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Provincial Insurance Scheme Bars Federal Tort Remedy

The Supreme Court of Canada ("SCC") recently released its unanimous decision in *Marine Services International Ltd. v. Ryan Estate* ("Ryan Estate"). The case, which was on appeal from the Court of Appeal for Newfoundland and Labrador ("NLCA"), concerned the interaction of Newfoundland and Labrador's provincial no fault workers' compensation scheme under the *Workplace Health, Safety and Compensation Act* ("*WHSCA*") and the tort based compensation scheme provided for in the federal *Marine Liability Act* ("*MLA*").

Specifically, the SCC was asked to determine whether the statutory bar of action in s. 44 of the *WHSCA* applies to and bars a negligence action brought under s. 6(2) of the *MLA*, or whether the *WHSCA* provision is inapplicable and/or inoperable because of the doctrines of federal paramountcy and/or interjurisdictional immunity, respectively.

Section 44 of the *WHSCA* states that the rights to compensation provided by the act are instead of and in place of any rights to which a worker would be entitled against an employer or the worker of an employer unless the injury occurred otherwise than in the conduct of operations usual to or incidental to the industry carried on by the employer. Meanwhile, s. 6(2) of the *MLA* states that if a person dies by the fault or neglect of another in circumstances that would have entitled the person, had they not died, to recover damages then the dependants of that person may maintain an action in a court of competent jurisdiction for their losses resulting from the death. A majority of the NLCA held that s. 44 of the *WHSCA* must be read down as it applies to s. 6(2) of the *MLA* for offending both the doctrines of federal paramountcy and interjurisdictional immunity.

The case began after David and Joseph Ryan (the "Ryan brothers") were tragically lost at sea in September of 2004, when their ship the *Ryan's Commander* sank while returning from a fishing expedition off the coast of Newfoundland and Labrador. Following the deaths of the Ryan brothers, their widows and dependants (collectively the "Ryan Estates") applied for and received compensation under the provincial *WHSCA*.

In 2006 the Ryan Estates also commenced a lawsuit under s. 6(2) of the *MLA* against Universal Marine Limited ("Universal Marine"), Marine Services International Limited ("Marine Services") and its employee David Porter ("Porter") for negligence in the design and construction of the *Ryan's Commander*. The Ryan Estates also sued the Attorney General of Canada for Transport Canada's alleged negligent inspection of the vessel.

In response to the Ryan Estates suit, Marine Services International Limited and Porter applied to the Workplace Health, Safety and Compensation Commission (the "Commission") under s. 46 of the *WHSCA* for a determination of whether s. 44 of the *WHSCA* barred the action under s. 6(2) of the *MLA*. The Commission concluded that the *WHSCA* applied to this case because the Ryan brothers had died in the course of their employment, that Universal Marine, Marine Services and the Attorney General of Canada were "employers" and that David Porter was a "worker" within the meaning of the *WHSCA*. The Commission further concluded that neither of the doctrines of federal paramountcy nor interjurisdictional immunity applied.

In a judicial review of the Commission's decision, Hall J. of the Supreme Court of Newfoundland and Labrador, the Commission ruled that interjurisdictional immunity did apply as s. 44 of the *WHSCA* impaired the right to make a claim under the *MLA*, which forms part of the core of the federal power over shipping and navigation. He also held that federal paramountcy applied because the Ryan Estates could not comply with both the *WHSCA* and the *MLA*.

As stated above, a majority of the NLCA upheld Hall's decision, stating that, while the *WHSCA* is a valid exercise of provincial power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*, interjurisdictional immunity applied because s. 44 of the *WHSCA* trenches on maritime negligence law, which according to the SCC's decision in *Ordon Estate v. Grail* ("*Ordon*"), sits at the core of federal power over navigation and shipping.

In its decision the SCC addressed two key questions, the first being whether s. 44 of the *WHSCA* applied to the facts of this case, and secondly, if so, whether it is constitutionally applicable and operative.

Before analyzing the crux of these issues, the Court began with a historical review of workers' compensation schemes operating throughout Canada, and noted that a hallmark of the schemes is the "trade-off" whereby workers lose their right to maintain a cause of action against employers, but gain timely compensation that depends neither on fault nor on the employer's ability to pay. The Court stated that these compensation

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End of the Line: Duty of Loyalty *(cont'd)*

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McKercher's partners had power of attorney from CN for service of process in Saskatchewan.

The SCC noted that the duty of loyalty has three key aspects: (1) a duty to avoid conflicting interests; (2) a duty of commitment to the client's cause; and (3) a duty of candour. The duty to avoid conflict is mainly concerned with protecting a former or current client's confidential information and 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 SCC also added that, in order to provide full disclosure to the existing client, a lawyer should first obtain the consent of the new client to disclose the existence, nature and scope of the new client. If the new client refuses, the lawyer is unable to fulfill his duty of candour and consequently, must decline to act for the new client.

In its prior decision of *R. v. Neil*, the SCC 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 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."

In the matter at hand, the SCC held that the "bright line" general rule set out in *Neil* 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 *and* unrelated matters. Where applicable, the bright line rule prohibits concurrent representation and it does not invite further consideration.

However, the SCC also held that the scope of the bright line rule is not unlimited. It applies only where the *immediate legal* interests of clients are *directly* adverse in the matters on which the lawyer is acting and applies only to legal interests, as opposed to commercial or strategic interests. It cannot be raised tactically – the SCC noted that the possibility of tactical abuse is especially high in the case of institutional clients dealing with large national law firms. Furthermore, the bright line rule 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 legal matters. This pertains to "professional litigants" whose consent to concurrent representation of adverse legal interests can 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, depending on the circumstances, could 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. The SCC noted that these are exceptional cases.

The SCC held that 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, or a substantial risk of impaired representation. The determination is contextual and the onus falls upon the client to establish, on a balance of probabilities, the existence of a conflict as there is only a deemed conflict if the bright line rule applies.

The SCC held that McKercher's conduct "fell squarely within the scope of the bright line rule" on the following grounds: (1) CN and the class suing CN are adverse in legal interest; (2) CN did not tactically abuse the bright line rule; (3) 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. On the third point, the SCC agreed with the motions judge's findings as follows: McKercher and CN had a longstanding relationship; CN used McKercher as the "go to" firm in the province; and given that the class action seeks huge damages against CN and alleges both aggravated and punitive damages, which connote a degree of moral turpitude on the part of CN, "it is hard to imagine a situation that would strike more deeply at the loyalty component of the solicitor-client relationship." The SCC concluded that McKercher's failure to obtain CN's consent before accepting the class action retainer breached the bright line rule and therefore, McKercher breached its duty to avoid conflicting interests. However, the SCC did not agree with the motions judge that the situation involves a risk of misuse of confidential information. It found that McKercher possessed no relevant confidential information that could be used to prejudice CN in the class action. The SCC rejected CN's assertion that McKercher's general understanding of CN's litigation philosophy constituted confidential information that might assist McKercher on the class action.

The SCC also held that McKercher's termination of its retainers with CN breached its duty of commitment. McKercher was bound to complete the retainers on personal injury, real estate and receivership matters, unless CN discharged it or acted in a way that gave McKercher cause to terminate its retainer. Finally, the SCC held that McKercher's failure to advise CN of its intention to represent the class breached its duty of candour. It noted that CN only learned that it was being sued by its own lawyer when it received a statement of claim and "this is precisely the type of situation that the duty of candour is meant to prevent."

As for remedy, the SCC held that disqualification may be required to: (a) avoid risk of improper use of confidential information; (b) avoid the risk of impaired representation; or (c) 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. The SCC held that while breach of the bright line rule normally calls for disqualification, several factors that may militate against disqualification, including: (1) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the disqualification motion; (2) significant prejudice to the new client's interest in retaining its counsel of choice and that party's ability to retain new counsel; (3) 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.

The SCC concluded that while 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, it is necessary to weigh all the factors identified by the court in its decision in order to determine whether disqualification is in fact appropriate in the circumstances. The SCC held that fairness suggests that the issue of remedy should be remitted to the lower court for consideration in accordance with the legal framework as recast in the SCC's decision.

Canadian National Railway Co. v. McKercher LLP, 2013 SCC 39 (CanLII)

Provincial Insurance Scheme *(cont'd)*

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schemes, which concern employment and insurance law, fall squarely within the provincial jurisdiction over property and civil rights, and also noted that Parliament has enacted two such no-fault schemes in the form of *The Government Employees Compensation Act* (the "*GECA*") and the *Merchant Seamen Compensation Act* (the "*MSCA*") which apply federally. In concluding its review of the schemes the Court stated that, despite some operative variations, all of these statutes provide direct compensation in lieu of the right to bring an action, and that by virtue of establishing no-fault schemes for workplace-related injuries these statutes are distinct from and do not interact with any tort regimes.

In addressing the first of the core issues, the Court held that s. 44 of the *WHSCA* was indeed applicable to the facts of this case. Although the respondents correctly pointed out that the Ryan brothers were not in an employment relationship with the defendants, the Court concluded that the *WHSCA* does not require that such a relationship exist. Any "employer" contributing to the scheme (and any "worker" of such an employer) benefits from the statutory bar so long as the worker was injured in the course of his or her employment by carrying out "operations usual or incidental to the industry carried on by the employer". The Commission had previously found, as a question of mixed law and fact, that Marine Services and Porter were engaged in operations connected to the fishing industry, that at the time of the Ryan brothers' death they were in the conduct of operations usual or incidental to the industry carried on by Marine Services and Porter, and that as a result the defendants benefited from the statutory bar provided in s. 44 of the *WHSCA*. Applying the reasonableness standard of review set down in its own ruling from *Dunsmuir v. New Brunswick*, the Court held that the Commission's finding in this regard should not be disturbed.

Having held that s. 44 of the *WHSCA* was in fact applicable to this case, the SCC next addressed the constitutional issues, beginning with interjurisdictional immunity. While interjurisdictional immunity only applies to situations already covered by precedent, the Court was forced to address the doctrine because of the *Ordon* decision.

In applying the two-part test from the SCC's decision in *Quebec (Attorney General) v. Canadian Owners and Pilots Association* ("*COPA*") the Court found that s. 44 of the *WHSCA* eliminates the Ryan Estates' access to s. 6(2) of the *MLA* and by altering the class of claimants who may use the statutory maritime negligence action, s. 44 of the *WHSCA* did trench on the core of the federal power over shipping and navigation.

However, in order to satisfy the Court that interjurisdictional immunity applied, the second prong of the test requires that the relevant provision *impairs* the federal provision. This differs from the Court's decision in *Ordon,* which predates the two-part test penned in *COPA* - where all that was required was that the relevant provision *affected* the federal provision.

If the Ryan brothers had received compensation, the statutory bar in s. 44 would have applied to them for the same reasons that the Commission concluded it applied to the Ryan Estates. The application of s. 44 to the Ryan brothers, had they lived, means that their dependants have no recourse to s. 6(2) of the* MLA*. On this reading, there is no conflict between the two statutes.

In considering this heightened standard, the Court found that the level of impairment was not sufficient to trigger interjurisdictional immunity because: (i) although s. 44 of the *WHSCA* has the effect of regulating a maritime negligence law issue, it does not alter the uniformity of Canadian maritime law; (ii) the section does not restrict parliament's ability to determine who has a cause of action under s. 6(2) of the *MLA* as parties in the position of the Ryan Estates still receive compensation for the accident in question (simply through a different mechanism); and (iii) there exists a near century long tradition of workers' compensation schemes applying in the maritime context.

The SCC next considered whether the effect of s. 44 of the *WHSCA* was incompatible with s. 6(2) of the *MLA* such that the doctrine of federal paramountcy would be triggered. Federal paramountcy applies where there is an inconsistency between a valid federal legislative enactment and a valid provincial legislative enactment, and unlike interjurisdictional immunity does not apply to common law classes of subject matter.

As there was no dispute about the validity of either s. 44 of the *WHSCA* or s. 6(2) of the *MLA*, the Court only needed to address whether an inconsistency existed between the two provisions. In the view of the Court, there was no conflict between the two statutory provisions and a proper reading of s. 6 (2) of the *MLA* makes room for the operation of s. 44 of the *WHSCA*. The Court noted that under the modern approach to statutory interpretation, the words of a piece of legislation are to be read together in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of parliament. The Court found that the object of s. 6 (2) of the *MLA* was to expand the class of claimants to include the eligible dependants of a person killed in a maritime accident whom had previously been without recourse, not to provide a separate avenue of recourse where one already exists. Considered in this light, the Court found that a proper reading of s. 6(2) was that: (i) it allows dependents to bring a claim in circumstances that would have entitled the deceased, had he or she not been killed, to recover damages; (ii) it allows for situations where a dependant is not allowed to bring an action; and (iii) such a situation occurs where a statutory provision , like s. 44 of the *WHSCA*, prohibits litigation because compensation has already been awarded under a workers' compensation scheme. In this case, the Ryan brothers' death occurred under circumstances that would have *disentitled* them from recovering damages had they not died because s. 44 of the *WHSCA* would have applied. Such an interpretation negates any conflict between the statutes, and leaves no issue of federal paramountcy nor of interjurisdictional immunity.

In concluding that s. 44 of the *WHSCA* was both constitutionally applicable and operable, the Court also stated that an interpretation recognizing the absence of conflict was also preferable because: (i) it ensures consistency between the provincial *WHSCA* and the federal *GECA* and *MSCA* schemes, both of which contain a statutory bar precluding a claim under s. 6(2) of the *MLA*; and (ii) recognizes the distinct purpose and nature of the *WHSCA* and the *MLA*—the first being a no-fault insurance benefits scheme and the latter being a statutory tort regime, both of which are important avenues of redress for potential claimants. As s. 44 of the *WHSCA* was found to be applicable and operative, the appeal was allowed and the Ryan Estates' claim was dismissed without an order as to costs.

Marine Services International Limited v. Ryan Estate, 2013 SCC 44

End of the Line *(Duty of Loyalty)*

The Supreme Court of Canada ("SCC") recently released a decision clarifying the issue of the duty of loyalty owed by lawyers to their clients. In particular, the questions before the SCC were as follows: 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?

We first reported on this case, *Wallace v. Canadian Pacific Railway et al.*, in the October 2011 edition of *Transportation Notes*.

McKercher LLP ("McKercher") commenced a class action on behalf of Gordon Wallace against Canadian National Railway ("CN") seeking $1.75 billion, alleging that CN (and other railways) had overcharged western Canadian grain farmers for rail transportation over the previous 25 years.

The problem was that McKercher had acted for CN in the past and in fact was acting for CN on several matters when, without CN's consent or knowledge, it accepted a retainer to act for the plaintiff in the class action. CN first learned that McKercher was acting against it in the class action when it was served with the statement of claim on January 9, 2009. Between December 5, 2008 and January 15, 2009, McKercher terminated all retainers with CN except for one which CN terminated.

Following receipt of the statement of claim, CN applied to remove McKercher as the solicitor of record due to an alleged conflict of interest.

CN was successful in disqualifying McKercher from acting on the class action after bringing a motion before the Saskatchewan Court of Queen's Bench. The motions judge found that the firm had breached the duty of loyalty it owed to CN by placing itself in a conflict of interest by accepting the Wallace retainer while acting for CN on other matters. In the motions judge's view, CN felt an undeniable sense of betrayal that substantially impaired McKercher's ability to represent CN in ongoing retainers. The motions judge also found that McKercher had received a unique understanding of the litigation strengths, weaknesses and attitudes of CN and this understanding constituted relevant confidential information. The motions judge concluded that McKercher's violation of the duty of loyalty and its possession of relevant confidential information made disqualification of McKercher as counsel on the class action an appropriate remedy.

McKercher appealed this decision to the Saskatchewan Court of Appeal ("SKCA"). The SKCA overturned the motion judge's order. The appellate court found that a general understanding of CN's litigation strengths and weaknesses did not constitute relevant confidential information warranting disqualification. It found that McKercher had not breached its duty of loyalty by accepting to act concurrently for Wallace. It also found that CN was a large corporate client and not in a role of vulnerability or dependency with respect to McKercher; as such, CN's implied consent to McKercher acting for an opposing party in unrelated legal matters could be inferred. However, the SKCA did find that McKercher had breached its duty of loyalty to CN by peremptorily terminating the solicitor-client relationship on its existing CN files. Nevertheless, disqualification was not an appropriate remedy in this case since McKercher's continued representation of Wallace created no risk of prejudice to CN.

The SCC allowed CN's appeal of the SKCA decision. The SCC decided that as the motions judge did not have the benefit of the SCC's reasons on the various legal issues, it was appropriate for the matter to be remitted to the Saskatchewan Court of Queen's Bench for redetermination of the appropriate remedy.

Before getting into the legal issues, it is helpful to understand the history of the relationship between CN and McKercher. CN operates close to 21,000 miles of track in North America and generated over $8 billion of revenue in 2008. It has thousands of employees world-wide; 75% of whom are in Canada. It employs 23 in-house counsel and consults with approximately 50 to 60 outside law firms in Canada. These firms bill CN for 600 individual files in any given year, roughly half of which involve non-regulatory litigation matters.

McKercher started acting for CN on a number of matters including corporate, commercial, tax, debt, collection, real estate and litigation files around 1999. From 2004 to 2008, McKercher billed CN a total of $68,462. This amount was less than a third of all fees paid to Saskatchewan law firms in that period and 0.1% of all fees paid to external counsel for the same time. Despite the fact that CN described McKercher as its "go-to" law firm in Saskatchewan, a search of court records for the period 1999 to 2009, revealed that 22 of the 32 matters in which counsel could be identified showed that McKercher was only representing CN on a single matter — and that a competitor of McKercher represented CN on 18 of the 22 matters.

Around the time McKercher commenced the Wallace claim, it represented CN in four 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

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