COMMISSION OF INQUIRY

INTO MATTERS RELATING TO THE DEATH OF NEIL STONECHILD

RULING AS TO REMOVAL OF COUNSEL FOR THE FSIN

INTRODUCTION

This is an application to remove Robertson Stromberg and Chris Axworthy, Q.C. particularly, as counsel for the Federation of Saskatchewan Indian Nations. The Federation is a party to the inquiry established to investigate the death of Neil Stonechild and the investigation which followed.

THE FACTS

Neil Stonechild, an aboriginal youth, was found dead on the outskirts of Saskatoon on November 27, 1990.

On February 21, 2003, an order-in-council was passed establishing a judicial inquiry into the Stonechild matter. The terms of reference set out in the order read as follows:

> 1. The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into any and all aspects of the circumstances that resulted in the death of Neil Stonechild and the conduct of the investigation into the death of Neil Stonechild for the purpose of making findings and recommendations with respect to the administration of criminal justice in the province of Saskatchewan. The Commission shall report its findings and make such recommendations, as it considers advisable.
> 2. The Commission shall perform its duties without

expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization, and without interfering in any ongoing police investigation related to the death of Neil Stonechild or any ongoing criminal or civil proceeding.

3. The Commission shall complete its inquiry and deliver its final report containing its findings, conclusions and recommendations to the Minister of Justice and Attorney General. The report must be in a form appropriate for release to the public, subject to *The Freedom of Information and Protection of Privacy Act* and other laws.

4. The Commission shall have the power to hold public hearings but may, at the discretion of the commissioner, hold some proceedings *in camera*.

5. The Commission shall, as an aspect of its duties, determine applications by those parties, if any, or those witnesses, if any, to the public inquiry that apply to the Commission to have their legal counsel paid for by the Commission, and further, determine at what rate such Counsel shall be paid for their services.

Certain individuals and organizations applied for standing at the inquiry. Some also sought funding. The Saskatoon City Police Association (the Association) represents uniform members of the Saskatoon Police Service below the rank of inspector. It was granted standing as was the Federation of Saskatchewan Indian Nations on May 13, 2003. The latter organization is represented by Robertson Stromberg and Ralph Ottenbreit, Q.C., in particular.

The material filed by Robertson Stromberg on the application for standing and funding on April 24, 2003 contained the following statement (Appendix A):

8. Chris Axworthy, Q.C. will be responsible for administering the said funding.

The application was followed by a letter of April 28, 2003 from Mr. Ottenbreit to Commission counsel. It attached the curriculum vitae of Messrs. Axworthy and Ottenbreit and contained this information:

> I can advise that I will be counsel at the Inquiry if standing is granted. Chris Axworthy will be assisting the process by helping to prepare for the Inquiry and any daily testimony. He will not appear as counsel. My regular hourly rate is $220.00. Chris Axworthy's regular hourly rate is $250.00. I expect that a maximum of two hours of preparation time will be required for each hour of inquiry time if funding for one counsel is approved. . . .
>
> (emphasis added)

Mr. Axworthy's curriculum vitae indicates that he held the office of Minister of Justice and Attorney General from 1999 to 2003, Minister of Aboriginal Affairs from 2001 to 2003, and was a member of the Legislative Assembly for Saskatoon-Fairview from 1999 to 2003.

On May 1, 2003 Mr. Plaxton, counsel for the Association, wrote to Robertson Stromberg. The letter reads as follows:

> I am writing at this time to make certain inquiries concerning your firm's representation of the FSIN at the above-noted inquiry. These are not only my concerns but also concerns of Messrs. Watson and Fox.
>
> Our concerns arise out of the association of Mr. Chris Axworthy, Q.C. with both your firm and this file. These

> concerns relate most specifically to the Stonechild matter, which of course was actively under consideration by the Department of Justice while Mr. Axworthy was Minister of Justice.
>
> In order for us to make a determination as to how to deal with the matter, I would ask you [to] (sic) provide us with the following information:
>
> 1. The nature of Mr. Axworthy's association with your firm and how long the same has been in place.
> 2. What involvement Mr. Axworthy has had with this client and this matter and how long he has been so involved.
> 3. What involvement you anticipate he will have with this client and this matter in the future.
>
> Our concern of course is the perception of a conflict of interest not only by individual clients, but also the public at large. I would suggest this is especially pertinent in a matter such as the one at hand.
>
> I would appreciate your early advice so that we are able to deal with this issue if necessary without delaying any of the Inquiry's proceedings.
>
> I thank you for your attention.

On May 2, 2003, he followed with a second inquiry. It reads as follows:

> Further to our telephone conversation yesterday, I would be obliged if you could get back to me with a written response to the questions posed in our 1st of May correspondence. As mentioned, I would like to have the same at hand to discuss the matter with other counsel and my clients.
>
> From our conversation, I understand the fact to be Mr. Axworthy was originally going to act on behalf of the FSIN at

> the Stonechild Inquiry. From this, I assume he has acted on the file and/or offered advice concerning same. Please correct me if I am wrong.
>
> I further have your advice that although you are seeking funding for senior and junior counsel, you would not be asking for Mr. Axworthy's time to be compensated by the Commission. From this, it would appear you intend to have Mr. Axworthy continue his involvement in this matter, although not actively at counsel table. Please correct me if I am wrong.
>
> Again, I would appreciate you getting back to me as soon as you can and thank you in advance for your consideration.

On May 2, 2003, Mr. Ottenbreit forwarded two fax communications to Mr. Plaxton. The first reads as follows:

> Thank you for your fax of May 1, 2003.
>
> I have several observations.
>
> The inquiry is not an adversarial proceeding. It is inquisitorial. The issues raised by you should be taken in this context. Moreover, the object of the inquiry is not to find fault. Your clients' concerns should also be taken in this context.
>
> I expect that the evidence that the Commission will hear will come primarily from the Department of Justice and that there will be full disclosure by them. This will happen in any event whether Mr. Axworthy was the Minister or not. Every party will therefore have access to the same information from the Department of Justice. The fact that Mr. Axworthy is associated with our firm should therefore not prejudice your clients and those of Messrs. Watson and Fox.
>
> At one point prior to the standing hearing, we believed that

Mr. Axworthy may be able to assist in the preparation for the inquiry after disclosure was given, although it was not contemplated he would appear as counsel before the inquiry. After further consideration we determined that Mr. Axworthy should have no part in this proceeding. Consequently at the hearing on April 30th I indicated to Justice Wright that we sought funding for only two lawyers, David Bishop and me. I confirmed then that only two of us would be working on this matter. I reiterate this and assure you that Mr. Axworthy will not be involved in any preparation for or appearance before the inquiry nor assist either Mr. Bishop or me in any other way with respect to our representations before the inquiry.

I also point out that Mr. Axworthy having been a Minister has a ministerial obligation of confidentiality related to his duties as Minister. This obligation is a continuing one which he takes seriously. He and the other members of our firm are mindful of this and I can advise that this obligation has been met and will continue to be met.

Insofar as the three questions set out in your letter are concerned, you know that I cannot provide you answers to all of these because of confidentiality obligations with respect to our client. However, I can advise that Mr. Axworthy joined our office in early February, 2003. He is not a partner. He had resigned as Minister around January 21, 2003.

Our office has only very recently been retained on this matter.

I also observe that Justice Wright is an experienced Judge who is highly regarded. I do not believe that Mr. Axworthy's association with our firm will make a bit of difference as to how he conducts this inquiry and subsequently makes findings. I have the utmost confidence that he will be objective, impartial and fair.

Mr. Axworthy did not sign the Order in Council for this inquiry nor did he set the terms of reference. That was done by Mr. Nilson.
It is my belief that it would be in everyone's interest that the

> parties are able to have the counsel they have chosen represent them. To do otherwise would arguably impose an actual prejudice in order to avoid a perceived one and an actual interference in the conduct of the inquiry.
>
> Lastly, I understand your clients' concern with the upcoming inquiry. I'm sure that it is very stressful for their members. I often represent police officers who are the subject of investigations, criminal or otherwise and I know first hand the emotional toll these difficult matters take on them.
>
> I trust this addresses your concerns.

The second fax states this:

> Thank you for your fax letter of May 2nd. I enclose my letter response to your letter of May 1st.
>
> You have our conversation of May 1st wrong. I specifically told you yesterday that Mr. Axworthy would not be acting as counsel at the Inquiry. What I did tell you yesterday is set forth in the third large paragraph of my enclosed letter.
>
> Insofar as Mr. Axworthy offering advice on the Stonechild matter, I believe that the only work done to date is in respect of the standing and funding application and I prepared that. The actual submission text was prepared by FSIN in house. Mr. Axworthy has acted to facilitate my communications and instructions with respect to that application.
>
> The nature of Mr. Axworthy's further involvement on this matter is set forth in the third large paragraph of my enclosed letter.
>
> I trust this answers your inquiries.

Mr. Plaxton wrote to Mr. Ottenbreit on May 6, 2003, and made these comments:

> Thank you for yours of the 2nd of May. I have had an opportunity to discuss this issue further with my clients.
>
> The Department of Justice is not a party or a proposed party to the Inquiry. Further, we have no guarantee that all parties will have access to the same information from the Department of Justice.
>
> Above and beyond this however, we believe your firm finds itself in an insurmountable conflict of interest, both actual and perceived. Accordingly, we must request your firm generally, and Mr. Axworthy specifically, cease acting for the FSIN, directly or indirectly in the Stonechild Inquiry or any other matters pertaining thereto.
>
> We believe the FSIN will be able to retain alternate counsel at this early date without any real inconvenience as not much has yet taken place on the file.
>
> My client makes this request on its own behalf and on behalf of its members.
>
> I would ask the favour of an early reply so that we may apply to the Commissioner for a ruling, if necessary.
>
> I thank you for your attention.

Ultimately, Mr. Ottenbreit replied on May 14, 2003. His reply reads as follows:

> I have now had an opportunity to consult with my client. Our client wants our office and specifically me as their counsel for the inquiry. Accordingly, we will not be stepping back from this matter.
>
> We disagree with your comments that our firm has an insurmountable conflict of interest on this matter.
>
> Conflicts in the legal sense usually arise in two fashions. A

conflict results in relation to confidential information or loyalty to a client. In either of these senses, there is no conflict on this matter.

Any information which Mr. Axworthy's officials or he would have received on this matter would have come as a result of various police investigations pursuant to a public duty respecting this matter rather [than] (sic) any direct or indirect solicitor/client relationship which he or anyone else in Justice had with the two police officers, your client or any other party at the inquiry. Although there is always the risk that the Department of Justice has some information which will not for some reason be given to the inquiry, this is highly unlikely and I am assured by the Department that any disclosure they make to anyone will go through Mr. Hesje. Presumably then any information gleaned from any of the investigations done by or at the request of the Department of Justice will at some point become public at this inquiry.

It is disingenuous to raise the alarm about the use of information which Mr. Axworthy may or may not have as a result of his being Minister where the very inquiry in which your clients will participate will presumably bring all that information to light for the public to see. Nevertheless we can assure that none of any information which Mr. Axworthy would have had access to while he was Minister has been disclosed to us or our client nor will it be disclosed to us or our client.

One of your co-counsel raised the issue of Chinese walls being put up with respect to confidential information. We are prepared to take steps that are reasonable to allay any of your concerns in this regard notwithstanding our earlier comments and notwithstanding the fact that we believe it would be overkill to do so. Mr. Axworthy comes to our office with none of the regular risk factors which would accompany lawyers transferring from one firm to another and which would have a bearing on disclosure of confidential information. He comes with none of the Justice files or material. He comes with no staff who would have worked on

any of the Justice files on this matter. In short he comes only with what he can remember and he is already bound not to disclose that pursuant to his ministerial duty.

With respect to the obligation of loyalty, it has often been stated that the relationship of counsel and client requires clients typically untrained in the law and lacking the skill of advocates to entrust the management of their cases to counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case. Mr. Axworthy while he was Minister had no a (sic) duty of loyalty to your client or the two police officers who seek to be parties or to the R.C.M.P. or to the FSIN or to any other party or potential party. In short, his loyalty was a public one to carry out his ministerial duties for the public good. In that sense we believe that Mr. Axworthy has not breached any duty of solicitor's loyalty to anyone. Mr. Axworthy's public duty as Minister ceased on January 21, 2003.

We fail to understand how his public duties prior to January 21, 2003 can somehow circumscribe our involvement with the inquiry because of his present association with our firm.

Your comments suggest that you perceive some unfairness to your clients as a result of our acting for our clients. We point out again that Mr. Axworthy played no favourites with any party to the inquiry nor did he shepherd the Order in Council setting up the Inquiry through Cabinet. Accordingly, he did not set the terms of reference for the inquiry. That was done by Mr. Nilson who as acting Minister had the final decision. The inquiry was in fact publicly announced by Eric Cline, Q.C.

Presumably your complaint is that Mr. Axworthy's actions as Minister of Justice, i.e. his public duty, somehow conflicts with or is inimical to your clients' interests. This also presumes that the performance of his public duty is adversarial to your clients and their interests. This is not so. Moreover, if I follow your logic, our firm is now visited with this supposed conflict because of his association. We do not

> see this as a valid argument.
>
> A party should not be deprived of his or her choice of counsel without good cause. The concepts of conflict of interest and the countervailing value that a litigant should not be deprived of their counsel of choice are really two aspects of protecting the integrity of the legal system. If a party could achieve an undeserved tactical advantage over an opposing party by bringing a disqualification motion or seeking other "ethical relief" using "the integrity of the administration of justice merely as a flag of convenience" fairness of the process would be undermined. Your suggestion that our firm has an insurmountable conflict despite Mr. Axworthy's stringent confidentiality obligations and despite the fact that neither I nor Mr. Bishop have any personal knowledge whatsoever of your clients or any party or their particular affairs, promotes form at the expense of substance and tactical advantage instead of legitimate protection.
>
> I point out again that the process of the inquiry is inquisitorial rather than adversarial. Our client is concerned as your client's (sic) are to determine what happened with Neil Stonechild.
>
> Accordingly, we will proceed to act on our client's behalf.

The Association counsel then wrote to Commission counsel on May 23, 2003 as follows:

> Due to what the Association perceives to be a conflict of interest I have requested the Robertson Stromberg firm generally and Mr. Chris Axworthy, Q.C. specifically cease acting for the F.S.I.N. directly or indirectly in the within matter or any matters pertaining thereto. Mr. Ottenbreit has declined my request, accordingly I wish to make application for an order removing them as counsel.
>
> I would ask you seek the Commissioner's directions as to whether this application should be made to the Commissioner

> or the Court of Queen's Bench. If the application should be made to the Commission please advise as to dates that would be acceptable for same.
>
> I thank you for your attention.

Mr. Ottenbreit replied briefly on the same day as follows:

> I have received Mr. Plaxton's letter of May 23, 2003 asking for directions from the Commissioner as to his application to have us removed from the Inquiry. In view of his request, we may have representations to make with respect as to what the proper forum would be. We will get back to you early next week.

Mr. Ottenbreit delivered a more detailed response on May 26, 2003. It reads:

> Respecting Mr. Plaxton's letter of May 23, 2003, I can advise as follows:
>
> 1. I believe the terms of reference on this inquiry are wide enough to allow Mr. Justice Wright to determine who may appear at the inquiry and conduct the case. In that sense, I take the view that the alleged conflict as it is presented is within his jurisdiction and should be heard by him.
>
> 2. I view with some dismay the apparent inaccuracy contained in Mr. Plaxton's letter to the effect that Chris Axworthy continues to act for the FSIN on this matter or that we have declined Mr. Plaxton's request in this regard. The letter is misleading in that it leaves the impression that Mr. Axworthy continues to act on this matter and that I have declined Plaxton's request that he cease to act. We made it clear that Mr. Axworthy was not going to be involved in this matter on a number of occasions as follows:
>
> (a) on April 30, 2003 at the standing and funding hearings when I indicated Mr. Bishop and I

would act on this matter;

(b) on May 1, 2003 in a telephone conversation with Mr. Plaxton where I indicated unequivocally Mr. Axworthy would not be involved in this matter;

(c) on May 2, 2003 by letter to Mr. Plaxton where I indicated unequivocally that Mr. Axworthy would not be involved in this matter.

3. In our view the only issue with respect to Mr. Plaxton's complaint is whether our firm as opposed to Mr. Axworthy specifically may appear on this matter. In this regard at the time of the funding application it was no secret that Mr. Axworthy was associated with our firm. Although the proposal for funding originally made reference to Mr. Axworthy, none of the parties objected at the funding application to the association of Mr. Axworthy and our firm.

I am under separate cover sending back the completed Undertaking of Counsel.

I would be pleased therefore to appear before the Commissioner at a convenient time to address this matter.

Mr. Plaxton then wrote again on May 27, 2003 to Commission counsel and stated:

I have received a copy of Mr. Ottenbreit's 26th of May correspondence to yourself. As indicated in the correspondence our request was both the Robertson Stromberg firm and Mr. Axworthy cease acting for the FSIN directly or indirectly concerning this matter. This was not a disjunctive but a conjunctive request in that from our perception, it is necessary to mitigate the harm caused that both the firm and Mr. Axworthy discontinue any association. By way of reference, I believe whether or not Mr. Axworthy is actually handling the file, he being a member of the firm is

> legally deemed to be acting for the client.
>
> It appears the proposed participation of Mr. Axworthy in this matter has changed dramatically from the outset to present. It does appear though he has had some actual involvement in same prior to the standing applications. The timing and full extent of same is not known to us. Mr. Ottenbreit in correspondence after the conflict issue was raised mentioned the possibility of separation walls concerning Mr. Axworthy, this however is too little, too late and, in any event, in no way addresses the issue of a cabinet minister and/or his law firm appearing at an Inquiry so soon after he left his post.
>
> I will be forwarding my materials as soon as possible in relation to our application.
>
> I thank you for your attention.

I have reproduced the particulars of Mr. Axworthy's history as Minister and the entire correspondence passing between counsel for the Association and the Federation and the Commission to provide a full understanding of the many complex issues raised in this application.

The Association ultimately advised that it wished to make a formal application to the Commission to remove Robertson Stromberg and Mr. Axworthy. That application was argued before me on June 9, 2003. The application was supported by counsel for Constables Hartwig and Senger and the Saskatoon Police Service. Counsel for Stella Bignell opposed the application for removal supporting the position of Robertson Stromberg and Mr. Axworthy.

CODE OF PROFESSIONAL CONDUCT

A Code of Professional Conduct was adopted by the Law Society of Saskatchewan. It

does not have the effect of law but it is a highly persuasive set of guidelines with respect to the conduct of solicitors and a solicitor's duty to the client, fellow solicitors and the public.

The following provisions appear to be material to the present application if even only tangentially:

> CHAPTER IV
> CONFIDENTIAL INFORMATION
>
> RULE
>
> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code.
>
> *Commentary*
>
> . . .
>
> Confidential Information Not to be Used
>
> . . .
>
> 6. The lawyer shall not disclose to one client confidential information concerning or received from another client and should decline employment that might require such disclosure.
>
> . . .
>
> Disclosure Required by Law
>
> . . .
>
> 14. The lawyer who has information known to be confidential government information about a person, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or employee) whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

. . .

CHAPTER V
IMPARTIALITY AND CONFLICT OF INTEREST BETWEEN CLIENTS

RULE

The lawyer shall not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.

Commentary

. . .

Acting Against Former Client

8. A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter, or take a position where the lawyer might be tempted or appear to be tempted to breach the Rule relating to confidential information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person.

9. For the sake of clarity the foregoing paragraphs are expressed in terms of the individual lawyer and client. However, the term "client" includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. It also includes the client of a lawyer who is associated with the lawyer in such a manner as to be perceived as practising in partnership or association with the first lawyer, even though in fact no such partnership or association exists.

CHAPTER VA
CONFLICTS OF INTEREST

A. Definitions

(1) In this Rule:

"client" includes anyone to whom a member owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them;

(emphasis added)

"confidential information" means information obtained from a client which is not generally known to the public;

"law firm" includes one or more members practising:

. . .

(e) in a government, a Crown corporation or any other public body, and . . .

. . .

Commentary

1. . . .

b. Government employees and in-house counsel

The definition of "law firm" includes one or more members of the Society practising in a government, a Crown corporation, any other public body and a corporation. Thus, the Rule applies to members transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same. Subrule (3) was included to reflect the particular employment structure of the federal government, but is not meant to alter the general principle that internal transfers within the government are not subject to review under the Rule.

"matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

. . .

B. Application of Rule

(2) This Rule applies where a member transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring member or the new law firm is

aware at the time of the transfer or later discovers that:

(a) the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client ("former client"),
(b) the interests of those clients in that matter conflict, and
(c) the transferring member actually possesses relevant information respecting that matter.

(3) Subrules (4) to (7) do not apply to a member employed by the federal Department of Justice who, after transferring from one department, ministry or agency to another, continues to be employed by the federal Department of Justice.

Firm Disqualifications

(4) Where the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless:

(a) the former client provides written consent to the new law firm's continued representation of its client, or

(b) the new law firm establishes, in accordance with subrule (8), that:

(i) it is in the interests of justice that its representation of its client in the matter continue, having regard to all relevant circumstances, including:

(A) the adequacy of the measures taken under (ii),
(B) the extent of prejudice to any party,
(C) the good faith of the parties,

(D) the availability of alternative suitable counsel, and
(E) issues affecting the national or public interest, and

(ii) it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur.

Transferring lawyer disqualification
(5) Where the transferring member actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client:

(a) the member should execute an affidavit or solemn declaration to that effect, and

(b) the new law firm shall:

(i) notify its client and the former client, or if the former client is represented in that matter by a member, notify that member, of the relevant circumstances and its intended action under this Rule, and

(ii) deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a), and

(iii) notify its client and former client that if they have any objection to the new law firm's continued representation of its client that they may apply to the Law Society or a court of competent jurisdiction under subrule (8) within thirty (30) days of receipt of the material provided under this Rule and if no

objection is taken within thirty days, they lose the right to apply to the Law Society under this Rule.

(6) A transferring member described in the opening clause of subrule (4) or (5) shall not, unless the former client consents:

(a) participate in any manner in the new law firm's representation of its client in that matter, or

(b) disclose any confidential information respecting the former client.

(7) No member of the new law firm shall, unless the former client consents, discuss with a transferring member described in the opening clause of subrule (4) or (5) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

CHAPTER X
THE LAWYER IN PUBLIC OFFICE

RULE

The lawyer who holds public office should, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

Commentary

Guiding Principles

1. The Rule applies to the lawyer who is elected or appointed to legislative or administrative office at any level of government, regardless of whether the lawyer attained such office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by failure on the lawyer's part to observe its professional standards of conduct.

Conflicts of Interest

2. The lawyer who holds public office must not allow personal or other interests to conflict with the proper discharge of official duties. The lawyer holding part-time public office must not accept any private legal business where duty to the client will or may conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict, but must nevertheless guard against allowing the lawyer's independent judgement in the discharge of official duties to be influenced by the lawyer's own interest, or by the interests of persons closely related to or associated with the lawyer, or of former or prospective clients, or of former or prospective partners or associates.

3. In the context of the preceding paragraph, persons closely related to or associated with the lawyer include a spouse, child, or any relative of the lawyer (or of the lawyer's spouse) living under the same roof, a trust or estate in which the lawyer has a substantial beneficial interest or for which the lawyer acts as a trustee or in a similar capacity, and a corporation of which the lawyer is a director or in which the lawyer or some closely related or associated person holds or controls, directly or indirectly, a significant number of shares.
. . .

Disclosure of Confidential Information

7. By way of corollary to the Rule relating to confidential information, the lawyer who has acquired confidential information by virtue of holding public office should keep such information confidential and not divulge or use it even though the lawyer has ceased to hold such office. (As to the taking of employment in connection with any matter in respect of which the lawyer had substantial responsibility or confidential information, see Commentary 3 of the Rule relating to avoiding questionable conduct.)
. . .

Note 3 to this provision reads as follows:

3. Cf. generally the Rule relating to conflict of interest between lawyer and client. "When a lawyer is elected to ... (a) public office of any kind, or holds any public employment...his duty as the holder of such office requires him to represent the public with undivided fidelity. His obligation as a lawyer...continues; ...it is improper for him to act professionally for any person...[who] is actively or specially interested in the promotion or defeat of legislative or other matters proposed or pending before the public body of which he is a member or by which he is employed, or before him as the holder of a public office or employment." from Brand, *Bar Associations, Attorneys and Judges* (Chicago, 1956) p. 179.

CHAPTER XIX
AVOIDING QUESTIONABLE CONDUCT

RULE

The lawyer should observe the rules of professional conduct set out in the Code in the spirit as well as in the letter.

Commentary

Guiding Principles

1. Public confidence in the administration of justice and the legal profession may be eroded by irresponsible conduct on the part of the individual lawyer. For that reason, even the appearance of impropriety should be avoided.

. . .

Duty after Leaving Public Employment

3. <u>After leaving public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility or confidential information prior to leaving, because to do so would give the appearance of impropriety even if none existed.</u> However, it would not be improper for the lawyer to act professionally in such a matter on behalf of the particular public body or

> authority by which the lawyer had formerly been employed. As to confidential government information acquired when the lawyer was a public officer or employee, see commentary 14 of the Rule relating to confidential information.
>
> (emphasis added)
>
> . . .
>
> Standard of Conduct
> 10. The lawyer should try at all times to observe a standard of conduct that reflects credit on the legal profession and the administration of justice generally and inspires the confidence, respect and trust of both clients and the community.

THE LEGISLATION

The Members' Conflict of Interest Act, S.S. 1993, c. M-11.11

The Act contains the following provisions:

> **4** A member shall not use information that is gained in the execution of his or her office and is not available to the general public to further or to seek to further the member's private interest, his or her family's private interest or the private interest of an associate.
>
> **8**(1) The Executive Council, a member of the Executive Council or an employee of a department, secretariat or office of the Government of Saskatchewan or a Crown corporation, including a corporation in which the Government of Saskatchewan owns a majority of shares, shall not knowingly award a contract to or approve a contract with, or grant a benefit to, a former member of the Executive Council or to any of the former member's family until 12 months have expired after the date on which the former member ceased to hold office.

> (2) Subsection (1) does not apply to contracts of employment with respect to further duties in the service of the Crown.
>
> (3) Subsection (1) does not apply if the conditions on which the contract or benefit is awarded, approved or granted are the same for all persons similarly entitled.

LAW

The issue of disqualification of counsel by reason of conflict of interest has been addressed many times in Canada. The seminal decision is that of the Supreme Court of Canada in *MacDonald v. Martin*, [1990] 3 S.C.R. 1235. Mr. Justice Sopinka set down the law at p. 1243:

> In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession. . . .

He then identified two basic approaches to determine whether a disqualifying conflict of interest exists: (1) the probability of real mischief, or (2) the possibility of real mischief. He described these two approaches at p. 1246:

> . . . The first approach requires proof that the lawyer was actually possessed of confidential information and that there is a probability of its disclosure to the detriment of the client. The second is based on the precept that justice must not only be done but must manifestly be seen to be done. If, therefore, it reasonably appears that disclosure might occur, this test for

> determining the presence of a disqualifying conflict of interest is satisfied.

After an extensive review of the authorities, Mr. Justice Sopinka concluded that the appropriate test is the possibility of real mischief. He stated the test, with respect to confidential information, at p. 1260, as follows:

> . . . the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. . . .

Mr. Justice Cory, concurring in the result, reiterated the three competing values identified by Mr. Justice Sopinka and stated, at p. 1265, as follows:

> Of these factors, the most important and compelling is the preservation of the integrity of our system of justice. The necessity of selecting new counsel will certainly be inconvenient, unsettling and worrisome to clients. Reasonable mobility may well be important to lawyers. However, the integrity of the judicial system is of such fundamental importance to our country and, indeed, to all free and democratic societies it must be the predominant consideration in any balancing of these three factors.

In *Martin*, the Supreme Court was dealing with the disqualification of a lawyer in civil proceedings. The issue arises as to whether the competing values are different with respect to a public inquiry. The second and third values as identified by Mr. Justice Sopinka, would appear to be the same. The first value, the integrity of our system of justice, is not necessarily the same.

The interest at issue in a public inquiry was recently addressed by the Ontario Superior

Court in *Aboriginal Legal Services of Toronto v. Shand Inquest*, [2003] O.J. No. 1117 (S.C. Div.Ct.). In that case, O'Driscoll J. adopted the following statements made by a coroner in disqualifying counsel at a coroners inquest, which disqualification was upheld by the Ontario High Court in *Cook v. Young*, unreported, November 8, 1989, at para. 5:

> . . .
>
> "Mr. Speid has a right to counsel. He has a right to professional advice, but he has no right to counsel who, by accepting the brief, cannot act professionally. A lawyer cannot accept a brief if, by doing so, he cannot act professionally, and if a lawyer so acts, the client is denied professional services. . . .
>
> . . .
>
> "Does this situation apply to inquests? As we heard in submissions, inquests are different, in focus, scope and rules from any other proceeding. But the same rules of fundamental or natural justice and fairness must be observed and must be seen to be operating at an inquest. Quite rightly it has been pointed out that inquests do not find fault or legal responsibility, rather they are fact-finding exercises. However, disputes regarding evidence, which might impact, for example on the reputation of an individual, can arise at an inquest. Therefore, it seems to me that a potential conflict in a lawyer's position is a valid consideration, although because of the non-fault-finding and unique nature of an inquest, the test to remove such lawyer might well be of a higher nature.

The court went on to adopt the following statement by the coroner in the case at issue at para. 6:

> . . .
>
> "In my opinion the most appropriate test is the proper functioning of the process and the maintenance of public confidence. An inquest is a public process in which the administration of justice and the fairness of the process will be closely scrutinized.

The court upheld the disqualification of the lawyer and stated its conclusion as follows at para. 7:

> This is one of those occasions where reality does not govern but the governing factors are perception and optics. It is a matter of the maintenance of public confidence in the administration of justice and the avoidance of an appearance of impropriety. . . .

In *Booth v. Huxter* (1994), 16 O.R. (3d) 528 (Gen. Div.), it was argued that because, there was no legal or monetary interest involved in a coroner's inquest, the rules of conflict of interest need not apply. In addressing this argument Moldaver J. stated at p. 536, the following:

> Secondly, I consider the proposed interpretation of the word "interest" to be somewhat naive and unrealistic. I have already touched upon the reasons for concluding that each of the Board and the officers has a very real and significant interest in the proceedings. The integrity, reputation, competence and professionalism of each had been placed under the spotlight of public scrutiny. To somehow suggest that such matters do not constitute interests worthy of preservation is to take a myopic view of the situation. One need only look at the laws of libel and slander to realize the importance of a person's reputation within our society. Here, the reputations of the officers and the Board are, in no small measure, under scrutiny.

The court also referred to the fact that the parties had been granted standing based on the separate interests they represent (p. 539).

I have been unable to find any case in which conflict of interest was alleged with respect to a former minister of the Crown.

APPLICATION

It is appropriate to quote from the language of the application:

> This is an application by the Saskatoon City Police Association to have the firm of Robertson Stromberg generally and Mr. Chris Axworthy, Q.C. specifically removed as counsel to the Federation of Saskatchewan Indian Nations in the matter within as well and matters pertaining to same. The applicant believes a number of other parties to the Inquiry will support it in this application.
>
> The applicant advances in support of its application a conflict of interest in Mr. Axworthy and the firm due to Mr. Axworthy's membership in same. The primary grounds for this submission lie in the fact Mr. Axworthy was the Minister of Justice for a number of years during which matters relevant to this inquiry were being considered by the department. During this period he would be privy to information, policies and decisions not known to the public. It is suggested the public would perceive this information could be available, advertently or otherwise, to the firm's clients.
>
> In addition to this the applicants submit Mr. Axworthy and the firm are again in a conflict of interest due to him or his firm accepting employment in connection with the matter with which he had substantial responsibility or confidential information prior to leaving his cabinet post.
>
> The applicants rely not only on the real possibility of conflict of interest but the appearance of conflict and circumstances that would lead the public to question the appropriateness of the firm continuing to act.

The applicant refers to a number of circumstances in support of its position:

- 30 September 1999 – Mr. Axworthy appointed Minister of Justice and Attorney General (News Release 30 September 1999)

- 16 February 2000 – Justice Minister Axworthy makes formal request to the RCMP to investigate circumstances of the deaths of Messrs. Naistus and Wegner and to review allegations concerning the complaint from Mr. Knight

- 24 February 2000 – It is reported the RCMP Task Force would also consider the Stonechild matter in due course (24 February 2000 Globe and Mail and StarPhoenix news reports)

- Spring 2000 – FSIN's leadership calling for a public inquiry into the justice system in Saskatchewan. These demands made in light of the deaths of Messrs. Wegner and Naistus (The Saskatchewan Indian – Spring 2000)

- 19 September 2000 – Justice Minister Axworthy directs an inquest into the death of Mr. Ironchild (Executive Council News Release 19 September 2000)

- 2 February 2001 - Justice Minister Axworthy directs an inquest into the death of Mr. Dustyhorn (Executive Council News Release 2 February 2001)

- 20 June 2001 – Justice Minister Axworthy questioned in the House concerning FSIN's demands for public inquiry into the justice system based primarily on the deaths of First Nations persons outside Saskatoon. Mr. Axworthy reports there have been discussions with FSIN and other groups. Mr. Axworthy reports there have been coroner's inquiries into the deaths of Messrs. Ironchild and Dustyhorn and that the reports out of these inquests have been well received by the First Nations and Métis communities (Hansard 20 June 2001)

- 27 June 2001 – Justice Minister Axworthy orders inquest

into the death of Mr. Naistus (Executive Council News Release 27 June 2001)

- 26 July 2001 – Justice Minister Axworthy orders inquest into the death of Mr. Wegner (Executive Council News Release 26 July 2001)

- 12 October 2001 – Mr. Axworthy also named Minister of Aboriginal Affairs (Executive Council News Release 12 October 2001)

- 15 November 2001 – Mr. Axworthy announces commission on First Nations and Métis injustice reform (Executive Council News Release 15 November 2001)

- 22 February 2002 – RCMP receive Saskatoon Police Service records concerning Mr. Stonechild (Mr. Hesje's correspondence 30 May 2003)

- 21 January 2003 – Mr. Axworthy announces his resignation from cabinet and advises "I am currently exploring career opportunities in private life, including teaching law and work with an established Saskatchewan law firm". Mr. Nilson appointed acting Attorney General and Minister of Justice (Executive Council News Release 21 January 2003)

- 17 February 2003 – Mr. Cline appointed Minister of Justice (Executive Council News Release 17 February 2003)

- 20 February 2003 – Justice Minister Cline announces inquiry into the death of Mr. Stonechild and advises public prosecutions division has determined there is not sufficient evidence to lay charges in relation to the death of Mr. Stonechild (Executive Council News Release 20 February 2003)

- Robertson Stromberg announces Mr. Axworthy has joined their firm and advises: "Chris brings a deep understanding

> of intergovernmental and aboriginal law to our team" (advertisement from Saskatoon StarPhoenix 20 February 2003)
>
> - 19 February – Order in Counsel signed establishing inquiry

The respondents do not dispute the correctness of any of these statements.

Mr. Axworthy swore an affidavit on June 5, 2003. I quote from the material portions:

> 2. On January 21, 2003 I resigned as Minister of Justice of Saskatchewan, a position which I had held for some years prior to that.
>
> 3. When I became Minister of Justice I considered my duties to be public ones. I swore an oath to keep confidential any information which I received in the course of my public duties.
>
> 4. I have not divulged either to the Federation of Saskatchewan Indian Nations, any lawyers or staff of Robertson Stromberg or anyone else the details of any information that I have received in my capacity of Minister of Justice either in respect of the subject matter of this inquiry or otherwise.
>
> 5. I joined the Robertson Stromberg firm in the first week of February, 2003. When I joined the firm I did not bring to the firm any files or other documentation or employees which had any connection with my duties as the Minister of Justice.

Lawrence Joseph, an officer of the Federation, swore an affidavit indicating his organization's desire that their present counsel continue to act. He concludes his

deposition with this statement:

> 4. If the Robertson Stromberg firm is disqualified from acting on this Inquiry, this will be prejudicial to the FSIN.

Mr. Joseph does not say what prejudice there will be nor does he suggest that other competent and experienced counsel could not serve the Federation as effectively.

ANALYSIS

It is appropriate that I repeat, at the outset, the statement which I made at the commencement of the application on June 9, 2003. In the event that I am persuaded that present counsel for the Federation should be removed, that will not impact upon the participation of the Federation of Saskatchewan Indian Nations. The Federation will be as fully a party to these proceedings as it has been to this point and will be entitled to retain and instruct counsel if other counsel is required. The application is not about diminishing or affecting the participation of the Federation. The narrow issue is whether in the circumstances prevailing here the Federation would be more appropriately represented by other counsel.

Res Judicata (Preliminary Objection)

The respondent Federation raised a preliminary objection to the application. Its contention is that the matter of the Robertson Stromberg/Axworthy engagement in this matter is *res judicata* inasmuch as no objection was raised to the participation of either during argument presented to me on the applications for standing and funding. With respect the objection is not tenable. I note also that standing and funding were granted to the parties not their counsel. In any event the defence of *res judicata* does not fit the

circumstances prevailing here. In my view the objection is really that the applicant is estopped from complaining now when it said nothing at the hearing. As I have noted the objection is answered by the evidence of the Association's prompt request for clarification of Mr. Axworthy's role and the timeliness of its application. It did not rest on its oars. There is still abundant time for the Federation to find new counsel if that is necessary.

Shortly stated the Association says that when Mr. Axworthy moved to Robertson Stromberg he would have inevitably taken with him confidential information received while Minister of Justice and Attorney General respecting the death of Mr. Stonechild and other aboriginal persons in Saskatoon. It is not appropriate therefore that he be associated with any of the parties in this inquiry.

It is also suggested that the early references to Mr. Axworthy's involvement in the Robertson Stromberg file reinforce the theory that his value to the law firm arose from his involvement as Minister and Attorney General. One may ask what qualifications or expertise did he have as counsel that led to his participation in the inquiry. As a consequence, it is argued, I should infer an actual conflict of interest exists and that taints the involvement of Mr. Axworthy and Robertson Stromberg as Federation counsel.

Mr. Plaxton also argues that members of the public presented with Mr. Axworthy's history as Minister and Attorney General would question his involvement and that of his firm in this matter. The second prong to the Association's argument is that of public perception.

The applicant suggests that if steps had been taken at the outset to ensure Mr. Axworthy was removed from any involvement in the Federation file such as a Chinese Wall there

would be much less concern. In fact, his role in the inquiry was emphasized from the beginning. It was only later that his involvement was minimized.

Counsel for the respondent prefaced his submissions on conflict of interest by referring to a number of cases that canvass a client's right to choose counsel. I refer to one in particular.

In *Manville Canada Inc. v. Ladner Downs* (1992), 88 D.L.R. (4th) 208, aff'd 100 D.L.R. (4th) 321, Esson C.J. states, at p. 223:

> . . . Such a remedy necessarily imposes hardship and, given that the party deprived of its representative is an innocent bystander in an issue between its lawyer and the opposite party, some degree of injustice on the innocent party. The imposition of such hardship and injustice can only be justified if it is inflicted to prevent the imposition of a more serious injustice on the party applying. It follows that the injunction should be granted only to relieve the applicant of the risk of "real mischief", not a mere perception.
>
> (emphasis added)

Chief Justice Esson continues at p. 224:

> . . . No doubt, some of those applications are brought to prevent a risk of real mischief. But can there be any doubt that many are brought simply because an application to disqualify has become a weapon which can be used, amongst many others, to discomfit the opposite party by adding to the length, cost and agony of litigation. If that becomes a regular feature of our litigation it would not likely do much to improve the profession's standards in an area in which there seem to have been few serious problems. But it could do much to further reduce the court's ability to get to judgment in a timely way.
>
> (emphasis added)

Robertson Stromberg argues there can be no conflict of interest as Mr. Axworthy never acted for any of the parties now seeking to disqualify it. Ordinarily a conflict of interest arises where a lawyer who has represented a client then seeks to act against that client in the same or related matter. This situation often arises as a result of a lawyer transferring to a new law firm. The Code of Professional Conduct suggests, however, that conflict of interest may go beyond this specific situation. Commentary 8, "Acting Against Former Client", of Chapter V, Impartiality and Conflict of Interest Between Clients, provides as follows:

> A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter, or take a position where the lawyer might be tempted or appear to be tempted to breach the Rule relating to confidential information. . . .
>
> (emphasis added)

This commentary suggests that a lawyer can breach the Code of Professional Conduct, relating to conflict of interest, without actually acting against a former client. The emphasized words suggest that a conflict of interest may arise between a lawyer's duty of confidentiality owed to a former client, and duty of loyalty to another client. This commentary refers to appearances. The lawyer may be in a conflict of interest by placing himself in a position where he might appear to be tempted to breach the rule relating to confidential information.

Commentary 1 of Chapter V is instructive in this regard. It states:

> A conflicting interest is one that would be likely to affect

> adversely the lawyer's judgement or advice on behalf of, or loyalty to a client or prospective client.

Mr. Dufour contends that inasmuch as the applicant is unable to say what confidential information, if any, reposes with Mr. Axworthy, it cannot be said there is any potential for conflict of interest. He concedes that if Mr. Axworthy had such information he could not divulge it as a former Minister. In the absence of any information as to what he knows, I am obliged to assess what is known. That is, what appears publicly about his activities as Minister and Attorney General.

"Confidential information" has been defined a number of cases. I refer to *Ott v. Fleishman*, [1983] 5 W.W.R. 721 (B.C.S.C.) at 723 (last paragraph):

> . . . for practical purposes any information received by a lawyer in his professional capacity concerning his client's affairs is prima facie confidential unless it is already notorious or was received for the purpose of being used publicly or otherwise disclosed in the conduct of the client's affairs.

Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 27 C.P.R. (3d) 180 (F.C.T.D.) sets out these principles at p. 202:

> . . . the following [is considered] as an elaboration of the formulation by Jerome A.C.J., in [*Montana Indian Band v. Canada (Minister of Indian & Northern Affairs*) (1988), 26 C.P.R. (3d) 68 (Fed. T.D.)], that whether information is confidential [within the meaning of the term "confidential information" in the *Access to Information Act*, R.S.C. 1985, c. A-1, s. 20 (1)(b)] will depend upon its content, its purpose and the circumstances in which it is compiled and

> communicated, namely:
>
> (a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own.
>
> (b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
>
> (c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

It is defined, of course, in the Code of Professional Conduct.

The respondent argues that in any event Mr. Axworthy is not in possession of any confidential information. The assertion is based on a very narrow interpretation of "confidential information". Counsel suggests that only information emanating from the applicant (ordinarily a former client) should be treated as confidential for the purpose of disqualifying a lawyer. At para. 22 of the respondent's brief, counsel suggests that at the very least:

> . . . the Applicant would have to show that confidential information was imparted by it to Mr. Axworthy in the context of a previous relationship that is akin to a solicitor/client relationship . . . .

The position taken by Robertson Stromberg is untenable for a number of reasons. First of all, it should be noted that Mr. Axworthy, in his brief affidavit, does not state that he has no confidential information with respect to matters within the terms of reference of the

public inquiry. Rather, he deposes that he has sworn an oath to keep confidential any information which he received in the course of his public duties. He goes on to depose that he has not disclosed to FSIN or Robertson Stromberg or anyone else:

> . . . the details of any information that I have received in my capacity of Minister of Justice either in respect to the subject matter of this inquiry or otherwise.

Mr. Axworthy, clearly recognizes that he is under a duty of confidentiality to his former client.

I observe also that a disqualifying conflict of interest can arise without proof of actual misuse or possession of confidential information. The issue was dealt with in *Martin*. The court noted, as did the applicant in this application, that it would be very difficult to know what confidential information is possessed by another lawyer.

Mr. Justice Sopinka noted that in cases where disqualification of a lawyer is sought with respect to the confidential information there are two questions to be answered: (1) Did the lawyer receive confidential information attributable to solicitor/client relationship relevant to the matter at hand? (2) Is there a risk that it would be used to prejudice the client? With respect to the first question Mr. Justice Sopinka stated at p. 1260:

> . . . In my opinion, once it is shown by the client that there existed a previous relationship 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 will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be

> discharged without revealing the specifics of the privileged communication. . . .

On this issue, Mr. Justice Sopinka adopted a test of a rebuttable presumption of receipt of confidential information.

The only evidence offered by Robertson Stromberg to rebut this presumption is the statement in Axworthy's affidavit that he has not divulged the details of any information.

It should be noted, that in propounding these two questions, Mr. Justice Sopinka was dealing with an application by a former client to disqualify a lawyer based on conflict of interest. *Martin* did not deal with the issue as to whether a disqualifying conflict of interest could arise where the former client was not objecting, and the application was not brought by a current client. However, the presumption of possession and misuse of confidential information arising from the establishment of a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, applies to this situation.

The applicant countered that Mr. Axworthy, as Minister of Justice and Attorney General was ***the*** Lawyer to the Government of Saskatchewan. If support for this proposition is required, it can be found in *The Department of Justice Act*, S.S. 1983, c. D-18.2. Section 9 sets out the powers and duties of the Minister of Justice. These duties include advising the Crown:

> (d) . . .upon all matters of law referred to him by the Crown;
> (e) advise the heads of the several departments of the government upon all matters of law connected with those departments.

The act also sets out the powers and duties of the Attorney General. Section 10 provides that the Attorney General is the official legal advisor of the Lieutenant Governor.
It seems clear that Mr. Axworthy was in a solicitor/client relationship with the Government of Saskatchewan. As a lawyer, advising on matters of law, it seems clear that he is bound by the Code of Professional Conduct.

In any event, a lawyer in public office must avoid conflicts of interest and the appearance of conflicts of interest even if there is no solicitor/client relationship. Chapter X of the Code of Professional Conduct deals specifically with a lawyer in public office. The rule provides as follows:

> The lawyer who holds public office should, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

Commentary 6 states:

> The lawyer should not represent in the same or any related matter any persons or interests that the lawyer has been concerned with in an official capacity. . . .

I appreciate that this chapter applies to a lawyer while in public office.

The disqualification under this rule does not appear to be predicated on any prior solicitor/client relationship. The test is two-fold: (1) was the lawyer concerned in an official capacity with the person or interest which he now seeks to represent; and (2) is it the same or a related matter? The applicant's material establishes that Mr. Axworthy, in

his capacity as Minister of Justice, dealt with FSIN with respect to the establishment of a public inquiry into the matters relating to the terms of reference.

Even more instructive is Chapter XIX, Avoiding Questionable Conduct. The rule states as follows:

> The lawyer should observe the rules of professional conduct set out in the Code in the spirit as well as in the letter.

Commentary 3 provides as follows:

> After leaving public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility or confidential information prior to leaving, because to do so would give the appearance of impropriety even if none existed. . . .

This rule appears to be directly on point. Mr. Axworthy, as Minister of Justice, had substantial responsibility with respect to the matter before the Commission of Public Inquiry. His retainer with the FSIN is in connection with the same matter. It can be argued that Mr. Axworthy was not "employed" by the Department of Justice. Strictly speaking Mr. Axworthy was a public officer rather than a public employee. I conclude that a public officer would be held to an even higher standard. The Supreme Court in *Martin* commented that courts are not bound to apply a code of ethics. However, Mr. Justice Sopinka stated at p. 1246:

> Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy. . . .

The Department of Justice has not objected to Mr. Axworthy's involvement. Does that

mitigate against the position of the applicant? In *Booth v. Huxter, supra*, the court there considered the issue of waiver of conflict of interest. It concluded there had been no express waiver notwithstanding the fact that several parties were seeking joint representation. However, the court did make the following statement at p. 538:

> In this regard, dealing only for the moment with the private interests of the clients, I might well have come to a different conclusion had mutual waivers been executed, particularly in view of the nature of the interests of each; the nature of the proceedings; the general right of the parties to counsel of their choice and the fact that the motion to disqualify emanated from third parties.

The court went on to suggest that this waiver was restricted to the private interest of the parties. The court suggested that public interest could not be waived. In doing so it quoted the following statement from *Goldberg v. Goldberg* (1982), 141 D.L.R. (3d) 133 (Ont.Div.Ct.): "Furthermore, when the public interest is involved, the appearance of impropriety overrides any private interest claimed by waiver." (at p. 538-39)

The absence of any express waiver of any duty of confidentiality owed by Mr. Axworthy to the Government of Saskatchewan is not determinative. The disqualifying factor relates to the appearance of impropriety and the maintenance of public confidence as *Shand* suggests. The interest cannot be waived.

Mr. Axworthy, in acting for FSIN with respect to the subject matter of the public inquiry, put himself in a position where his duty of confidentiality to his former client, the Government of Saskatchewan, creates a conflict with his duty of loyalty to FSIN.

The next issue is that if Mr. Axworthy is disqualified, does that necessarily disqualify Mr.

Ottenbreit and his firm? This is the issue which divided the Supreme Court in *Martin*. Mr. Justice Sopinka, speaking for the majority held that the firm is not automatically disqualified. He held that the concept of imputed knowledge – knowledge of one member of the firm being knowledge of all was "overkill". In this regard he stated as follows at p. 1262:

> Moreover, I am not convinced that a reasonable member of the public would necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it. There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. . . .

He went on to outline institutional measures which might rebut the inference, such as Chinese Walls and cones of silence.

Chapter VA of the Code of Professional Conduct was adopted after, and apparently in response to, the Supreme Court decision in *Martin*. It deals with reasonable measures to ensure nondisclosure of confidential information. However, there is no evidence on this application that any measures were put in place by Robertson Stromberg. The only "evidence" in this regard is Mr. Axworthy's statement in his affidavit that he has not:

> divulged either to the Federation of Saskatchewan Indian Nations, any lawyers or staff of Robertson Stromberg or anyone else the details of any information that I have received in my capacity of Minister of Justice either in respect to subject matter of this inquiry or otherwise.

As noted by the applicant, this statement provides little comfort particularly in light of the narrow interpretation that counsel of Robertson Stromberg has placed on the term "confidential information".

The following statement by Mr. Justice Sopinka in *Martin* is also directly on point, at p. 1263:

> A *fortiori* undertakings and conclusary statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement with the statement of Posner J. in *Analytica, supra*, to which I have referred above, that affidavits of lawyers difficult to verify objectively will fail to assure the public.

CONCLUSION

The evidence as to Mr. Axworthy's activities as Minister of Justice and Attorney General and his suggested role in this inquiry is not in issue. It raises the strongest possible inference that a conflict of interest exists. I am also satisfied that a reasonably informed member of the public viewing the circumstances outlined in this application would reach the same conclusion.

Furthermore, the involvement of Mr. Axworthy or his firm in this inquiry does, at a very minimum, give rise to the appearance of impropriety, and, if allowed to continue, could adversely impact on the public's confidence in the process.

DISPOSITION

Robertson Stromberg and its members are disqualified from acting for the Federation of Saskatchewan Indian Nations in the inquiry.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 2nd day of July, 2003.

_____

Mr. Justice David H. Wright
Commissioner