

Supreme Court revisits conflicts of interest in *CNR v. McKercher* decision

In the unanimous decision of the Supreme Court on July 5, 2013, *Canadian National Railway Co. v. McKercher LLP*,¹ the Chief Justice frames the main question on appeal as whether a law firm can accept a retainer to act against a current client on a matter unrelated to the client's existing files and more specifically, can a firm bring a lawsuit against a current client on behalf of another client?

conflicts background and result

Briefly, the circumstances of this case involved a Saskatchewan law firm, McKercher LLP which was acting for CNR on several matters when, without CNR's consent or knowledge, it accepted a retainer to act for Prairie farmers in a \$1.75 billion class action against CNR. CNR only learned that McKercher was acting against it when it was served with the statement of claim. Before CNR was served, McKercher summarily terminated all retainers with CNR, except for one which CNR terminated. CNR applied to strike McKercher as counsel in the class action on the basis of conflict of interest. The motion judge granted the application and disqualified McKercher. The Court of Appeal overturned the motion judge's order.

¹ 2013 SCC 39.

The SCC allowed the appeal and remitted the matter to the Court of Queen's Bench for redetermination of a whether disqualification is the appropriate remedy based on the Court's reasons.

duties of loyalty, commitment and candour breached

The SCC reexamined a lawyer's duties to a client and stated:

- "As we held in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, the general "bright line" rule is that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent — regardless of whether the client matters are related or unrelated... However, when the bright line rule is inapplicable, the question becomes whether the concurrent representation of clients creates a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person".
- "The bright line rule was engaged by the facts of this case: CN and Wallace were adverse in legal interests; CN has not attempted to tactically abuse the bright line rule; and it was reasonable in the circumstances for CN to expect that McKercher would not concurrently represent a party suing it for \$1.75 billion. McKercher failed to obtain CN's consent to the concurrent representation of Wallace, and consequently breached the bright line rule when it accepted the Wallace retainer."
- "In addition to its duty to avoid conflicts of interest, a law firm is under a duty of commitment to the client's cause which prevents it from summarily and unexpectedly dropping a client in order to circumvent conflict of interest rules, and a duty of candour which requires the law firm to advise its existing client of all matters relevant to the retainer. I conclude that McKercher's termination of its existing retainers with CN breached its duty of commitment to its client's cause, and its failure to advise CN of its intention to accept the Wallace retainer breached its duty of candour to its client."

conflict rules of Canadian Bar Association and Law Societies

Although the intervener submissions of the CBA and the Federation of Law Societies of Canada expressed different views, the SCC was careful to not take sides. The Court did state:

- "Both the courts and law societies are involved in resolving issues relating to conflicts of interest — the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession... In exercising their respective powers, each may properly have regard for the other's views. Yet each must discharge its unique role. Law societies are not prevented from adopting stricter rules than those applied by the courts in their supervisory role. Nor are courts in their supervisory role bound by the letter of law society rules, although "an expression of a professional standard in a code of ethics . . . should be considered an important statement of public policy.""
- "In recent years the Canadian Bar Association and the Federation of Law Societies of Canada have worked toward common conflict rules applicable across Canada. However, they have been unable to agree on their precise form...That debate was transported into the proceedings before us, each of these interveners asking this Court to endorse their approach. While the court is properly informed by views put forward, the role of this Court is not to mediate the debate. Ours is the more modest task of determining which principles should apply in a case such as this, from the perspective of what is required for the proper administration of justice."

"Bright Line" rule – where *immediate legal* interests are *directly adverse*

The SCC emphasized that this "rule applies where the *immediate legal* interests of clients are *directly* adverse. It does not apply to condone tactical abuses. And it does not apply in circumstances where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters" such as in the case of a "professional litigant", for example a bank

and other large institutions which retain many law firms on different litigation matters and whose consent can be inferred.

practical implications

From a practical perspective, the Court offered this direction on how to address perceived conflicts:

- "When a law firm is asked to act against an existing client on an unrelated matter, it must determine whether accepting the retainer will breach the bright line rule. It must ask itself whether (i) the immediate *legal* interests of the new client are directly adverse to those of the existing client, (ii) the existing client has sought to exploit the bright line rule in a tactical manner; and (iii) the existing client can reasonably expect that the law firm will not act against it in unrelated matters. In most cases, simultaneously acting for and against a client in legal matters will result in a breach of the bright line rule, with the result that the law firm cannot accept the new retainer unless the clients involved grant their informed consent".
- "If the law firm concludes that the bright line rule is inapplicable, it must then ask itself whether accepting the new retainer will create a substantial risk of impaired representation. If the answer is no, then the law firm may accept the retainer. In the event that the existing client disagrees with the law firm's assessment, the client may bring a motion before the courts to prevent the firm from continuing to represent the adverse party".
- "It follows that as a general rule a lawyer should advise an existing client before accepting a retainer that will require him to act against the client, even if he considers the situation to fall outside the scope of the bright line rule. At the very least, the existing client may feel that the personal relationship with the lawyer has been damaged and may wish to take its business elsewhere".
- "The lawyer's duty of candour towards the existing client must be reconciled with the lawyer's obligation of confidentiality towards his new client. In order to provide full disclosure to the existing client, the lawyer must first obtain the consent of the new client to disclose the existence, nature and scope of the new retainer. If

the new client refuses to grant this consent, the lawyer will be unable to fulfill his duty of candour and, consequently, must decline to act for the new client".

The *CNR* decision is a helpful reminder to law firms of the various duties owed to clients and as a general rule the need to inform and obtain consent from an existing client before accepting a new retainer from another that is directly adverse to their immediate legal interests even on an unrelated matter.

However, the SCC acknowledges that the courts will continue to be called on a case-by-case basis to "further develop the contours of the bright line rule" to ensure that lawyers "exercise their professional judgment free of conflicting pressures."

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[a cautionary note](#)

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