

2018 ICSC

Canadian Shopping Centre Conference
Breakfast Roundtables

CONFLICTS OF INTEREST

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OVERVIEW

Lawyers' conflicts of interest are governed by both the courts and law societies.

The central rule, as set out by both the courts and law societies, is the “**bright-line rule**”.

The bright-line rule states that:

“a lawyer may not represent one client whose interest 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 preferable independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other”

R. v. Neil, 2002 SCC 70 at 29.

The governing case law is set out in the following Supreme Court of Canada trilogy of cases:

1. ***Macdonald Estate v. Martin, [1990] 3 SCR 1235***: A junior lawyer of the appellant's law firm later moved to the respondent's law firm. The lawyer was actively involved with the case when working for the appellant's firm.
2. ***R. v. Neil, 2002 SCC 70***: A law firm represented two accused in the same criminal matter, and advanced the interests of one client to the detriment of the other.
3. ***Canadian National Railway Co. v. McKercher LLP, 2013 SCC 39***: The law firm was acting for CN on other matters when it accepted a retainer to act for the plaintiff in a much more lucrative class action law suit against CN. CN had no knowledge of the retainer and did not consent to it.

The bright-line rule was first stated in *R v. Neil*.

It is incorporated into the *Rules of Professional Conduct*, and the commentary to rules 3.4-1, 3.4-2, 3.4-3 and 3.4-5 on Conflicts of Interest, Consent, Disputes and Joint Retainers, respectively, has been amended to provide greater guidance.

However, after *R v. Neil*, questions remained about the scope of the bright-line rule. *CN v. McKercher*, which was released 11 years later, was intended to clarify the bright-line rule and answer some of those questions.

It's not clear that *McKercher* clarified the rule. See, for example, *7102763 Canada Inc. v 2242869 Ontario Inc.*, 2014 ONSC 3819, where the court held that a law firm did not fall foul of the bright-line rule where its existing client, the defendant, could not reasonably expect that the law firm would not act against it on an unrelated matter.

Some Practice Considerations:

1. Conflicts checks: At the commencement of a retainer and ongoing
2. Law firm on both sides of a negotiation
3. Conflicts with non-clients: Removing opposing counsel from the record, even if your client is not their former client
4. Shared space: What to do to ensure you are complying with your duty of confidentiality
5. Advance consent/waiver of conflicts: Obtaining your client's consent to act in advance of a conflict