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The More Things Change.... A Post-McKercher Conflicts Case

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Case Commented on: *MTM Commercial Trust v Statesman Riverside Quays Ltd.* [2014 ABQB 16](#)

In his decision in *MTM Commercial Trust v Statesman Riverside Quays Ltd.* Justice Macleod determined whether Bennett Jones LLP could act for Matco Group, a client of many years, in a dispute with the Statesman Group, for whom Bennett Jones acted on a very limited retainer, and who had been advised that Bennett Jones would act for Matco in the event of a future dispute between the two clients. Somewhat surprisingly, Justice Macleod held that Bennett Jones could not represent Matco. In this comment I will suggest that this judgment supports the position I set out in an ABlawg post in 2011, that “in actual cases judges are less concerned with carefully articulating the applicable rules, and more concerned with reaching the right outcome on the facts, all things considered” ([The Practice \(not theory\) of Conflicts of Interest](#); see also [Conflicts of Interest and Good Judgment](#)).

The Judgment

Bennett Jones LLP has represented the Matco Group of Companies for many years. In 2006, Matco entered into a joint venture with the Statesman Group to develop a property in Inglewood. Matco owned the land, and Statesman was to provide the “building expertise and the interim financing”, as well as credit guarantees (para 8). Along with other arrangements, the two groups created a general partnership in which they each had a 50% interest.

In 2008 a lien had been filed by a third party, and Bennett Jones represented the general partnership with respect to the building lien issues. In addition, it filed a defence for the Statesman group (para 5). Because, however, Bennett Jones had acted for Matco for many years it sent an e-mail to in-house counsel at Statesman “purporting to preserve the Law Firm’s right to act for the Matco group in any disagreement with the Statesman group notwithstanding the acceptance of the retainer” (para 6). The e-mail stated that it was to confirm that in the “unlikely event of disagreement between [Matco] and the Statesman group” Statesman would “take no objection to our continued freedom to act for Matco” (para 6).

Unfortunately, by 2010 relations between the Matco group and Statesman had deteriorated. After consulting with Bennett Jones in May and June, on June 21, 2010 Matco served a “Notice of Default and Notice of Termination” on the general partner (para 10). On July 8, 2010 it served an Originating Notice to commence an oppression action (para 10).

Although the law firm had continued to act for Statesman, it did not disclose to Statesman that it was acting against its interests until the service of the Notice of Default and Notice of Retainer. After that point in time the firm no longer acted for Statesman, and Statesman and Matco embarked on litigation that was “extremely personal and highly charged emotionally” (para 11). And as part of that litigation Statesman sought a declaration that the law firm “was in a conflict of interest and an order that it not act for the Matco group” and which also sought damages for breach of fiduciary duty (para 16). At that point Bennett Jones stepped aside as counsel for Matco in the litigation, but the conflicts action continued, and Bennett Jones sought to have it resolved because were the Court to find that there was no conflict the firm might “be able to act on behalf of the Matco Group notwithstanding that it is itself a party to the litigation” (para 17).

In his judgment Justice Macleod began by reviewing the applicable provisions of the Law Society Code of Conduct. He then reviewed the common law on conflicts of interest, including the decision by the Supreme Court in *Canadian National Railway Co v McKercher LLP*, [2013 SCC 39](#) (which I discussed in an earlier ABlawg post [here](#)). He noted that the judgment affirmed the bright line rule, which prevents a lawyer from representing “one client whose interests are directly adverse to the immediate interests of another current client” (para 30). He stated that where a firm “acts simultaneously for and against a client in legal matters, this will breach the bright line rule in most cases” (para 31). He also noted the principle from *McKercher* that a conflict will not arise “where it will not be reasonable for a client to expect a firm to refrain from acting against it in unrelated matters”, but that this is “the exception” (para 33).

Justice Macleod also noted the cases dealing with advance consent, and the case law which indicates that an advance consent will only be sufficient if it anticipates the type of conflict that later arose. That law means, he suggested, that one had to consider whether the “generic consent obtained from Statesman” was sufficient to justify Bennett Jones’ later representation of Matco against Statesman in related litigation (para 40).

Justice Macleod held that it did not. He noted the “unenviable dilemma” of the firm in having a long-term client want to take steps that were adverse to the interests of another client to the point of “eliminating the Statesman Group from the project”, while also being unable to advise the other client of what was going on (para 41). He also noted that the advance consent could not have led Statesmen to understand that Bennett Jones would be acting for Statesman’s interests in relation to the project, while simultaneously acting “for the Matco Group to effect the elimination of the Statesman Group from that very same project” (para 42). To do so was a breach of the firm’s duties to Statesman. As a consequence, the firm was disqualified from acting further in that matter.

Analysis

One of the striking things about Justice Macleod’s judgment is that it spends a significant amount of time summarizing the law governing conflicts of interest, but only two paragraphs discussing the application of that law to the facts of Bennett Jones’ two retainers. That division means that it is not entirely clear how the legal doctrine cited informs the result.

The decision cites, for example, the lawyer’s duty of candour to a client, but does not say whether or not Bennett Jones violated that duty in not disclosing the pending lawsuit to Statesman. It cites the bright line conflicts rule from *McKercher*, which prohibits a lawyer from acting for one client against another, “*even if the two mandates are unrelated*” [emphasis in original], but does not discuss the significance, if any, from the fact that the matters in this case were related, not unrelated (para 30). It cites the principle that the bright line rule does not apply

where it would be unreasonable for a client to expect it to apply, and that such cases are an exception, but does not say how that applies to the expectations of Statesman here. That is, it does not say that the issue here is that Statesman could reasonably have expected Bennett Jones not to act against it. It notes that a law firm should not “summarily and unexpectedly drop a client simply in order to avoid conflicts of interests” (para 34) but, again, does not say whether Bennett Jones acted in that way (and given that the firm did not drop the client, it is not obvious why one would have concluded that it did so). Further, the judgment notes the two key decisions on advance consent in conflicts cases, which require that the subsequent retainer be contemplated by the advance consent. Yet it does not explain why the statement “we do not disqualify ourselves from assisting Matco in what I trust is the unlikely event of disagreement between it and the Statesman group in the future” (para 6) was not sufficient to alert Statesman of the possibility of the type of retainer which Bennett Jones subsequently accepted for Matco. It is true that the later retainer was very adversarial, but there is no particular reason to expect that a “disagreement” between the parties wouldn’t be adversarial; legal disagreements tend to have that quality.

Ultimately it appears that two things caused problems for Bennett Jones: that it did not tell Statesman that it had taken a retainer from Matco significantly adverse to Statesman’s interests, and the severity of the impact on Statesman of Matco’s allegations in the litigation. The legal relevance of those principles would perhaps be the violation of the duty of candour, and a reasonable supposition that there is a greater likelihood of a substantial risk on a representation where the two matters are related and highly adversarial. However, as a matter of law, one also has to note the very limited nature of the prior representation of Statesman, that that representation would almost certainly be overtaken by these subsequent events, that Bennett Jones did not improperly withdraw from that representation, and the unreasonableness of Statesman expecting Bennett Jones not to act for Matco given the clear wording of the advance consent.

Perhaps the key point is this: Bennett Jones could have advised Statesman, or have withdrawn in an orderly fashion from that retainer. Likely that would not have been the preferred course of action for Matco, but Bennett Jones could also have asked for and obtained consent from Matco for taking those steps. There was nothing in law to prevent it from taking steps to advise Statesman of what it was doing. That means that its failure to do so raises some doubt as to the propriety of the firm’s conduct. And, as noted at the outset, doubt as to propriety tends to be highly significant in predicting the outcome in a conflicts case. If the law firm has acted in an up front and candid way, then it is likely to avoid problems, even if its conduct might be considered a conflict of interest on a strict application of the law. Conversely, if there is any sense that the firm has not been up front and candid, it will run into problems, even if it has a reasonable argument that it is not in a conflict.

The unfortunate thing for the firm here is that in many ways it had been candid with Statesman. Its e-mail regarding the advance consent was pretty blunt as to what it was trying to do. But the lesson may be that there is very little judicial tolerance for an absence of candour in situations of conflict; a little bit of candour won’t do.

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