**Unofficial English translation of the Judgment of the Court**

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| Baril c. Woods | | | | | 2022 QCCA 277 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-09-700039-217 | | | | |
| (500-11-057716-199) | | | | | |
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| DATE: | February 23, 2022 | | | | |
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| CORAM: | | THE HONOURABLE | | JACQUES J. LEVESQUE, J.A.  BENOÎT MOORE, J.A.  FRÉDÉRIC BACHAND, J.A. | |
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| MICHEL BARIL  FRANÇOIS BIRON  GUY BOURASSA  PAUL-HENRI COUTURE  MARC DAGENAIS  PATRICK GODIN  VANESSA LAPLANTE  RENÉ LESSARD  JACQUES MALETTE  STEVE NADEAU  LUC SÉGUIN | | | | | |
| APPELLANTS – Applicants | | | | | |
| v. | | | | | |
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| WOODS LLP | | | | | |
| RESPONDENT – Respondent | | | | | |
| and | | | | | |
| **BRIAN SHENKER, personally and in his capacity as trustee**  **of The Freedom 57 Trust**  **THE SHENKER FAMILY FOUNDATION**  **SAM SKYE COMMUNITY FOUNDATION**  **RANDEE FAGEN**  **NATHAN GLAICH** | | | | | |
| RESPONDENTS – Plaintiffs/Respondents | | | | | |
| and | | | | | |
| **NMX RESIDUAL ASSETS INC.**  **NMX RESIDUAL LIABILITIES INC.** | | | | | |
| IMPLEADED PARTIES – Debtors | | | | | |
| and | | | | | |
| **PRICEWATERHOUSECOOPERS INC.** | | | | | |
| IMPLEADED PARTY – comptroller | | | | | |
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| JUDGMENT | | | | | |
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1. The appellants appeal from a judgment of the Superior Court, District of Montreal (the Honourable Michel A. Pinsonnault),[[1]](#footnote-1),rendered on June 8, 2021, which dismissed their application for a declaration of disqualification of the Woods law firm representing the respondents.
2. The appeal raises the issue of whether a law firm (the respondent Woods) that obtained information during a pre-trial examination in a case that was settled (Nordic dispute) must be disqualified from representing new clients (the respondents) in a second dispute (Shenker dispute) that involves the former directors and officers (appellants) of the corporation concerned in the first dispute (Nemaska) and features related elements.
3. The appellants argue that this must be the case. It is their view that the implied rule of confidentiality (“IRC”), as defined in *Lac d’amiante* and *Juman*,[[2]](#footnote-2) makes it impossible for lawyers subject to it to compartmentalize their minds in such a way as to ignore what they know. A reasonably informed person would therefore conclude that the risk of disclosing or using information covered by the IRC, even involuntarily or unconsciously, compromises the integrity of the judicial process and the administration of justice.
4. The respondent Woods, for its part, argues that there must be compelling reasons to disqualify a law firm and that, absent such evidence, and subject to solicitor-client privilege, the presumption should be that lawyers will comply with their legal and ethical obligations. Because the judge applied the correct legal framework, the Court must show deference to his assessment.
5. The facts are simple and essentially uncontested. The appellants are former directors and officers of Nemaska Lithium Inc. (”Nemaska”), which commenced arrangement proceedings under the *Canada Business Corporations Act*.[[3]](#footnote-3)
6. In those proceedings, the respondents, a group of Nemaska shareholders (“Shenker group”) represented by the respondent Woods, claim damages and interest from the appellants arising from the loss of their investment in Nemaska (“Shenker dispute”).
7. It so happens that the respondent Woods had previously represented Nordic Trustee AS (”Nordic”) in a dispute with Nemaska (“Nordic dispute”). In that case, Woods obtained information during the pre-trial examination of the appellant Guy Bourassa, Nemaska’s chief executive officer. That case was settled out of court[[4]](#footnote-4) with approval by the Honourable Louis J. Gouin on February 13, 2020.[[5]](#footnote-5) At the same time, the judge ordered that any exhibits disclosed in the Nordic dispute and any related pleadings be withdrawn from the record.
8. On January 27, 2021, the appellants filed an application to disqualify Woods. The parties agree that the Nordic and Shenker disputes are related, and both raise allegations of misrepresentations by Nemaska and its former officers. Similarly, Woods admits that it has information relevant to the Shenker dispute that it obtained in the Nordic dispute, which is subject to both the IRC and undertakings of confidentiality of which the Court took act in a case management order:[[6]](#footnote-6)

**TAKES ACT** of Nordic's undertaking to keep confidential all information received from Nemaska until further instructions from the Court and to take the necessary steps to have the members of the Bondholders *Ad Hoc* Committee to return to Nemaska Exhibit R-2 of the Contestation.

1. Mtre Bogdan Catanu and Mtre Neil Peden, who work for the respondent Woods, are representing the respondents. In the affidavits filed in response to the application for disqualification, they claim that they did not use the information in question to prepare the originating application, and they describe the measures taken by the respondent Woods to comply with its legal and ethical duty of confidentiality. Thus, in their mandate letter with the respondents, they included a statement that the firm had received information in a previous dispute and that they reserved the right to use it or disclose it only in compliance with their legal and ethical duty of confidentiality.

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1. The judge dismissed the application for disqualification. While he recognized the importance of the IRC, he set aside the appellants’ argument that the principles established in *MacDonald Estate*[[7]](#footnote-7)in matters of conflicts of interest and solicitor-client privilege should apply to those rules. In his view, the appellants’ theory would mean that a lawyer could not represent the same party twice if the files had any related elements. It was his view that this is neither the state of the law nor that of its practise.
2. The judge noted that the information in question included nothing covered by solicitor-client privilege or settlement or litigation privilege. Its disclosure in a pre-trial examination does not confer on it any additional privilege and does not entail its protection under solicitor-client privilege in any other subsequent case, even one that is related.
3. It is therefore possible for the same information, subject to its relevance, to be disclosed in the context of the Shenker dispute. Admittedly, Woods is still subject to the IRC, the confidentiality orders rendered, and the undertakings of confidentiality made in the Nordic dispute. However, the mere fact that the two files are related does not result in disqualification based on a risk or suspicion that the information may be used. Nor does it create a presumption that the information will be disclosed in violation of the undertakings of confidentiality. In this case, the affidavits provide sufficient guarantees that the obligations arising from the Nordic dispute will be respected.
4. The judge added that even if it had been proved that the Shenker group used or disclosed the information protected by the undertakings of confidentiality and the IRC, a declaration of disqualification would not necessarily have been the appropriate remedy. Recalling every litigant’s right to choose his or her counsel, the judge stated that disqualification can be ordered only when the integrity of the judicial system so requires.

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1. Before the Court, the appellants argue that the judge applied the wrong legal framework, ignored the contextual nature of the analysis that would have led to a declaration of disqualification, erred by limiting the reasons for disqualification to only the cases set out in article 193 of the *Code of Civil Procedure*, and failed to analyze the main question, which is whether, in the eyes of a reasonably informed member of the public, maintaining the Woods firm as the representative would bring the integrity of the judicial process and the administration of justice into disrepute.
2. For the reasons below, the appeal must be dismissed.
3. First, it should be recalled that, in disqualification matters, the standard of review on appeal is stringent, and this Court will intervene only where the trial judge exercised his or her discretion abusively, unreasonably, or in a non-judicial manner.[[8]](#footnote-8) With their grounds of appeal, however, the appellants are attempting to orient this case towards a question of law to minimize or even set aside, this deference. They are wrong. While it is true, as we will see, that the judge erred in law, this error is not determinative and does not vitiate the reasonableness of his assessment. This is why.
4. In *Lac d’Amiante*, the Supreme Court confirmed the existence of the IRC in Quebec civil law. The rule covers the information obtained in pre-trial examinations and documents produced in that context.[[9]](#footnote-9) It imposes:[[10]](#footnote-10)

... on the parties to civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature).

1. The IRC is imposed in “recognition of the examinee’s privacy interest, and the public interest in the efficient conduct of civil litigation”[[11]](#footnote-11) while also favouring complete disclosure of the information available during the pre-trial examination.[[12]](#footnote-12) During the dispute, it applies to the party that obtains the information and to those who represent that party, and it survives beyond the dispute if the party does not enter it into evidence or if the trial never takes place, such as where a settlement is reached, as in this case.[[13]](#footnote-13) It is therefore undeniable in this case that the respondent Woods remains subject to the IRC with respect to the information received during the examination of Guy Bourassa in the Nordic case. Therefore, without judicial authorization, Woods cannot disclose any or all of this information to anyone, including its other clients. It also cannot use it for its own benefit or for that of its other clients. But what is the impact of the IRC on its capacity to act on behalf of another party in a subsequent related file?
2. In *Lac d’Amiante*,[[14]](#footnote-14) as in *Juman*, the Supreme Court distinguishes between information subject to the IRC and that falling under solicitor-client or another privilege. It adds that the IRC does not transform the nature of the information by making it privileged or exempt from seizure on that basis alone.[[15]](#footnote-15) This distinction is crucial on at least two fronts.
3. First, it states that the purpose of the IRC is not the same that of privileged information, in particular because solicitor-client privilege is preserved. According to the former, the rule seeks to reconcile the scope of the renunciation of privacy involved in a legal action and arising from the open court principle, which requires the just and full disclosure of information, thereby facilitating the search for truth. Confidentiality supports the proper administration of justice. According to the latter, the purpose is to provide absolute – or quasi-absolute– protection of a secret *in se*, a right enshrined in s. 9 of the *Charter of human rights and freedoms*.[[16]](#footnote-16)
4. Next, as the trial judge determined, and this is a corollary of the last point, contrary to solicitor-client privilege, nothing prevents information subject to the IRC from once again being disclosed in a subsequent dispute the same way it was in the initial dispute, that is, in a pre-trial examination. Therefore, the fact that lawyers previously received information and, as per the principle in *MacDonald Estate*, cannot compartmentalize their minds so as to forget it has less of an impact than does privileged information, which they cannot legally obtain again. Simply put, there is no point for lawyers subject to the IRC to remember the information; they simply need to repeat or recall the questions they asked in the first dispute to obtain it.
5. However, this distinction between privileged information on the one hand, and information covered by the IRC on the other, as important as it may be, does not mean that the case at hand raises no challenges or delicate issues for the respondent Woods. The Supreme Court is clear. The IRC applies not only to the party, but also to those who represent it,[[17]](#footnote-17) and it prevents the latter from disclosing or using the information received for purposes other than the dispute for which it was gathered,[[18]](#footnote-18) subject to the Court’s authorization, which was not sought in this case. On this last point, the appellants quite rightly argue that the respondent parties are the ones who may make that request, not the respondent Woods, as it is not a party to the dispute. Indeed, it is difficult to imagine that such an application could be made without the respondent Woods having first violated its obligations.[[19]](#footnote-19)
6. It also cannot be denied that, in this case, the issues in the two disputes are related, that the information covered by the IRC is relevant to the Shenker case, and that its significance is such as to create a fear that it might be disclosed or used. The only issue is whether, in these circumstances, this must lead to the disqualification of the respondent Woods.
7. The legitimacy of the judicial institution, like any other institution, relies on the trust placed in it by litigants. In this sense, preserving the strict standards that surround the legal profession and the integrity of the legal system as a whole exceeds mere compliance with specific standards. As soon as a given situation compromises the integrity of the judicial process and the administration of justice in the eyes of a reasonably informed person, a declaration of disqualification may be required notwithstanding the fact that the ground is not listed in article 193 C.C.P.[[20]](#footnote-20)
8. The appellants are therefore correct to argue that the judge erred when he stated in *obiter* that the case law does not consider disqualification to be a sanction for a violation of the IRC, even a real one. While it is true that the Supreme Court does not refer to disqualification in *Lac d’Amiante* and *Juman* when it discusses sanctions for violating the IRC, it also does not reject it, especially since these judgments do not concern the use of information by a lawyer. Disqualification was not therefore at issue. These judgments did not allow an absolute principle to be established, and this is consistent with the fact that a declaration of disqualification is in essence made on a case-by-case basis. There is no automatic application in such cases, and decisions turn on the circumstances of each case.[[21]](#footnote-21)
9. It is therefore possible for a lawyer – for example one who has been convicted of contempt of court for disclosing information covered by the IRC – to be disqualified in a specific case. But such a sanction would be justified only because of the lawyer’s actual actions – in other words, a sufficiently serious violation of the IRC – or, exceptionally, a specific risk of violation that would justify the extreme sanction of a declaration of disqualification. A mere hypothetical and generic apprehension of *some type of* involuntary, even unconscious, use of the information covered by the IRC is not sufficient to justify this measure. It must be a risk of use that would constitute a sufficiently serious and prejudicial violation of the IRC.
10. It is up to the party seeking the declaration of disqualification to prove the need for it by establishing that the prospect of other sanctions, such as a conviction for contempt, would be insufficient to preserve the integrity of the judicial system in the eyes of a reasonably informed person. On this point, fears that the information will be used must be quantified and characterized while taking sufficient account of the presumption of integrity and independence of lawyers and the fact that they are supposed to respect their ethical obligations.[[22]](#footnote-22) While there is a certain risk, it is not serious enough to extend the presumption established in *MacDonald Estate*, as our Court did in *Métro*,[[23]](#footnote-23) invoked by the appellants.
11. In that case, Métro sought the disqualification of the law firm representing the group of merchants it was in a dispute with, on the ground that it had represented the broker that had managed several of its public offerings. This Court recognized that the principles established in *MacDonald Estate* should apply in [translation] “an exceptional relationship, one which should be analogized to the solicitor-client relationship”.[[24]](#footnote-24) The Court wrote:

[translation]

[69] To not recognize in this case a relationship comparable to the one between a solicitor and client would, in my view, run the risk of affecting the openness and generosity of these crucial exchanges between issuer and underwriter. It would encourage the issuer to be reserved and prudent and to refrain from disclosing anything unless it appears absolutely indispensable to do so. Ultimately, this would be to the detriment of the public purchasers of securities.

1. During the preparation of the prospectus, Métro disclosed information to the broker and its attorneys beyond what was to be included in the prospectus that concerned, among other things, its future prospects and its acquisition strategies or plans. But mostly, the broker’s lawyers were working as a team with Métro, thereby establishing a relationship of trust that was highly analogous to the solicitor-client relationship. The situation was the same in *Heafey*,[[25]](#footnote-25) on which the appellants also rely.
2. The similarity with the solicitor-client relationship does not exist in this case. The information was disclosed to the respondent Woods during a process – a pre-trial examination – that it could recreate, not in a situation of trust resulting from the nature of the collaboration, as was the case in *Métro* and *Heafey*. Determining that merely taking part in an examination in a case that has been settled is [translation] “an exceptional relationship” that must be equated with the solicitor-client relationship would go beyond what is necessary to protect the integrity of the judicial process and the administration of justice.
3. Similarly, finding that mere participation in a pre-trial examination bars lawyers from accepting future cases that are in some degree related would have an undue impact on the practise of law, especially for specialized lawyers, constitute a significant violation of the right of litigants to choose their counsel, and provoke a multitude of incidental debates that would pointlessly delay the progress of disputes.
4. Contrary to what the appellants argue, these are considerations that the judge could take into account. Not only are they relevant to the decision, but they are not out of the ordinary. In *MacDonald Estate*, the Supreme Court included the reasonable and desirable mobility in the legal profession among the three founding principles to consider in the context of a conflict of interest.[[26]](#footnote-26)
5. In this sense, the remarks of the Federal Court in *Merck*,[[27]](#footnote-27) although they predate *Lac d’Amiante*, remain relevant:

In my view the implied undertaking would be most impractical if it resulted in an inability to remove from a case any solicitor who was bound by an implied undertaking. The implied undertaking is not of suffi­cient public interest when balanced against the right of a party to choose his own solicitors and the public interest in the efficient administration of justice to require the Court to disqualify any solicitor who might wrongly deploy information subject to the undertaking. If a solicitor fails to observe the under­taking the remedy is to cite him for contempt, not to remove him.

A lawyer who takes cases regularly must have acquired a great deal of information subject to implied undertakings. In these days of specialized education and long work hours for junior lawyers, it is possible that a significant percentage of a lawyer's general knowledge will have been acquired in his practice of law, there having been little other oppor­tunity for him to acquire the same. It is equally possi­ble that a large portion of that general knowledge will be subject to implied undertakings. If the defendants' submissions are correct, few lawyers who have been called for any length of time will be able to take part in litigation. It is to be remembered that the undertak­ing is to the Court and is not limited to deploying information in cases involving one or more of the same parties.

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1. Now that these principles have been established, how do they apply to this case?
2. The appellants, without stating it outright, suggest the existence in this case of an actual violation of the IRC based on the resemblance between the originating applications in the Nordic and Shenker cases. On this basis, in their view the case is located at one end of the spectrum of violation of the integrity of the judicial process and administration of justice. However, the originating applications are not covered by the IRC, and the appellants did not demonstrate that they contained information obtained through the examination. Obviously, the pleadings were withdrawn from the Nordic case pursuant to an order of the Superior Court, the merits of which are not before us, but that is all. The resemblance between the originating applications therefore does nothing more than illustrate that the two files are related, which is not contested, rather than establish a violation of the IRC by the respondent Woods. The judge was right to conclude that the evidence did not establish an actual violation of the IRC in this case.
3. As for the risk of future use, the appellants justify it by again invoking essentially the fact that the cases are related. Under the principles set out above, however, that relationship alone is not sufficient to establish a specific and particularized fear in this case. It is worth adding that the respondent Woods implemented concrete means to ensure compliance with their undertakings, and that the appellants failed to convincingly explain how the violation of the IRC that they fear would be likely to cause them sufficiently serious harm to justify the extreme measure of disqualification. Therefore, all of these circumstances allowed the judge to conclude that the integrity of the judicial process and the administration of justice were not undermined in the eyes of a reasonably informed person. There is nothing to justify not showing deference to this assessment.
4. The appellants also ask the Court to put under seal various schedules filed in support of the application for leave to appeal that contain information subject to the IRC. The Court will grant this request for precisely that reason.

**FOR THESE REASONS, THE COURT:**

1. **DISMISSES** the appeal;
2. **ORDERS** that schedules 15 to 18, 20, and 22 to 30 in support of the application for leave to appeal be filed under seal;
3. **THE WHOLE** with legal costs.

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|  | | FRÉDÉRIC BACHAND, J.A. |
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| Mtre Miguel Bourbonnais  Mtre Jean-Philippe Mathieu  Mtre Daphné Anastassiadis | | |
| McCARTHY TÉTRAULT | | |
| For the appellants | | |
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| Mtre Audrey Boctor | | |
| IMK | | |
| For the respondent Woods | | |
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| Date of hearing: | January 27, 2022 | |

1. *Arrangement relatif à NMX Residual Assets Inc.*, 2021 QCCS 2308 [judgment *a quo*]. [↑](#footnote-ref-1)
2. *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc*., 2001 SCC 51; *Juman v. Doucette*, 2008 SCC 8. [↑](#footnote-ref-2)
3. R.S.C. (1985), c. C-44. [↑](#footnote-ref-3)
4. It is appropriate to add that the appellants do not rely on Woods’ awareness of the content of the settlement. Their application for disqualification is based only on the information acquired by Woods during Mr. Bourassa’s pre-trial examination. [↑](#footnote-ref-4)
5. A.S. at 178 to 196. [↑](#footnote-ref-5)
6. Case management order, November 27, 2019, A.S. at 135; R.S. at para. 7. [↑](#footnote-ref-6)
7. *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. [↑](#footnote-ref-7)
8. *Dussault* *c.* *9007-5433 Québec inc.*, 2020 QCCA 853 at para. 17; *Heafey* *c.* *Dormani*, 2018 QCCA 421 at para. 24. [↑](#footnote-ref-8)
9. *Lac d'Amiante*, *supra* note 2 at paras. 53 and 79. [↑](#footnote-ref-9)
10. *Juman*, *supra* note 2 at para. 27. [↑](#footnote-ref-10)
11. *Juman*, *supra* note 2 at para. 30. [↑](#footnote-ref-11)
12. *Lac d'Amiante*, *supra* note 2 at paras. 64–65, 76. [↑](#footnote-ref-12)
13. *Juman*, *supra* note 2 at paras. 25, 51; *Lac d'Amiante, supra* note 2 at para. 74. [↑](#footnote-ref-13)
14. *Lac d’amiante*, *supra* note 2 at para. 60. [↑](#footnote-ref-14)
15. *Juman*, *supra* note 2 at para. 56, see also para. 27. [↑](#footnote-ref-15)
16. CQLR, c. C-12. [↑](#footnote-ref-16)
17. *Lac d’amiante*, *supra* note 2 at para. 75. [↑](#footnote-ref-17)
18. *Juman*, *supra* note 2 at para. 1. [↑](#footnote-ref-18)
19. *Juman*, *supra* note 2 at para. 53. [↑](#footnote-ref-19)
20. *Dussault*, *supra* note 8 at paras. 21–23; *Heafey*, *supra* note 8. [↑](#footnote-ref-20)
21. *Dussault*, *supra* note 8 at para. 16. [↑](#footnote-ref-21)
22. *Kazandjian* *c.* *Burger King Restaurants of Canada Inc.*, 2015 QCCA 646 at para. 9; *Iredale* *c.* *Stroll*, 2007 QCCA 1779. [↑](#footnote-ref-22)
23. *Métro inc.* *c.* *Regroupement des marchands actionnaires inc.*, [2004] R.J.Q. 2665 (C.A.). [↑](#footnote-ref-23)
24. *Ibid.* at para. 54. [↑](#footnote-ref-24)
25. *Heafey*, *supra* note 8. [↑](#footnote-ref-25)
26. *MacDonald*, *supra* note 7 at 1243. See also *Ormiston v. Matrix Financial Corp*., 2002 SKQB 264 (CanLII) at para. 11. [↑](#footnote-ref-26)
27. *Merck & Co.* *v.* *Interpharm Inc.*, [1992] 3 F.C. 774 at 777–778 (F.C.). This excerpt in particular was cited with approval by the Court of Appeal of England and Wales in *British Sky Broadcasting Group plc v. Virgin Media Communications Limited*, [2008] EWCA Civ 612 at para. 23. [↑](#footnote-ref-27)