## When May a Law Firm Act Against a Present or Former Client?

## A Commentary on *C.N.R. v. McKercher*, 2013 SCC 39

The Supreme Court of Canada, in C.N.R. v. McKercher, 2013 SCC 39, has clarified the rules as to when a law firm may act against present or former clients. This is an issue which has become increasingly problematical as law firms expand in size and scope.

The McKercher LLP law firm was acting for C.N.R. on several matters when it undertook a retainer from Gordon Wallace to sue C.N.R. in a $1.75 billion class action suit. C.N.R.'s first notice that McKercher was acting against it was receipt of the statement of claim. Subsequently McKercher withdrew from acting for C.N.R. on all but one of its other retainers which was terminated by C.N.R.

C.N.R. was successful in the first instance in a motion before the Saskatchewan Court of Queen's Bench to have McKercher removed as counsel for Wallace, but this decision was overturned by the Saskatchewan Court of Appeal. The matter was then heard by the Supreme Court of Canada, which released its decision on July 5, 2013. Both the Canadian Bar Association and the Federation of Law Societies of Canada were heard as intervenors.

The Supreme Court was careful to delineate between the respective roles of the court and of law societies in dealing with such conflicts of interest. The Court noted:

> [13] …The courts' purpose in exercising their supervisory powers over lawyers has traditionally been to protect clients from prejudice and to preserve the repute of the administration of justice, not to discipline or punish lawyers.
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> [15] The inherent power of courts to resolve issues of conflicts in cases that may come before them is not to be confused with the powers that the legislatures confer on law societies to establish regulations for their members, who form a self- governing profession: *Macdonald estate v. Martin*, [1990] 3 SCR 1235, 1990 CanLII 32, at p. 1244. The purpose of law society regulation is to establish general rules applicable to all members to ensure ethical conduct, protect the public and discipline lawyers who breach the rules — in short, the good governance of the profession.
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> [16] 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: see R. v. Cunningham, 2010 SCC 10, [2010] 1 S.C.R. 331. 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": *Martin* at p. 1246.

The Court then went on to analyze whether, from the standpoint of the administration of justice, the McKercher firm should be struck as counsel for Wallace, presumably leaving it open to the Law Society to deal separately with whatever penalties it might levy from the standpoint of good governance of the profession.

The Court noted that conflict of interest rules must strike a balance and recognize commercial realities:

> [22] In addition to retaining an emphasis on risk of prejudice to the client, the Court concluded in *Martin* that an effective and fair conflicts rule must strike an appropriate balance between conflicting values. On the one hand stands the high repute of the legal profession and the administration of justice. On the other hand stand the values of allowing the client's choice of counsel and permitting reasonable mobility in the legal profession. The realities of large law firms and litigants who pick and choose between them must be factored into the balance. As was the case in the English common law, the Court declined to endorse broad rules that are not context-sensitive.

The Court differentiated the situation where a law firm acts against a former client and the situation where it acts for an existing client:

> [23] The law of conflicts is mainly concerned with two types of prejudice: prejudice as a result of the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer "soft peddles" his representation of a client in order to serve his own interests, those of another client, or those of a third person. As regards these concerns, the law distinguishes between former clients and current clients. The lawyer's main duty to a former client is to refrain from misusing confidential information. With respect to a current client, for whom representation is ongoing, the lawyer must neither misuse confidential information, nor place himself in a situation that jeopardizes effective representation…

In cases where a law firm attempts to act concurrently for and against the same party, the Court stated that the starting point for any analysis of conflicts of this nature must start from the "bright line" rule, which it described as follows:

> [27] In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, this Court (per Binnie J.) stated that a lawyer may not represent a client in one matter while representing that client's adversary in another matter, unless both clients provide their informed consent. Binnie J. articulated the rule thus:

> The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other. [Emphasis in original.]
> (Neil, at para. 29)

> [28] The rule expressly applies to both related and unrelated matters. It is possible to argue that a blanket prohibition against concurrent representation is not warranted with respect to unrelated matters, where the concrete duties owed by the lawyer to each client may not actually enter into conflict. However, the rule provides a number of advantages. It is clear. It recognizes that it is difficult — often impossible — for a lawyer or law firm to neatly compartmentalize the interests of different clients when those interests are fundamentally adverse. Finally, it reflects the fact that the lawyer-client relationship is a relationship based on trust. The reality is that "the client's faith in the lawyer's loyalty to the client's interests will be severely tried whenever the lawyer must be loyal to another client whose interests are materially adverse": Restatement of the Law Third: The Law Governing Lawyers (2000), vol. 2, §. 128(2), at p. 339.

The Court expressly rejected the argument that the "bright line rule" was a rebuttable presumption, stating, (at para. [29]), "Where applicable, the bright line rule prohibits concurrent representation. It does not invite further considerations."

However, the Court was careful to point out that,

> [32] …the scope of the rule is not unlimited. The 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.

The Court (paras. [33] to [37]) held there were three situations in which the bright line rule would not apply:

> 1. Where the *immediate* interests of the client are not *directly* adverse in the matters in which the law firm is acting,
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> 2. Where the clients have no *legal* (as opposed to commercial or strategic) interest in which they were adverse in the matters in which the law firm was acting,

> 3 Where the bright line rule was being abused by a party raising it for tactical reasons (as, for instance, where a party deliberately retains a lawyer from a large law firm to act on one matter with a view to conflicting out the law firm from acting against it on other matters.)

The Court summarized the bright line rule as follows:

> [41] The bright line rule is precisely what its name implies: a bright line rule. It cannot be rebutted or otherwise attenuated. It applies to concurrent representation in both related and unrelated matters. However, the rule is limited in scope. It applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting. It applies only to legal — as opposed to commercial or strategic — interests. It cannot be raised tactically. And it does not apply in circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters. If a situation falls outside the scope of the rule, the applicable test is whether there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected.

The Court found that the McKercher firm was in breach of the bright line rule on the facts. However that was not the end of the inquiry as the issue remained as to whether disqualifying McKercher from continuing to represent Wallace was the appropriate remedy.

The Court stated:

> [60] I have concluded that accepting the Wallace retainer placed McKercher in a conflict of interest, and that McKercher breached its duties of commitment and candour to CN. The question is whether McKercher should be disqualified from representing the Wallace plaintiffs because its acceptance of the Wallace retainer breached the duty of loyalty it owed CN.

The Courts stated that in cases where there was a danger of misuse of confidential information, disqualification was generally the only appropriate remedy. Similarly, where there is a risk of impaired representation because the lawyer might have divided loyalties while acting for and against the same client concurrently, disqualification is normally ordered (para. [62]).

Finally, (par. [63]) disqualification *may* be required "to protect the integrity and repute of the administration of justice."

The court found on the facts, that there was no danger in the circumstances of this case of misuse of confidential information and no longer an issue of impaired representation as the McKercher firm was no longer acting for C.N.R.

This then left only the third issue (protecting the integrity and repute of the administration of justice) to be dealt with.

The Court stated that there were competing interests to be considered in this regard:

> [64] In assessing whether disqualification is required on this ground alone, all relevant circumstances should be considered. On the one hand, acting for a client in breach of the bright line rule is always a serious matter that on its face supports disqualification. The termination of the client retainers — whether through lawyer withdrawal or through a client firing his lawyer after learning of a breach — does not necessarily suffice to remove all concerns that the lawyer's conduct has harmed the repute of the administration of justice.
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> [65] On the other hand, it must be acknowledged that in circumstances where the lawyer-client relationship has been terminated and there is no risk of misuse of confidential information, there is generally no longer a concern of ongoing prejudice to the complaining party. In light of this reality, courts faced with a motion for disqualification on this third ground should consider certain factors that may point the other way. Such factors may include:
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> > (i) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification;
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> > (ii) significant prejudice to the new client's interest in retaining its counsel of choice, and that party's ability to retain new counsel; and
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> > (iii) the fact that the law firm accepted the conflicting retainer in good faith, reasonably believing that the concurrent representation fell beyond the scope of the bright line rule and applicable law society restrictions.

As a result, the Court overturned the decision of the Court of Appeal, but remitted the matter to the Court of Queen's Bench for reconsideration, stating:

> [67] As discussed, a violation of the bright line rule on its face supports disqualification, even where the lawyer-client relationship has been terminated as a result of the breach. However, it is also necessary to weigh the factors identified above, which may suggest that disqualification is inappropriate in the circumstances. The motion judge did not have the benefit of these reasons, and obviously could not consider all of the factors just discussed that are relevant to the issue of disqualification. These reasons recast the legal framework for judging McKercher's conduct and determining the appropriate remedy. Fairness suggests that the issue of remedy should be remitted to the court for consideration in accordance with them.

The decision goes into far more detail than would be appropriate to re-iterate in a brief commentary of this nature, setting out the considerations applicable to measure

whether there is a danger of misuse of confidential information or a danger of impaired representation. The case makes useful and interesting reading and should be at the top of the list of reading for any lawyer who, or whose firm, is in the situation of acting against former or present clients.