

January 2007

10. CHAPTER 7: WHETHER LAWYER MAY ACT IN TRUST MATTERS WHERE HE HAS AN INTEREST

A lawyer requesting advice from the Committee is an Aboriginal lawyer and a registered member of a First Nation (“the Band”) pursuant to the *Indian Act*. The Band would like to employ him to do work on a number of trusts that the Band has created for its members. Because he is a beneficiary of the trusts he asked the Ethics Committee whether any of the rules of professional conduct, particularly those in Chapter 7, prevent him from undertaking that work on behalf of the Band.

The lawyer is a beneficiary of trusts created by the Band for the benefit of over four hundred Band members. The trusts provide for benefits to promote educational, cultural, and social development programs and community capital projects for members of the Band. Benefits to individuals are authorized by the trustees of the trusts, but beneficiaries have no ability to access benefits apart from those authorized by the trustees. The trusts pay for a variety of communal and individual benefits both on and off reserve, including such things as the building of a skating rink, road building, hunting and guiding permits, meeting houses and school buses. As well, the trust provides some individual educational benefits and housing assistance for members of the Band, both on and off reserve.

Between 1998 and 2004 the trusts paid per capita payments to individual beneficiaries of the trusts amounting to about \$90,000 per individual.

The lawyer’s job with the Band would be as an analyst in the area of trust law. He would be expected to give general legal advice regarding the trusts, designed to enhance the trust benefits accruing to trust beneficiaries, including himself. For much of that work he would be assisting a lawyer with a large firm in Vancouver, although he would have individual responsibilities as well. With respect to that work, he does not anticipate that his own interests would diverge from the interests of all other trust beneficiaries. All have an interest in ensuring that as much revenue as possible flows into the trusts.

A potential area of controversy involving the trusts is the question of encroachment on capital. Some beneficiaries would prefer that the benefits of the trusts be simply paid over to them. Most beneficiaries, including the lawyer, want to preserve capital for the benefit of future generations of Band members. This is a political question and the lawyer does not expect to give advice to the Band with respect to it.

The Committee recognized that if Rule 1(a) applies to the lawyer’s interest in the trusts, he would be prohibited from performing any legal services for the Band, whether or not his interest is such that it would reasonably be expected to affect his professional judgment. The Committee chose to analyze the lawyer’s circumstances under Rule 2.

The Committee regarded the individual and shared financial benefits that trust beneficiaries had received, and are likely to receive in the future, as substantial. Although the lawyer does not expect to work on the issue of encroachment on capital directly, work that he does in relation to the trusts may nevertheless affect that issue and be seen to affect it by other trust beneficiaries.

In the Committee's view, the responsibilities the lawyer would undertake in the employment he contemplates with the Band, coupled with the significant personal and shared interests he has in the trusts, would reasonably be expected to affect the lawyer's professional judgment in the work the Band expects to assign to him. For that reason, it was the Committee's view that it would be improper for the lawyer to undertake this work for the Band.