

**SUPREME COURT OF CANADA**

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| **Citation:** Canadian National Railway Co. *v.* McKercher LLP, 2013 SCC 39, [2013] 2 S.C.R. 649 | **Date:** 20130705  **Docket:** 34545 |

**Between:**

**Canadian National Railway Company**

Appellant

and

**McKercher LLP and Gordon Wallace**

Respondents

- and -

**Canadian Bar Association and**

**Federation of Law Societies of Canada**

Interveners

**Coram:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 68) | McLachlin C.J. (LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring) |

Canadian National Railway Co. *v.* McKercher LLP, 2013 SCC 39, [2013] 2 S.C.R. 649

Canadian National Railway Company Appellant

v.

McKercher LLP and Gordon Wallace Respondents

and

Canadian Bar Association and

Federation of Law Societies of Canada Interveners

**Indexed as: Canadian National Railway Co. *v.* McKercher LLP**

2013 SCC 39

File No.:  34545.

2013:  January 24; 2013:  July 5.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for saskatchewan

*Law of professions — Barristers and solicitors — Duty of loyalty — Conflict of interest — Breach of confidence — Whether a law firm can accept a retainer to act against a current client on a matter unrelated to the client’s existing files — Whether a law firm can bring a lawsuit against a current client on behalf of another client and if not, what remedies are available to the client.*

McKercher LLP was acting for CN on several matters when, without CN’s consent or knowledge, it accepted a retainer to act for the plaintiff in a $1.75 billion class action against CN. CN first learned that McKercher was acting against it in the class action when it was served with the statement of claim. McKercher hastily terminated all retainers with CN, except for one which CN terminated. CN applied to strike McKercher as the solicitor of record in the class action due to an alleged conflict of interest. The motion judge granted the application and disqualified McKercher. The Court of Appeal overturned the motion judge’s order.

*Held*: The appeal should be allowed and the matter should be remitted to the Court of Queen’s Bench for redetermination of a remedy.

A lawyer’s duty of loyalty has three salient dimensions: a duty to avoid conflicting interests; a duty of commitment to the client’s cause; and a duty of candour. The duty to avoid conflicts is mainly concerned with protecting a former or current client’s confidential information and with ensuring the effective representation of a current client. The duty of commitment entails that, subject to law society rules, a lawyer or law firm as a general rule should not summarily drop a client simply to avoid conflicts of interest. The duty of candour requires disclosure of any factors relevant to the ability to provide effective representation. A lawyer should advise an existing client before accepting a retainer that will require him to act against the client.

The present appeal concerns the risk to effective representation that arises when a lawyer acts concurrently in different matters for clients whose immediate interests in those matters are directly adverse. *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, held that the general bright line rule is that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without first obtaining their consent. 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 is based on the inescapable conflict of interest inherent in some situations of concurrent representation and it reflects the essence of a fiduciary’s duty of loyalty. The rule cannot be rebutted or otherwise attenuated and it applies to concurrent representation in both related andunrelated matters. However, the rule is limited in scope. It applies only where the immediate interests of clients are directlyadverse in the matters on which the lawyer is acting and it applies only to legal interests, as opposed to commercial or strategic interests. It cannot be raised tactically. 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.

McKercher’s conduct fell squarely within the scope of the bright line rule. CN and the class suing CN are adverse in legal interest; CN did not tactically abuse the bright line rule; and it was reasonable in the circumstances for CN to have expected that McKercher would not concurrently represent a party suing it for $1.75 billion. McKercher’s failure to obtain CN’s consent before accepting the class action retainer breached the bright line rule. McKercher’s termination of its retainers with CN breached its duty of commitment. Its failure to advise CN of its intention to represent the class breached its duty of candour. However, McKercher possessed no relevant confidential information that could be used to prejudice CN in the class action.

Disqualification may be required to avoid the risk of improper use of confidential information, to avoid the risk of impaired representation, or to maintain the repute of the administration of justice. In this case the only concern that would warrant disqualification is the protection of the repute of the administration of justice. While a breach of the bright line rule normally attracts the remedy of disqualification, factors that may militate against it must be considered. These factors may include: (i) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification; (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 (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 or applicable law society rules. As the motion judge did not have the benefit of these reasons, the matter should be remitted to the Queen’s Bench for redetermination of the appropriate remedy.

**Cases Cited**

**Referred to:** *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Cholmondeley v. Clinton* (1815), 19 Ves. Jun. 261, 34 E.R. 515; *Bricheno v. Thorp* (1821), Jacob 300, 37 E.R. 864; *Taylor v. Blacklow* (1836), 3 Bing. (N.C.) 235, 132 E.R. 401; *Rakusen v. Ellis*, [1912] 1 Ch. 831; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *Bolkiah v. KPMG*, [1999] 2 A.C. 222; *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371; *Canadian Pacific Railway v. Aikins, MacAulay & Thorvaldson* (1998), 23 C.P.C. (4th) 55; *De Beers Canada Inc. v. Shore Gold Inc.*, 2006 SKQB 101, 278 Sask. R. 171; *Toddglen Construction Ltd. v. Concord Adex Developments Corp.*(2004), 34 C.L.R. (3d) 111.

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APPEAL from a judgment of the Saskatchewan Court of Appeal (Lane, Ottenbreit and Caldwell JJ.A.), 2011 SKCA 108, 375 Sask. R. 218, 340 D.L.R. (4th) 402, [2012] 1 W.W.R. 251, 9 C.P.C. (7th) 292, 525 W.A.C. 218, [2011] S.J. No. 589 (QL), 2011 CarswellSask 625, setting aside a decision of Popescul J., 2009 SKQB 369, 344 Sask. R. 3, [2009] 12 W.W.R. 157, 77 C.P.C. (6th) 24, [2009] S.J. No. 549 (QL), 2009 CarswellSask 610 (*sub nom. Wallace v. Canadian Pacific Railway*). Appeal allowed.

*Douglas C. Hodson*, *Q.C.*, *Vanessa Monar Enweani* and *C. Ryan Lepage*, for the appellant.

*Gavin MacKenzie* and *Lauren Wihak*, for the respondents.

*Malcolm M. Mercer*, *Eric S. Block* and *Brendan Brammall*, for the intervener the Canadian Bar Association.

*John J. L. Hunter*, *Q.C.*, and *Stanley Martin*, for the intervener the Federation of Law Societies of Canada.

The judgment of the Court was delivered by

1. The Chief Justice — Can a law firm accept a retainer to act against a current client on a matter unrelated to the client’s existing files? More specifically, can a firm bring a lawsuit against a current client on behalf of another client? If not, what remedies are available to the client whose lawyer has brought suit against it? These are the questions raised by this appeal.

I. Background

1. McKercher LLP (“McKercher”) is a large law firm in Saskatchewan. The Canadian National Railway Company (“CN”) retained McKercher to act for it on a variety of matters. In late 2008, McKercher was acting for CN on three ongoing matters: a personal injury claim concerning a rail yard incident in which children had been injured; the purchase of real estate; and the representation of CN’s interests as a creditor in a receivership. As well, two of its partners held power of attorney from CN for service of process in Saskatchewan.
2. At the same time, the McKercher firm accepted a retainer from Gordon Wallace (“Wallace”) to act against CN in a $1.75 billion class action based on allegations that CN had illegally overcharged Western Canadian farmers for grain transportation. It is not contested on appeal that the Wallace action was legally and factually unrelated to the ongoing CN retainers.
3. The McKercher firm did not advise CN that it intended to accept the Wallace retainer. CN learned this only when it was served with the statement of claim on January 9, 2009. Between December 5, 2008, and January 15, 2009, various McKercher partners hastily terminated their retainers with CN, except on the real estate file, which was terminated by CN.
4. Following receipt of the statement of claim, CN applied for an order removing McKercher as solicitor of record for Wallace in the class action against it, on the grounds that the McKercher firm had breached its duty of loyalty to CN by placing itself in a conflict of interest, had improperly terminated its existing CN retainers, and might misuse confidential information gained in the course of the solicitor-client relationship.
5. The motion judge granted the application, and disqualified McKercher from acting on the Wallace litigation: 2009 SKQB 369, 344 Sask. R. 3. He found that the firm had breached the duty of loyalty it owed CN, placing itself in a conflict of interest by accepting the Wallace retainer while acting for CN on other matters. In his view, CN felt an understandable sense of betrayal, which substantially impaired the McKercher firm’s ability to represent CN in the ongoing retainers. Moreover, McKercher had received a unique understanding of the litigation strengths, weaknesses and attitudes of CN; this understanding constituted relevant confidential information. The motion judge concluded that McKercher’s violation of the duty of loyalty, in addition to the possession of relevant confidential information, made disqualification of McKercher as counsel on the Wallace action an appropriate remedy.
6. The Court of Appeal overturned the motion judge’s order disqualifying McKercher: 2011 SKCA 108, 375 Sask. R. 218. The Court of Appeal found that a general understanding of CN’s litigation strengths and weaknesses did not constitute relevant confidential information warranting disqualification. Moreover, it found that McKercher had not breached its duty of loyalty by accepting to act concurrently for Wallace. CN was a large corporate client that was not in a position of vulnerability or dependency with respect toMcKercher. As such, its implied consent to McKercher acting for an opposing party in unrelated legal matters could be inferred. However, the Court of Appeal found that McKercher had breached its duty of loyalty towards CN by peremptorily terminating the solicitor-client relationship on its existing files for CN. Nevertheless, disqualification was not an appropriate remedy in this case, since McKercher’s continued representation of Wallace created no risk of prejudice to CN. Indeed, the termination of the lawyer-client relationship had effectively put an end to any possibility of prejudice.
7. The case at hand requires this Court to examine the lawyer’s duty of loyalty to his client, and in particular the requirement that a lawyer avoid conflicts of interest. 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: para. 29. 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”: *Neil*, at para. 31. This appeal turns on the scope of the bright line rule: Did it apply to McKercher’s concurrent representation of CN and Wallace? Or is the applicable test instead whether the concurrent representation of CN and Wallace created a substantial risk of impaired representation?
8. In these reasons, I conclude that McKercher’s concurrent representation of CN and Wallace fell squarely within the scope of the bright line rule. 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.
9. 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. However, McKercher possessed no relevant confidential information that could be used to prejudice CN.
10. As regards the appropriate remedy to McKercher’s breaches, I conclude that the only concern that would warrant disqualification in this case is the protection of the repute of the administration of justice. A breach of the bright line rule normally attracts the remedy of disqualification. This remains true even if the lawyer-client relationship is terminated subsequent to the breach. However, certain factors may militate against disqualification, and they must be taken into consideration. As the motion judge did not have the benefit of these reasons, I would remit the matter to the Queen’s Bench for redetermination in accordance with them.

II. Issues

1. The appeal raises the following issues:

A. The Role of the Courts in Resolving Conflicts Issues

B. The Governing Principles

C. Application of the Principles

D. The Appropriate Remedy

III. Analysis

A. *The Role of the Courts in Resolving Conflicts Issues*

1. Courts of inherent jurisdiction have supervisory power over litigation brought before them. Lawyers are officers of the court and are bound to conduct their business as the court directs. When issues arise as to whether a lawyer may act for a particular client in litigation, it falls to the court to resolve those issues. 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.
2. In addition to their supervisory role over court proceedings, courts develop the fiduciary principles that govern lawyers in their duties to clients. Solicitor-client privilege has been a frequent subject of court consideration, for example.
3. 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 S.C.R. 1235, 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.
4. 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.
5. 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: see, for example, A. Dodek, “Conflicted Identities: The Battle over the Duty of Loyalty in Canada” (2011), 14 *Legal Ethics* 193. 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.
6. Against this backdrop, I now turn to examine the principles that govern this appeal.

B. *The Governing Principles*

1. A lawyer, and by extension a law firm, owes a duty of loyalty to clients. This duty has three salient dimensions: (1) a duty to avoid conflicting interests; (2) a duty of commitment to the client’s cause; and (3) a duty of candour: *Neil*, at para. 19. I will consider each in turn.

1. Avoiding Conflicts of Interest

(a) *English Origins*

1. Canada’s law of conflicts as administered by the courts is based on precedents rooted in the English jurisprudence. Traditionally, the main concern was that clients not suffer prejudice from a lawyer’s representation — at the same time or sequentially — of parties adverse in interest. Disqualification of a lawyer from a case was reserved for situations where there was a real risk of harm to the client, as opposed to a theoretical possibility of harm: see, for example, *Cholmondeley v. Clinton* (1815), 19 Ves. Jun. 261, 34 E.R. 515; *Bricheno v. Thorp* (1821), Jacob 300, 37 E.R. 864; *Taylor v. Blacklow* (1836), 3 Bing. (N.C.) 235, 132 E.R. 401. The rule was not absolute or “bright line”, but pragmatic. Courts looked to the circumstances of each case and sought to determine whether it was realistic to conclude that the client would suffer some form of harm. Fletcher Moulton L.J.’s statement in *Rakusen v. Ellis*,[1912] 1 Ch. 831 (C.A.), catches the flavour of the English common law approach:

As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated. . . . [W]here there is such a probability of mischief that the Court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere and say that a solicitor shall not act. Now in the present case there is an absolute absence of any reasonable probability of any mischief whatever. [p. 841]

(b) *The Martin Test: A Focus on Risk of Prejudice and Balancing of Values*

1. In the *Martin* case, this Court (*per* Sopinka J.) adopted the English common law’s focus on protecting the client from real risks of harm, although it diverged from some of the English case law with respect to the exact level of risk that should attract the conflicts rule. The issue in *Martin* was whether a law firm should be disqualified from acting against a party because a lawyer in the firm had received relevant confidential information in the course of her prior work for that party. As will be discussed further below, the Court held that a firm cannot be disqualified unless there is a risk of prejudice to the client, although in some cases the client benefits from a presumption of risk of prejudice: pp. 1260-61.
2. 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.

(c) *Types of Prejudice Addressed by Conflict of Interest Rules*

1. 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. I will examine each of these aspects of the conflicts rule in turn.

(d) *Confidential Information*

1. The first major concern addressed by the duty to avoid conflicting interests is the misuse of confidential information. The duty to avoid conflicts reinforces the lawyer’s duty of confidentiality — which is a distinct duty — by preventing situations that carry a heightened risk of a breach of confidentiality. A lawyer cannot act in a matter where he may use confidential information obtained from a former or current client to the detriment of that client. A two-part test is applied to determine whether the new matter will place the lawyer in a conflict of interest: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of that client?: *Martin*, at p. 1260. If the lawyer’s new retainer is “sufficiently related” to the matters on which he or she worked for the former client, a rebuttable presumption arises that the lawyer possesses confidential information that raises a risk of prejudice: p. 1260.

(e) *Effective Representation*

1. The second main concern, which arises with respect to current clients, is that the lawyer be an effective representative — that he serve as a zealous advocate for the interests of his client. The lawyer must refrain “from being in a position where it will be systematically unclear whether he performed his fiduciary duty to act in what he perceived to be the best interests” of his client: D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters’ Law of Trusts in Canada* (4th ed. 2012), at p. 968. As the oft-cited Lord Brougham said, “an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client”: *Trial of Queen Caroline* (1821), by J. Nightingale, vol. II, The Defence, Part I, at p. 8.
2. Effective representation may be threatened in situations where the lawyer is tempted to prefer other interests over those of his client: the lawyer’s own interests, those of a current client, of a former client, or of a third person: *Neil*, at para. 31. This appeal concerns the risk to effective representation that arises when a lawyer acts concurrently in different matters for clients whose immediate interests in those matters are directly adverse. This Court has held that concurrent representation of clients directly adverse in interest attracts a clear prohibition: the bright line rule.

(f) *The Bright Line Rule*

1. In *Neil*, 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; para. 29]

1. 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.
2. The parties and interveners to this appeal disagreed over the substance of the bright line rule. It was variously suggested that the bright line rule is only a rebuttable presumption of conflict, that it does not apply to unrelated matters, and that it attracts a balancing of various circumstantial factors that may give rise to a conflict. These suggestions must be rejected. Where applicable, the bright line rule prohibits concurrent representation. It does not invite further considerations. As Binnie J. stated in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, “[t]he ‘bright line’ rule is the product of the balancing of interests not the gateway to further internal balancing”: para. 51. To turn the rule into a rebuttable presumption or a balancing exercise would be tantamount to overruling *Neil* and *Strother*. I am not persuaded that it would be appropriate here to depart from the rule of precedent.
3. However, the bright line rule is not a rule of unlimited application. The real issue raised by this appeal is the scope of the rule. I now turn to this issue.

(g) *The Scope of the Bright Line Rule*

1. The bright line rule holds that a law firm cannot act for a client whose interests are adverse to those of another existing client, unless both clients consent. It applies regardless of whether the client matters are related or unrelated. The rule is based on “the inescapable conflict of interest which is inherent” in some situations of concurrent representation: *Bolkiah v. KPMG*, [1999] 2 A.C. 222 (H.L.), at p. 235, cited in *Neil*, at para. 27. It reflects the essence of the fiduciary’s duty of loyalty: “. . . a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position”: *Bolkiah*, at p. 234.
2. However, *Neil* and *Strother* make it clear that 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 limited scope of application of the rule is illustrated by *Neil* and *Strother*. This Court found the bright line rule to be inapplicable to the facts of both of those cases, and instead examined whether there was a substantial risk of impaired representation: *Neil*, at para. 31; *Strother*, at para. 54.
3. First, the bright line rule applies only where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting. In *Neil*, a law firm was concurrently representing Mr. Neil in criminal proceedings and Ms. Lambert in divorce proceedings, when it was foreseeable that Lambert would eventually become Neil’s co-accused in the criminal proceedings. The lawyer representing Lambert in the divorce proceedings began to gather information that he could eventually use against Neil. The law firm also encouraged another one of its clients, Mr. Doblanko, to report criminal actions by Neil to the police. The goal was to mount a “cut-throat” defence for Lambert in the criminal case, painting her as an innocent dupe who had been manipulated by Neil.
4. This Court did not apply the bright line rule to the facts in *Neil*, because of the nature of the conflict. Neither Neil and Lambert, nor Neil and Doblanko, were *directly* adverse to one another in the legal matters on which the law firm represented them. Neil was not a party to Lambert’s divorce, nor to any action in which Doblanko was involved. The adversity of interests was *indirect*: it stemmed from the strategic linkage between the matters, rather than from Neil being directly pitted against Lambert or Doblanko in either of the matters.
5. Second, the bright line rule applies only when clients are adverse in *legal* interest. The main area of application of the bright line rule is in civil and criminal proceedings. *Neil* and *Strother* illustrate this limitation. The interests in *Neil* were not legal, but rather strategic. In *Strother*, they were commercial:

. . . the conflict of interest principles do not generally preclude a law firm or lawyer from acting concurrently for different clients who are in the same line of business, or who compete with each other for business. . . .

The clients’ respective “interests” that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity. Here the alleged “adversity” between concurrent clients related to business matters. [paras. 54-55, *per* Binnie J.]

1. Third, the bright line rule cannot be successfully raised by a party who seeks to abuse it. In some circumstances, a party may seek to rely on the bright line rule in a manner that is “tactical rather than principled”: *Neil*, at para. 28. The possibility of tactical abuse is especially high in the case of institutional clients dealing with large national law firms. Indeed, institutional clients have the resources to retain a significant number of firms, and the retention of a single partner in any Canadian city can disqualify all other lawyers within the firm nation-wide from acting against that client. As Binnie J. remarked,

[i]n an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection. [Emphasis added; para. 15.]

Thus, clients who intentionally create situations that will engage the bright line rule, as a means of depriving adversaries of their choice of counsel, forfeit the benefit of the rule. Indeed, institutional clients should not spread their retainers among scores of leading law firms in a purposeful attempt to create potential conflicts.

1. Finally, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. In *Neil*, Binnie J. gave the example of “professional litigants” whose consent to concurrent representation of adverse legal interests can be inferred:

In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied. [para. 28]

In some cases, it is simply not reasonable for a client to claim that it expected a law firm to owe it exclusive loyalty and to refrain from acting against it in unrelated matters. As Binnie J. stated in *Neil*, these cases are the exception, rather than the norm. Factors such as the nature of the relationship between the law firm and the client, the terms of the retainer, as well as the types of matters involved, may be relevant to consider when determining whether there was a reasonable expectation that the law firm would not act against the client in unrelated matters. Ultimately, courts must conduct a case-by-case assessment, and set aside the bright line rule when it appears that a client could not reasonably expect its application.

(h) *The Substantial Risk Principle*

1. When a situation falls outside the scope of the bright line rule for any of the reasons discussed above, 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. The determination of whether there exists a conflict becomes more contextual, and looks to whether the situation is “liable to create conflicting pressures on judgment” as a result of “the presence of factors which may reasonably be perceived as affecting judgment”: Waters, Gillen and Smith, at p. 968. In addition, the onus falls upon the client to establish, on a balance of probabilities, the existence of a conflict — there is only a deemed conflict of interest if the bright line rule applies.

(i) *Practical Implications*

1. 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.
2. 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. In this manner, the courts will be called upon to further develop the contours of the bright line rule, and to ensure that lawyers do not act in matters where they cannot exercise their professional judgment free of conflicting pressures.

(j) *Summary*

1. 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.
2. I now turn to the other dimensions of the duty of loyalty which are relevant to the present appeal.

2. The Duty of Commitment to the Client’s Cause

1. The duty of commitment is closely related to the duty to avoid conflicting interests. In fact, the lawyer must avoid conflicting interests precisely so that he can remain committed to the client. Together, these duties ensure “that a divided loyalty does not cause the lawyer to ‘soft peddle’ his or her [representation] of a client out of concern for another client”: *Neil*, at para. 19.
2. The duty of commitment prevents the lawyer from undermining the lawyer-client relationship. As a general rule, a lawyer or law firm should not summarily and unexpectedly drop a client simply in order to avoid conflicts of interest with existing or future clients. This is subject to law society rules, which may, for example, allow law firms to end their involvement in a case under the terms of a limited scope retainer: see, for example, Law Society of Upper Canada, *Rules of Professional Conduct* (online), r. 2.02(6.1) and (6.2); Law Society of Alberta, *Code of Conduct* (online), Commentary to r. 2.01(2); Nova Scotia Barristers’ Society, *Code of Professional Conduct* (online), rr. 3.2-1A and 7.2-6A.

3. The Duty of Candour

1. A lawyer or law firm owes a duty of candour to the client. This requires the law firm to disclose any factors relevant to the lawyer’s ability to provide effective representation. As Binnie J. stated in *Strother*, at para. 55: “The thing the lawyer must not do is keep the client in the dark about matters he or she knows to be relevant to the retainer” (emphasis deleted).
2. 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.
3. I add this. 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.

C. *Application of the Principles*

1. All three of the duties that flow from the lawyer’s duty of loyalty are engaged in this case: the duty to avoid conflicting interests; the duty of commitment to the client’s cause; and the duty of candour to the client. I will deal with each in turn.

1. The Duty to Avoid Conflicting Interests

1. The question here is whether McKercher’s concurrent representation of CN and Wallace fell within the scope of the bright line rule. I conclude that it did.
2. The bright line rule prevents the concurrent representation of clients whose immediate legal interests are directly adverse, subject to the limitations discussed in these reasons. The fact that the Wallace and CN retainers were legally and factually unrelated does not prevent the application of the bright line rule.
3. Here, the bright line rule is applicable. The immediate interests of CN and Wallace were directly adverse, and those interests were legal in nature. Indeed, McKercher helped Wallace bring a class action directly against CN. In addition, there is no evidence on the record that CN is seeking to use the bright line rule tactically. Nothing suggests that CN has been purposefully spreading out its legal work across Saskatchewan law firms in an attempt to prevent Wallace or other litigants from retaining effective legal counsel. The motion judge accepted the testimony of CN’s general counsel and concluded that CN was acting “on a principled basis, and not merely for tactical reasons”: para. 62. I find no palpable and overriding error in this conclusion.
4. Finally, it was reasonable in these circumstances for CN to expect that McKercher would not act for Wallace. I agree with the motion judge’s findings on this point:

The solicitor and client had a longstanding relationship. CN used the McKercher Firm as the “go to” firm. Although there were at least two other firms in Saskatchewan that also did CN’s legal work, I accept the testimony of Mr. Chouc, that the McKercher Firm was its primary firm within this province. . . . The lawsuit commenced seeks huge damages against CN and alleges both aggravated and punitive damages, which connote a degree of moral turpitude on the part of CN. Simply put, it is hard to imagine a situation that would strike more deeply at the loyalty component of the solicitor-client relationship. [para. 56]

In other words, it was reasonable for CN to be surprised and dismayed when its primary legal counsel in the province of Saskatchewan sued it for $1.75 billion.

1. Consequently, the facts of this appeal fall within the scope of the bright line rule. McKercher breached the rule, and by extension its duty to avoid conflicting interests, when it accepted to represent Wallace without first obtaining CN’s informed consent.
2. However, I cannot agree that this is a situation where there also exists a risk of misuse of confidential information. CN’s contention that McKercher obtained confidential information that might assist it on the Wallace matter — namely, a general understanding of CN’s litigation philosophy — does not withstand scrutiny. “[M]erely . . . making a bald assertion that the past relationship has provided the solicitor with access to . . . litigation philosophy” does not suffice: *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.), at p. 401. “There is a distinction between possessing information that is relevant to the matter at issue and having an understanding of the corporate philosophy” of a previous client: *Canadian Pacific Railway v. Aikins, MacAulay & Thorvaldson* (1998), 23 C.P.C. (4th) 55 (Man. C.A.), at para. 26. The information must be capable of being used against the client in some tangible manner. In the present case, the real estate, insolvency, and personal injury files on which McKercher worked were entirely unrelated to the Wallace action, and CN has failed to show how they or other matters on which McKercher acted could have yielded *relevant* confidential information that could be used against it.

2. The Duty of Commitment to the Client’s Cause

1. The duty of commitment to the client’s cause suggests that a law firm should not summarily and unexpectedly terminate a retainer as a means of circumventing conflict of interest rules. The McKercher firm had committed itself to act loyally for CN on the personal injury, real estate and receivership matters. McKercher was bound to complete those retainers, unless the client discharged it or acted in a way that gave McKercher cause to terminate the retainers. McKercher breached its duty of commitment to CN’s causes when it terminated its retainer with CN on two of these files. It is clear that a law firm cannot terminate a client relationship purely in an attempt to circumvent its duty of loyalty to that client: *De Beers Canada Inc. v. Shore Gold Inc.*, 2006 SKQB 101, 278 Sask. R. 171, at para. 17; *Toddglen Construction Ltd. v. Concord Adex Developments Corp.* (2004), 34 C.L.R. (3d) 111 (Ont. S.C.J., *per* Master Sandler).
2. The conclusion on this point is supported by the obligation imposed on McKercher by its Law Society that it not withdraw its services from a client without good cause and appropriate notice: see the ethical rules applicable at the relevant time, Law Society of Saskatchewan, *Code of Professional Conduct* (1991), c. XII, at p. 47. The desire to accept a new, potentially lucrative client did not provide good cause to withdraw services from CN.

3. The Duty of Candour

1. The McKercher firm breached its duty of candour to CN by failing to disclose to CN its intention to accept the Wallace retainer.
2. It bears repeating: a lawyer must not “keep the client in the dark about matters he or she knows to be relevant to the retainer”: *Strother*, at para. 55. As discussed, this rule must be broadly construed to give the client an opportunity to judge for itself whether the proposed concurrent representation risks prejudicing its interests and if so, to take appropriate action.
3. CN should have been given the opportunity to assess McKercher’s intention to represent Wallace and to make an appropriate decision in response — whether to terminate its existing retainers, continue those retainers, or take other action. Instead, CN only learned that it was being sued by its own lawyer when it received a statement of claim. This is precisely the type of situation that the duty of candour is meant to prevent.

D. *The Appropriate Remedy*

1. 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.
2. As discussed, the courts in the exercise of their supervisory jurisdiction over the administration of justice in the courts have inherent jurisdiction to remove law firms from pending litigation. Disqualification may be required: (1) to avoid the risk of improper use of confidential information; (2) to avoid the risk of impaired representation; and/or (3) to maintain the repute of the administration of justice.
3. Where there is a need to prevent misuse of confidential information, as set out in *Martin*, disqualification is generally the only appropriate remedy, subject to the use of mechanisms that alleviate this risk as permitted by law society rules. Similarly, where the concern is risk of impaired representation as set out in these reasons, disqualification will normally be required if the law firm continues to concurrently act for both clients.
4. The third purpose that may be served by disqualification is to protect the integrity and repute of the administration of justice. Disqualification may be required to send a message that the disloyal conduct involved in the law firm’s breach is not condoned by the courts, thereby protecting public confidence in lawyers and deterring other law firms from similar practices.
5. 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.
6. 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: (i) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification; (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 (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.
7. Against this background, I return to this appeal. The motion judge concluded that the appropriate remedy was to disqualify McKercher from the Wallace action. He based this conclusion on a variety of factors — in particular, he focused on what he perceived to be CN’s justified sense of betrayal, the impairment of McKercher’s ability to continue to represent CN on the ongoing retainers, and the risk of misuse of confidential information. Some of these considerations were not relevant. Here, disqualification is not required to prevent the misuse of confidential information. Nor is it required to avoid the risk of impaired representation. Indeed, the termination of the CN retainers that McKercher was working on ended the representation. The only question, therefore, is whether disqualification is required to maintain public confidence in the justice system.
8. 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.

IV. Conclusion

1. I would allow the appeal and remit the matter to the Queen’s Bench to be decided in accordance with these reasons. I would award costs to the appellant, CN.

*Appeal allowed with costs.*

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