;

(b) a sentence imposed on the defendant, but only if the proceeding was commenced by an information;

(c) any other order made by a justice against the defendant under this Act.

. . .

**Decision on appeal**
**82** Upon an appeal, a judge of the Court of Queen's Bench may

(a) confirm, vary or set aside the decision or order appealed from;

(b) direct a new hearing; or

(c) make any other order in relation to the matter that the judge considers appropriate.

. . .

> **Further appeal**
> **84** Any party may appeal a decision of the Court of Queen's Bench to the Court of Appeal, but only with leave of a judge of the Court of Appeal on a question of law alone.

[24] Neighbourhood relies on section 84 of the *POA* as the source of this Court's jurisdiction to hear the appeal. On the other hand, the City relies on the existing jurisprudence pursuant to the *Criminal Code* (the *Code*) to argue that this Court does not have jurisdiction to hear this appeal.

[25] The *SCA* did not contain explicit appeal provisions. Instead, in section 3(1), it incorporated, by reference, Part XXVII of the *Code*, which outlines the procedure for appealing to the Court of Queen's Bench and, ultimately, to this Court (see *R v Rémillard (R) et al*, 2009 MBCA 112 at paras 1-3).

[26] Under section 830(1) of the *Code*, a party may "appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court". Section 839 allows appeals to the Court of Appeal from decisions made by the summary conviction appeal court.

[27] Upon interpreting section 839 of the *Code*, in *R v Scott*, 2015 MBCA 80, this Court held that the "*Code* only provides for appeals of final orders" (at para 4) (emphasis added). In that case, the accused was seeking to appeal a trial judge's interlocutory evidentiary ruling. The Court found that the *Canadian Charter of Rights and Freedoms* "rulings within a prosecution are interlocutory in nature and, therefore, are not final orders" (*ibid*). Accordingly, the Court found it did not have jurisdiction to hear the appeal.

[28] While *Scott* dealt with an evidentiary ruling, the Supreme Court of Canada has made it clear that the decision to remove counsel is also an interlocutory ruling and, therefore, not appealable on an interlocutory basis pursuant to the *Code*. The removal of counsel was considered by the Supreme Court of Canada in *R v Druken*, [1998] 1 SCR 978, where it held that (at para 1): "The decision to remove counsel . . . is to be reviewed after the trial through the normal appeal process set out by the *Criminal Code.*"

[29] A number of appellate courts have confirmed this point over the years. See, for example, *R v Sandhu*, 2012 BCCA 73; and *Lacoste-Methot c Directeur des poursuites criminelles et pénales*, 2018 QCCA 228, leave to appeal to SCC refused, 38065 (23 August 2018). For a thorough review of the law on this point, see David Layton, "The Pre-Trial Removal of Counsel for Conflict of Interest: Appealability and Remedies on Appeal" (1999) 4 Can Crim L Rev 25.

[30] The City argues that the language of the presently governing legislation, the *POA*, is similar to section 839 of the *Code* and, therefore, the appeal judge and, consequently, this Court, do not have the jurisdiction to hear this interlocutory appeal.

[31] I do not agree. There is a difference in the language of the *POA* as opposed to the *SCA*. As set out above, section 79(1) of the *POA* dealing with appeals to the Court of Queen's Bench refers to "any other order made by a justice against the defendant under this Act." This appears to be a broader appeal right than was available pursuant to the *SCA*. Specifically, it is not limited to final orders.

[32] I have reviewed Hansard surrounding the passage of this legislation (Bill 38, *The Provincial Offences Act and Municipal By-law Enforcement Act*,

3rd Sess, 40th Leg, Manitoba, 2013 (assented to 5 December 2013), SM 2013, c 47) and no comments were made regarding the appeal procedure. I acknowledge that legislation in other provinces, albeit with different wording, narrows appeal rights rather than expanding them.[1] In the face of explicit wording, I will not speculate on whether the Legislature intended to expand appeal rights or whether this was unintentional.

[33] In conclusion, unlike the previous *SCA*, section 839 of the *Code* and its jurisprudence no longer apply to appeals under the *POA*. The appeal rights in the *POA* are broader than were previously available. This Court does have the jurisdiction to hear this appeal even though it is not a final order. While it is not always easy to differentiate between interlocutory and final orders, in this case, the order to remove counsel was not determinative of the main issue, which is Neighbourhood's application to quash its guilty plea with respect to the breach of the *Sewer By-law*. It was an interlocutory order.

[34] In the chambers decision of *City of Winnipeg v Innocent Vision Inc*, 2018 MBCA 76, the accused was convicted on October 25, 2017 of two counts of allowing garbage to accumulate on its property contrary to a City by-law. The accused filed a summary conviction appeal on November 30, 2017, but the appeal proceeded under the *SCA*. In dismissing the motion for leave to appeal to this Court, the chambers judge commented, in *obiter*, that the *POA* has its own unique appeal proceedings "which are more limited than those set out in the *Code*" (at para 3).

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[1] Several other provinces have provincial offences acts. The legislation in New Brunswick and Newfoundland simply adopts the *Code* procedure, similar to the previous Manitoba *SCA*. Ontario's legislation specifically limits appeals to convictions, dismissals, mental disorder findings, sentences and costs. Alberta's legislation permits appeals from a "judgment, order or sentence" (*Provincial Offences Procedure Act*, RSA 2000, c P-34, sections 18-19), but also adopts the *Code*. The courts in Alberta have decided that this combination must mean that appeals are permitted from final orders only. See also *Provincial Offences Procedure Act*, SNB 1987, c P-22.1, section 116; *Provincial Offences Act*, SNL 1995, c P-31.1, section 6; and *Provincial Offences Act*, RSO 1990, c P33, section 116.

[35] This decision is easily distinguishable from the case at bar. First, it was an *obiter* comment since that case was proceeding under the *SCA*, not the *POA*. But more importantly, the chambers judge was dealing with a final order and was referring to the new and more restrictive appeals to the Court of Queen's Bench contained in section 79(3) of the *POA* which states:

> **Limited appeal re tickets**
> **79(3)** An appeal under subsection (1) or (2) for proceedings commenced by a ticket may be taken only with leave of a judge of the Court of Queen's Bench on a question of law or mixed fact and law.

In this case, we are dealing with an interlocutory order for an offence which, at the time, was not commenced by a ticket, so that section 79(3) does not apply to this case.[2]

## Test for Granting Leave

[36] The test for granting leave from a decision of the Court of Queen's Bench acting as a summary conviction appeal court is threefold: the grounds of appeal must involve questions of law alone; the matter must raise an arguable case of substance; and the case must be of sufficient importance to merit the attention of the full Court (see *R v Langlois*, 2008 MBCA 72; and *R v Grant*, 2017 MBCA 84).

[37] The City has contended that many of the grounds of appeal relate to questions of mixed fact and law and not questions of law alone. Clearly, the application judge's decision to disbelieve Buchart is not a question of law. As well, there is support for the view that whether a conflict of interest exists in

[2] Interestingly, the City passed a new Sewer By-law on December 13, 2018 (No. 106/2018), which repealed the by-law at issue in our case and came into effect on January 1, 2019. It contains a provision which addresses the *POA* (see sections 104-5).

the factual circumstances established by the evidence in a specific case, is a question of mixed fact and law (see *Law Society of Newfoundland & Labrador v Regular*, 2011 NLCA 54 at para 41).

[38] However, in criminal cases, the application of a legal standard to the facts of the case is a question of law (see *R v Shepherd*, 2009 SCC 35 at para 20). It is also an error of law to make a finding of fact for which there is no evidence (see *R v Artimowich*, 2013 MBCA 62 at para 22). Moreover, on a summary conviction appeal, an appeal judge substituting his or her discretion for the discretion of the trial judge in circumstances where there was no error of law committed by the trial judge, raises a question of law (see *R v Dickson (WA)*, 2013 MBCA 58 at para 3).

[39] So, while some of the grounds raised do not give rise to a question of law alone, others, such as the application of a legal standard to the facts or the appeal judge's exercise of her discretion, do.

[40] Cases that warrant the attention of the Court will generally be those that are significant, not just for the immediate case or to the individual litigants, but in determining similar disputes which are likely to arise in the future and are important to the public at large (see *Meeking v Cash Store Inc et al*, 2014 MBCA 69 at para 14).

[41] This case has broad application to in-house counsel who move to private practice and is therefore of sufficient importance to merit the attention of the full Court. In addition, the interpretation and application of the new appeal provisions in the *POA* are of interest to the legal profession in Manitoba.

[42] However, I would note that this is a second-level appeal. It has already been reviewed by a judge of the Court of Queen's Bench, which is the primary appellate court to review such matters. Such second-level appeals should be granted leave only in exceptional circumstances. There should be a compelling reason that requires leave. The fact that the issue is unusual or rare is not, in and of itself, compelling (see *R v Dickson (WA)*, 2012 MBCA 2; and *R v S (WEQ)*, 2018 MBCA 106). In the final analysis, I must determine whether there is an arguable case of sufficient substance to warrant the attention of a court for the third time.

## IS THERE A CONFLICT OF INTEREST?

### Did the Application Judge Misapply the Legal Test for Disqualifying Counsel on the Basis of a Conflict of Interest and Did the Appeal Judge Err in Failing to Identify and Correct that Error?

[43] The *SCA* required that offence notices be issued by peace officers (see sections 13, 16). *The Police Services Act*, CCSM c P94.5 has provisions respecting eight classes of officials who provide police-related services in Manitoba. One of those classes is special constables. *The Police Services Act* specifies that the other seven classes of officials have the powers of peace officers, but it does not grant those powers to special constables. The argument to be advanced by Buchart on behalf of Neighbourhood is that the offence notice was invalid because it was issued by a special constable who was not a peace officer and was therefore not permitted to issue offence notices.

[44] Neighbourhood argues that this is a purely legal argument and a lawyer's knowledge of the law cannot be subject to privilege and is not confidential. The information is in legislation and it is available and

accessible to the public. The City's plans, strategies and positions on this issue are not relevant. It is a question of statutory interpretation for the judge.

[45] Alternatively, even if the information was confidential, it is submitted that the City has not demonstrated that Buchart had any direct or actual knowledge of the information during his course of employment with the City. Buchart denies that he had any discussion with City lawyers on this issue.

[46] Both the application judge and the appeal judge held otherwise and I agree with them.

[47] Misapplying a legal test is an error of law. The test for conflict of interest is set out in *MacDonald Estate* at p 1260. The application judge applied the test from *MacDonald Estate*. He correctly identified that two-pronged test:

1. Did the lawyer receive confidential information attributable to a solicitor-and-client relationship relevant to the matter at hand?

2. Is there a risk that it will be used to the prejudice of the client?

[48] He also referred to the competing values identified in *MacDonald Estate* that must be considered when applying the test and articulated the standard correctly as being that of the reasonably informed member of the public. The application judge found that, even though the facts and law relied upon by Buchart might well be public knowledge, Buchart was still in a conflict because of "the potential information that Mr. Buchart would have had to the City's position on these issues, to their strategies or of their plans."

[49] The appeal judge agreed with this assessment, as do I. The information that Buchart obtained by means of his employment was more than mere general litigation policy or knowledge of the law. It was more than simply "having an understanding of the corporate philosophy of a previous employer" (*Canadian Pacific Railway* at para 26). In particular, the concern relates to information Buchart may have about the City's legal argument in relation to the special constable/peace officer issue. This was information that would have been relevant to his representation of Neighbourhood.

[50] It is not necessary for the City to show that Buchart did use confidential information, only that there is a risk that it will be used. Indeed, there is persuasive authority for the proposition that "lawyers have a duty not to act against a former client in a related matter whether or not confidential information is at risk" (*Brookville Carriers Flatbed GP Inc v Blackjack Transport Ltd*, 2008 NSCA 22 at para 17).

[51] Nonetheless, the application judge was satisfied that Buchart was, in fact, consulted on the very issue in dispute. The City filed copies of confidential briefing notes outlining legal analysis of the special constable/peace officer issue that had been prepared during Buchart's employment with the City's Legal Services Department. The Legal Services Department had been asked to give opinions on this issue several times and did so. At the time these opinions were prepared, Buchart was involved in by-law prosecutions on behalf of the City in respect of offence notices issued by special constables. There was evidence that Buchart was involved in discussions about the issue. Specifically, there is documentary evidence that Buchart provided some research with respect to the issue of special constables and was invited to attend a meeting to "[d]iscuss 'peace officer' issue". The

purpose of the meeting was to consider the Province's view of the authority of special constables to issue offence notices.

[52] This is the very issue raised in Neighbourhood's application to quash the offence notice in this matter. The issue, to be clear, is not as Buchart indicated in his email to Jessica Hall, a solicitor at the City, which stated: "I also have no recollection of ever having been consulted by any City department about anything related to grease traps." Rather, it is the status of City compliance officers as special constables and peace officers. It is broader than simply the application of certain sections of *The Police Services Act*. This is the issue on which Buchart received "confidential information attributable to a solicitor and client relationship relevant to the matter at hand" (*MacDonald Estate* at p 1260).

[53] Solicitor/client privilege protects more than simply information. It also protects knowledge of tactics or strategies. It is the fact that Buchart had knowledge of the City's position on these issues that essentially rendered the information confidential. As was stated in *Merrick v Rubinoff*, 2013 BCSC 2352 at para 17, quoting from *Milverton Capital Corp v Thermo Tech Technologies Inc et al*, 2002 BCSC 773 at para 80: "They hold that in the context of litigation, an understanding of an opponent's strengths and weaknesses gained in a solicitor/client [privileged] relationship may have significant importance".

[54] Upon reviewing the evidence, the appeal judge held that the evidence presented by the City was capable of supporting the application judge's conclusion that the test was met and was entitled to deference. I see no legal error or arguable case of substance in that conclusion.

## WORK PRODUCT

### Did the Appeal Judge Further Err by Ruling that Neighbourhood and Its New Counsel Cannot Use Any of Buchart's Materials or Work Product?

[55] Neighbourhood argues that what is involved here is a legal argument and it is an error of law for a judge to attempt to prevent counsel from learning of a legal argument. Further, and in any event, the legal argument is now outlined in the two written decisions from the courts below.

[56] The appeal judge did not order that future counsel be precluded from reading decisions that were released to the public or accessing any legal research or utilising the application. Rather, the appeal judge ordered that future counsel be precluded from using any material that Buchart prepared, such as motion briefs or notes.

[57] This is not a common order in cases involving conflicts of interest. Generally speaking, conflict of interest cases focus on the remedy of disqualification without addressing the work product issue. This may be because conflicts of interest must be dealt with promptly so counsel do not often generate a great deal of work product prior to the conflict ruling. Moreover, if such an order is granted, the abandoned client not only has to bear the brunt of finding different representation, but also incurs additional burdens of delay and expense. So, such an order should be granted sparingly.

[58] However, I agree with the appeal judge that the Provincial Court did have the jurisdiction to make the requested order as part of its power to control its process. A statutory court has the power to control its processes and to oversee the conduct of counsel (see *R v Cunningham*, 2010 SCC 10 at para 19;

*Valeant Canada LP v Canada (Health)*, 2014 FCA 50 at para 40; and *Attisano v R*, 2016 CarswellNat 966 at paras 6-15 (TCC)).

[59] The Supreme Court of Canada has clearly held that one of the chief purposes of removing counsel who has breached solicitor/client privilege or who has been found in a conflict of interest is maintaining the high standards of the legal profession and the integrity of the judicial system. This purpose is effectively defeated if his or her work product can later be relied on by future counsel on the same or a related matter (see *MacDonald Estate*). If counsel is disqualified because of his or her knowledge of confidential information, it makes no sense to allow that confidential information to be used in pursuance of the litigation.

[60] Precluding future counsel from utilising the work product or related materials that stem from a breach of solicitor/client privilege or from a conflict of interest, falls within the Provincial Court's jurisdiction to control its Court processes and to prevent an abuse of process, not unlike the inherent jurisdiction to remove counsel. It is a necessary power to maintain the integrity of the administration of justice. This has been recognised in a number of American cases which have held that, where work product has been prepared by conflicted counsel relying on confidential information, courts may take steps to ensure that the former client's confidences are not used against them. See, for example, *First Wisconsin Mortg Trust v First Wisconsin Corp*, 584 F (2d) 201 (7th Cir 1978). I agree with the appeal judge that the application judge had the jurisdiction to grant the order requested.

## HEARSAY IN AFFIDAVITS FILED

[61] In respect of its application to have Buchart removed as Neighbourhood's counsel, the City relied on three affidavits of

Ms Boryskavich. The first one was affirmed August 1, 2016 in support of its application for a sealing order; the second one was affirmed August 10, 2016; and the third one was affirmed August 26, 2016. The last two affidavits were subject to a sealing order granted by the Provincial Court on the basis that they contain solicitor/client privileged information.

[62] Ms Boryskavich's affidavits contain information that relates to the commencement and termination of Buchart's employment with the City and to the court proceedings regarding the City's prosecution of Neighbourhood. They also contain information about the special constable/peace officer issue. That issue was a topic of discussion and concern at the City's Legal Services Department while Buchart worked there, starting in 2010 and up to 2014. The application judge admitted and relied upon the evidence in his decision.

[63] On appeal, Neighbourhood claimed that large portions of Ms Boryskavich's affidavits are hearsay and that it was an error on the part of the application judge to have admitted them or, in the alternative, that he ought to have given the evidence no weight.

[64] First, it is important to note that, hearsay content aside, other portions of the affidavit material support the conclusion that Buchart was consulted on these issues while he worked in the City's Legal Services Department. The affidavits completed by Ms Boryskavich refer to the meeting notice received by her and indicate that she was involved in these discussions directly. Moreover, attached to the affidavits is documentary evidence that either confirms matters discussed in the affidavits or contradicts Buchart's evidence.

[65] The City filed affidavits in support of its position as it was entitled to do. No cross-examination was conducted on those affidavits. While I do

not wish to be too specific since that would negate the purpose of the sealing order, what they revealed was that Buchart was privy to confidential discussions as to the City's position and strategy on the issue of special constables. Also, Buchart's own affidavit indicates that he discussed the issue with another lawyer at the City, Harold Dick.

[66] With respect to the hearsay that was in the City's affidavits, it is admissible under Manitoba, Provincial Court, "Practice Directives for Contested Applications in the Provincial Court of Manitoba" (4 November 2013) at section 4.03(2), online (pdf): *Manitoba Courts* <www.manitoba courts.mb.ca/site/assets/files/1175/notice_nov4_2013.pdf>, which allows hearsay in an affidavit filed in support of applications in criminal matters.

[67] Section 4.03(2) of the Provincial Court Practice Directive states:

> **Contents**
> **4.03(2)** An affidavit shall be confined to a statement of facts within the personal knowledge of the deponent and to evidence that the deponent could give if testifying as a witness in court, except that an affidavit may contain statements of the deponent's information and belief if the source(s) of the information and the fact of belief are specified in the affidavit.

[68] A provincial court practice directive is, for all intents and purposes, a rule of the court. See *R v Van Wissen*, 2016 MBCA 108, where the chambers judge indicated (at para 2): "Practice directives are a well-known process by which courts regulate and control their procedures and practices."

[69] Ms Boryskavich's affidavits contain statements that are identified as being based on information and belief and their sources are identified. A careful review of the affidavits shows that they contain only two contentious statements attributed to another lawyer in the Legal Services Department to

the effect that he recalled discussing the issue with Buchart during his employment with the City. The other statements attributed to other individuals were not controversial and Neighbourhood raised no objection to them. Except for those two statements, the affidavits all support the conclusion that Buchart would have been involved in, or privy to, discussions among the lawyers in the Legal Services Department about the issue in question when he was in the City's employ.

[70] These arguments were made before both lower courts. The application judge was entitled to weigh the evidence as he saw fit. He did not err in admitting the evidence or in giving it the weight he did. The appeal judge reviewed the evidence and held that the application judge was entitled to deference on appeal as to his conclusions about the facts, the inference to be drawn from the facts and the assignment of weight to the evidence. She held that the application judge did not err in his assessment of the evidence, including the weight he assigned to Ms Boryskavich's affidavits. These were findings of fact and reasonable inferences drawn from those findings of fact.

## INSUFFICIENT REASONS

[71] Neighbourhood also argues that the application judge failed to provide adequate reasons for his decision and the appeal judge erred in failing to identify and correct that error.

[72] This argument may be disposed of succinctly. Failure to provide adequate reasons is an error of law. However, a plain review of the reasons of both the application judge and the appeal judge reveals that their reasons were more than adequate in the circumstances. Each judge identified the issues and explained why they decided in the manner that they did. Courts are not required to make explicit written findings on each constituent element

leading to their final conclusions. They are simply required to explain why they decided in the manner that they did. That was done here.

## PREMATURITY

[73] Even if I had found an error of law of significant substance to allow leave to appeal, I would have denied leave on the grounds of prematurity.

[74] The decision to grant leave to appeal is discretionary. See *R v Vidulich*, 1989 CarswellBC 110 (CA) (at para 25):

> The decision whether to grant leave is a matter for the discretion of the court. The exercise of the discretion will be guided by balancing the interests of justice as they affect all the parties. The rule is no different in criminal cases than it is in civil cases, though the balancing of the interests of justice may have a different emphasis.

[75] In the present case, Neighbourhood proposes to appeal the appeal judge's decision which upheld the application judge's interlocutory decision to remove Buchart as counsel of record. This decision is interlocutory in the sense that it does not determine the real issue, but only a collateral matter.

[76] Traditionally, a court has the discretion as to whether to allow an appeal as to an interlocutory matter. A judge in chambers deciding whether to grant leave to appeal has the same discretion.

[77] I understand the importance to the legal system of the right to counsel of one's own choosing and I acknowledge that the leading case in this area was an interlocutory motion (see *MacDonald Estate*). The *MacDonald Estate* case involved an action for an accounting arising from the administration of an estate. The case of *Canadian Pacific Railway* was an appeal from an order enjoining the law firm from acting against the

respondents. As well, there are situations that call out for an interlocutory injunction and the criteria for such a remedy are strict and well-known (see *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311).

[78] However, normally, interlocutory appeals should be discouraged both in civil and criminal matters (see Donald JM Brown & David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2017) vol 2 (loose-leaf updated 2018, release 2018-2), ch 5 at para 5.3100). They tend to take on a life of their own, as this case clearly shows. They are often a significant source of delay and an inefficient use of judicial resources.

[79] That is especially the case in criminal cases where there are strong policy reasons against interlocutory appeals. As was stated in *Deschamps* (at para 29): "Our system operates on the premise that a system which minimizes interlocutory proceedings serves the best interests of both those charged with offences and society as a whole." This is particularly relevant now when courts are struggling with balancing access to the justice system with delay and increased costs to the litigants. The Supreme Court of Canada has recently indicated that delay has reached unacceptable levels (see *R v Jordan*, 2016 SCC 27; and *R v Awashish*, 2018 SCC 45 at paras 10, 17).

[80] In certain exceptional cases, discretion can and should be exercised in interlocutory matters to grant leave to appeal. This is not an exceptional case. Neighbourhood was charged with a relatively minor offence under a City by-law. It has an argument about the legality of the offence notice that it wishes to make before a judge. There are many counsel capable of handling a case of this nature. The argument is a straightforward one and would take no more than half a day. Had the matter been allowed to proceed to adjudication on its merits, it would have been resolved months, if not years, ago.

[81] Instead, this matter has travelled on an expensive and time-consuming journey through the courts as Neighbourhood has appealed the decision of the application judge to disqualify its counsel from acting on its behalf and the City has defended that appeal, as well as filing cross appeals. The matter has been ongoing for more than four years and has consumed vast quantities of legal and judicial resources. Yet, we still do not know whether it was legal for a special constable to serve Neighbourhood with an offence notice under the *Sewer By-law* in force at that time. It is time for this matter to be heard on its merits.

[82] The motion for leave to appeal is dismissed without costs.

Steel JA