

**Lessons learned: Analysis of the Supreme Court of Canada's decision
in *C.N.R. v. McKercher***

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**Lessons learned: Analysis of the Supreme Court of Canada's decision
in *C.N.R. v. McKercher*¹**

In July 2013, the Supreme Court of Canada released its decision in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 (“*McKercher*”). This unanimous decision is significant to a number of issues of importance to Canadian lawyers.

The most obvious significance of *McKercher* is the reaffirmation and clarification of the bright-line rule established in *R. v. Neil*, [2002] 3 SCR 631. (“*Neil*”) Less obvious, but of no less significance for lawyers assessing conflicts, is the formulation of the test for disqualification where the bright line has been crossed. *McKercher* is also of interest on three further issues namely duties of commitment and candour in relations to conflicts, the respective roles of the courts and the law societies and the nature of the jurisdiction exercised by courts in dealing with conflicts.

In order to fully appreciate *McKercher*, this paper will first consider what was at issue in the *McKercher* case, then review past conflicts jurisprudence in the Supreme Court of Canada, and finally return to *McKercher* to consider the reasons of the Supreme Court of Canada.

The McKercher Issues

The essential facts of *McKercher* are mostly straightforward. The McKercher firm acted for the Canadian National Railway Co. (“CN”) in four matters namely (i) defending a personal injury claim, (ii) acting for CN as a creditor in a CCAA proceeding, (iii) acting for CN in a real estate transaction and (iv) acting as CN’s agent for service. While CN alleged that McKercher was CN’s “go to” firm in Saskatchewan, this was disputed by McKercher. Whatever the proper characterization, CN used a number of other firms in Saskatchewan and the amount of work actually done by McKercher was not particularly significant.

The McKercher firm took on a class action for Gordon Wallace (“Wallace”) against CN as plaintiff’s counsel. The class action alleged over one billion dollars in damages and alleged

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impropriety on the part of CN. The McKercher firm terminated some of its retainers for CN and did not disclose that it commenced acting for Mr. Wallace against CN.

The McKercher firm was clearly acting against a current client without consent. There was no doubt that the class action was “directly adverse to the immediate interests” of CN which is the “bright line” test from *Neil*. However, the McKercher firm argued that CN was a sophisticated litigant whose consent should be implied pursuant to *Neil*. McKercher also argued that the bright line rule did not prohibit retainers which did not put client representation at risk and that there was no reason to see any real risk of material impairment of the existing CN retainers arising from the class action.

The Court of Appeal for Saskatchewan found that McKercher had not breached the “bright line” rule but also found that McKercher had breached its duty of commitment by terminating some of the existing CN retainers and its duty of candour by failing to advise CN that it had accepted the retainer by Mr. Wallace to sue CN.

Protecting confidential information and the administration of justice

While the *McKercher* case is a “current client” conflict case, the relevant Supreme Court of Canada jurisprudence starts with *MacDonald Estate v. Martin*, [1990] 3 SCR 1235 (“*MacDonald Estate*”). *MacDonald Estate* was a “transferring lawyer” case in which a lawyer acting for one party in litigation joined the firm acting for the opposing party. While not strictly speaking a “former client” case, *MacDonald Estate* has been applied in “former client” cases as well as in “transferring lawyer” cases. This is because the principal issue in both types of cases is protection of confidential information.

In *MacDonald Estate*, Justice Sopinka for the majority concluded that lawyers should be disqualified in litigation where there is a risk of misuse of the confidential information of the opposing party. The “probability of mischief” standard was rejected as setting too low a standard. Justice Sopinka established a rebuttable presumption for determining possession of relevant confidential information. If the lawyer was acting opposite to a former client in a matter which substantially related to a matter in which the lawyer acted for the current client then it is presumed that confidential information from the old matter is relevant to new matter. However, this presumption can be rebutted. The lawyer may show that, despite the substantial relationship,

the lawyer is possessed of no relevant confidential information. This is a difficult presumption to overcome because the lawyer is not permitted to disclose any confidential information in seeking to demonstrate that the lawyer has no relevant confidential information.

This has become known as the “related matter” test. At issue is protection of confidential information. And since the confidential information of both current and former clients must be protected, the “related matter” test applies to both. This is why the controversy about current client conflicts is about “unrelated matters” where confidential information is, presumably, not in issue.

Where a lawyer is possessed of relevant confidential information and acts for an adverse party, there is obviously no way to determine whether the confidential information is used or not. The lawyer may not even realize that misuse is occurring. Clearly, promises by a lawyer that he or she will not use confidential information known by the lawyer are no answer. Disqualification is required.

The more difficult question is how to deal with other lawyers in the same firm. Justice Sopinka observed that lawyers talk about their cases within their firms and that this creates sufficient risk of misuse of confidential information that the firm should be disqualified. However, Justice Sopinka went on to suggest that the courts should not disqualify on this basis if the law societies establish confidentiality screening standards and approve the use of confidentiality screens.

In *MacDonald Estate*, the Court was not dealing with a former client of the lawyers of the firm other than the transferring lawyer. Unlike the typical “former client” case, the client of the transferring lawyer was never a client of the firm. The firm owed no contractual or fiduciary duties to adverse party in litigation with the client to whom an undivided duty of loyalty was owed. For this reason, it is no surprise that Justice Sopinka exercised the jurisdiction of the Court over the administration of justice as the basis to disqualify counsel. Justice Sopinka was careful to limit the ambit of the majority ruling to litigation. As he wrote:

The court's role is merely supervisory, and its jurisdiction extends to this aspect of ethics only in connection with legal proceedings. The governing bodies, however, are concerned with the application of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater part of the practice of law. It would be wrong, therefore, to shut out the governing body of a self-regulating profession

from the whole of the practice by the imposition of an inflexible and immutable standard in the exercise of a supervisory jurisdiction over part of it.

By both highlighting the role of the law societies to develop rules regarding confidentiality screens and by noting the limited role of the courts with respect to conflicts, Justice Sopinka emphasized the complementary roles of the courts and the law societies.

In *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189 (“*Celanese*”), the Supreme Court of Canada again addressed protection of confidential information in litigation but in rather different circumstances. Rather than information from a prior retainer for a client or information known by a transferring lawyer, *Celanese* dealt with information learned by lawyers as a result of the execution of an *Anton Piller* order. Unfortunately, the lawyers took privileged information that they were not entitled to access pursuant the order. As Justice Binnie put it “The disclosure of solicitor-client confidences came about not by egregious misconduct, but through a combination of carelessness, overzealousness, a lack of appreciation of the potential dangers of an Anton Piller order and a failure to focus on its limited purpose, namely the preservation of relevant evidence”.

Justice Binnie concluded that the governing authority was *MacDonald Estate* and disqualified the lawyers from continuing to act. He emphasized that disqualification was not intended as a punitive order but rather was intended to protect privileged information.

Clearly, *Celanese* was an exercise of the jurisdiction over the administration of justice. The party whose confidential information was at risk was not the client of the disqualified law firm. The disqualified law firm owed no contractual or fiduciary duty to the adverse party.²

² For the application of the same principles to a “transferring expert” case, see *Stewart v. Humber River Regional Hospital* (2009), 95 OR (3d) 161 (CA). As Goudge JA said:

[23] The starting point is that the courts have an inherent supervisory jurisdiction that extends to the removal of solicitors from the record where their conduct of legal proceedings would adversely affect the administration of justice (*MacDonald Estate*, at p. 1245 S.C.R.).

[24] Where solicitor-client information comes into the possession of the opposing party, this creates a serious risk to the integrity of the administration of justice. ...

Protecting the representation of current clients

In *R. v. Neil* [2002] 3 S.C.R. 631 (“*Neil*”), the Supreme Court turned to “current client” conflicts. The *Neil* case was a criminal law case in which an accused sought a stay of proceedings based on an allegation of conflict of interest on the part of his lawyer. Being a criminal law matter, the lawyer was not a party to the appeal. The “bright line” rule, which did not yet exist in Canada, was not raised in the courts below nor was it part of the submissions to the Court.

At the risk of oversimplification, there were two separate bases for the allegation of conflict in *Neil*. The first was that the firm that acted for Mr. Neil also acted for a co-accused. A “cut-throat” defence was available to the co-accused in which the co-accused would be characterized as Mr. Neil’s innocent dupe. The second was that the same firm acted in matrimonial proceedings in which forgeries by Mr. Neil were demonstrated. This evidence was turned over by a lawyer in the firm to a police officer involved in the criminal proceedings against Mr. Neil. It was alleged that the purpose for so doing was to impeach Mr. Neil’s credibility for the benefit of the co-accused.

Justice Binnie, writing for the Court, analyzed the conflicts question as a matter of fiduciary law and particularly the fiduciary obligation to avoid conflicting interests. In so doing, Justice Binnie applied what has come to be known as the “substantial risk principle”. While a slightly different formulation, the “substantial risk principle” is the traditional fiduciary principle dealing with conflicts of interest with duty and conflicts of duty with duty. As Justice Binnie wrote:

In my view the Venkatraman law firm, and Lazin in particular, put themselves in a position where the duties they undertook to other clients conflicted with the duty of loyalty which they owed to the appellant. I adopt, in this respect, the notion of a “conflict” in § 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as 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”. (emphasis added)

Justice Binnie also articulated a new “bright line” rule as follows:

... 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 added)

The phrase “even if the two mandates are unrelated” is a reference to *MacDonald Estate* and makes clear that the “bright line” rule applies irrespective of whether or not confidential information is at risk.

The impact of the “bright line” rule was somewhat limited in *Neil* by the proposition that professional litigants, such as governments and chartered banks, could be taken as “broad-minded” such that their informed consent could be implied. Also, as the Court emphasized judicial discretion as to remedy, not all “bright-line” crossings would result in disqualification. For example, where a complaint was viewed by the court as tactical, a remedy could be denied.

The policy basis for the “bright-line rule” is reasonably clear. The rule guards against impairment of client representation. The lawyer-client relationship may be compromised by feelings of betrayal where a lawyer acts in a matter directly adverse to the immediate interests of his or her client. From the other perspective, a lawyer might be tempted to “pull punches” so as not to offend the adverse client.

However, there are real policy problems with this rule as formulated in *Neil*. The rule applied in situations where there was no real risk of mischief. Naturally, some sophisticated clients prefer to keep control by stating that express consent is always required thereby defeating the prospect of implied consent. While flexibility in remedy is helpful where disqualification is sought from the court, this remedial flexibility is of limited if any assistance in day-to-day conflicts clearance. And some law societies adopted the “bright line” as a conduct rule without any of the remedial flexibility at least in part on the theory that the law societies must adopt conflicts rules set by the court.

The jurisdiction discussed in *Neil* is also significant. Recalling that *Neil* was a criminal law case in which a stay of proceedings was sought on the basis that defence counsel was conflicted, *Neil* was actually about the administration of justice and the rights of an accused. The lawyer alleged to have been in conflict was not a party to the appeal and no remedy was sought against him.

Yet in contrast to Justice Sopinka in *MacDonald Estate*, Justice Binnie in *Neil* invoked fiduciary law rather than the administration of justice in his reasons. And he made no reference to any limited supervisory role for the courts nor to the role of the law societies.

While this distinction between *MacDonald Estate* and *Neil* may seem abstract and theoretical, there are two potentially important implications that arise. The first, which is not a focus of this paper, is with respect to the development of fiduciary law. The conventional understanding is that fiduciary law is general in nature and does not differ for different types of fiduciaries. There should not be a different fiduciary law applicable to doctors, lawyers, investment advisors etc. As Professor Flanigan of the University of Saskatchewan put it³:

Conventional fiduciary regulation operates independently as a general regime of obligation. It is distinguishable from idiosyncratic nominate regulation. Legislatures and courts have, over time, attached a nomenclature, and discrete legal characteristics (rules), to numerous different physical arrangements. The categories of trustee/beneficiary, agent/principal and partner/partner are examples of relations subject to distinct nominate sets of legal rules. The legal content of each category is shaped by the unique nature and function of the physical arrangement. These distinct categories of arrangements are also simultaneously governed by a number of overlapping general liability regimes, primarily the contract, tort, criminal and fiduciary liability regimes.

A specific “fiduciary law of lawyers” or “fiduciary law of doctors” would be seen by Professor Flanigan as being nominate rather than general and accordingly an inappropriate application of fiduciary law. As Professor Flanigan further wrote:

Fiduciary accountability seeks to ensure that the performance of the nominate function is not compromised by the self-regarding impulse. It is a default regulation running parallel to the idiosyncratic nominate regulation of the distinct categories. Its function is to support nominate performance by controlling opportunism.

Thus, from the perspective of the development of fiduciary law, *Neil* was problematic and unnecessarily so given that the jurisdiction to supervise the administration of justice was more applicable and entirely sufficient.

The second potential implication was with respect to the role of the law societies. In *MacDonald Estate*, Justice Sopinka made clear that the “related matter” rule applied to matters before the courts and not more generally. In contrast, a fiduciary “bright line” rule would apply to all

³ Robert Flannigan, *The Boundaries of Fiduciary Accountability*, Canadian Bar Review, Vol. 83, p. 35, 2004

lawyer-client relationships. Recourse to fiduciary law rather than to protection of the administration of justice would mean that rules are set for lawyers generally. While there was no discussion at all of the point, Justice Binnie presumably did not think, as Justice Sopinka did, that “It would be wrong, therefore, to shut out the governing body of a self-regulating profession from the whole of the practice by the imposition of an inflexible and immutable standard in the exercise of a supervisory jurisdiction over part of it”.

This, in my view, explains the difficulties experienced in the profession since *Neil* with respect to whether the law societies should adopt the “bright line” rule as a regulatory rule. While some supported such a regulatory rule as a policy matter, there was little principled discussion and debate as to whether the “bright line” rule was necessary and appropriate as an additional regulatory rule. This is not entirely surprising as some law societies understood that the Court in *Neil* had established a fiduciary rule applicable to all lawyers in all retainers. For many, there was little left to consider⁴.

McKercher before the Supreme Court of Canada

Before the Court, CNR submitted that the “bright-line” rule was bright and plain.

Disqualification should follow as a matter of course where a lawyer acted in a matter directly adverse to the immediate interests of a current client. The Federation of Law Societies essentially supported CNR’s position saying that this was the intent of the Federation’s Model Rule.

McKercher submitted that informed consent should be implied because CNR was the archetypal sophisticated client and that implied consent should not trumped by ex post facto refusal. The Canadian Bar Association submitted that the “bright-line” rule should be understood as presumptive so as not to apply where it could be shown that there was no real risk of mischief.

⁴ In its *Report on Conflicts of Interest* of November 21, 2011, the Federation of Law Societies Standing Committee on the Model Code wrote “It is the view of the members of the Standing Committee that the approach of the Advisory Committee to the current client conflicts of interest rule was correct as it respected relevant jurisprudence and focused on protecting the public interest”. The centrality of the “relevant jurisprudence” to this conclusion is demonstrated by the absence of any real analysis as to advantages and disadvantages of the “bright line” in the public interest including any analysis as to whether existing less restrictive regulatory rules were in fact not sufficient to the task.

A “bright line” rule of limited scope

The Supreme Court in *McKercher* accepted none of these approaches and instead clarified and materially modified the “bright line” rule. First, the Court made clear that “the bright line rule applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting” and then only where the clients are adverse in legal interest. Mere adversity is not sufficient to engage the rule. Direct adversity to immediate legal interests in the matter is required. The Court observed, “The main area of application of the bright line rule is in civil and criminal proceedings”.

As in *Neil*, the Court in *McKercher* did not attempt to define the meaning of “directly adverse to immediate [legal] interests”. However, some guidance was provided in that Court observed that the relevant retainers in *Neil* and *Strother* were not “directly adverse to the immediate [legal] interests” of the current client. In *Neil*, the clients were co-accused. The conflict was in respect of the defence of Neil against charges brought by the Crown. This is described as an indirect and strategic adversity rather than a direct and legal adversity. In *Strother*, the effect on the current client was in the market place, whether one client would compete with the other. The Court described this as commercial adversity rather than legal adversity.

Second, the Court effectively replaced the unworkable concept of implied consent with a limitation to the scope of the rule. The “bright line” rule does not apply in unrelated matters where “it is unreasonable for a client to expect that its law firm will not act against it”.

Recognizing that cases where this limitation to the scope of the rule applies will be exceptional, this is an important change. The fiction of implied consent is replaced with objective examination of what a reasonable client would expect. The nature of the client is no longer the only issue. For example, 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, are properly considered. As the Court said at para. 37:

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.

Third, the Court moved the issue of tactical objections from a factor to be considered as to remedy to a limitation of the scope of the rule. The Court particularly noted that “The possibility of tactical abuse is especially high in the case of institutional clients dealing with large national law firms”. However, the Court also made clear that this limitation applies only where there has been an improper intent. As the Court said at para. 36:

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. (Emphasis added)

While the Court clearly rejected the proposition that the “bright line” rule is presumptive, the changes made by the Court to the scope of the rule substantially reduce apparent over-breadth by permitting consideration of essentially the same factors that would be considered if the rule were presumptive. Assessing reasonable expectations permits examination of the nature of the lawyer-client relationship and whether the nature of adverse retainer is such that the existing representation might be compromised. The statement that “The main area of application of the bright line rule is in civil and criminal proceedings” is, I think, significant both with respect the proper understanding of the concept of “directly adverse to immediate legal interests” and to assessment of “reasonable expectations”.

I think that what the Court has done is both subtle and significant. Previously, over-breadth in the “bright line” rule was thought tempered by the presumption that large clients would be reasonable and that courts could address remaining over-breadth in exercising discretion as to remedy. But conflicts must be cleared day-to-day and overwhelmingly practicing lawyers, not judges, have to decide conflicts. The presumption of broadmindedness on the part of large clients turned out to be wrong⁵. Perhaps understandably, no client gives up control that might be used to advantage. As well, large clients faced the invidious proposition that consent might be implied irrespective of the nature of their relationship with the lawyer and the nature and effect of the adverse claim.

⁵ For example, the Government of Canada seeks to require that all private sector lawyers engaged by the Government not act against the Government in Constitutional, Charter, First Nations, Official Languages and other specific matters whether or not the lawyers are retained to have anything whatsoever to do with those areas of law. I consider it to be fundamentally inappropriate that government would seek to restrict access to counsel for the public in this way.

Disqualification

The Court in *McKercher* also addressed the disqualification remedy. The Court reaffirmed that crossing the “bright line” does not automatically mean disqualification. As the Court said at para. 61:

... 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.

According to the Court, disqualification requires consideration of potential mischief (using the language from *MacDonald Estate*) whether misuse of confidential information, impairment of representation or harm to the administration of justice. Even if the “bright line” rule applies where there is no risk of mischief despite its newly limited scope, it appears that disqualification will not be available absent risk of mischief.

While emphasis was not given to the point, the Court elected to consider disqualification as a matter of its supervisory jurisdiction over the administration of justice rather than as a matter of fiduciary law. I think this important because it is a further indication that the “bright line” rule mainly applies to litigation.

The Substantial Risk Principle applies even where the “Bright Line” Rule is not engaged

The Court in *McKercher* made clear that lawyers had to apply both the “bright line” rule and the “substantial risk” principle in clearing conflicts involving current clients. But as a practical matter given the reduced scope of the “bright line” rule, it is difficult to see circumstances where the “bright line” would be crossed without the substantial risk principle not also being engaged. It is even more difficult to contemplate disqualification absent substantial risk of mischief.

Candour and Commitment

There are two further significant practice points that arise from *McKercher*. The first should be no surprise. In *Neil*, the Court noted that the duty of commitment to the client’s cause was an

aspect of the fiduciary duty of loyalty. The Court in *McKercher* concluded that it was improper for McKercher to unilaterally terminate its retainers with CN. As the Court said:

... 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 ...

In Ontario, Rule 2.09(1) of the *Rules of Professional Conduct* provide that "A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances".

The second practice point is more significant. The Court in *Neil* noted that the duty of candour with the client on matters relevant to the retainer is an aspect of the fiduciary duty of loyalty. The Court in *McKercher* stated at para. 45 that "This requires the law firm to disclose any factors relevant to the lawyer's ability to provide effective representation" and at para. 46 that:

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.

Clients are entitled to know when their lawyers act against them even where the lawyer concludes that there is no conflict. The client may disagree. And the client is entitled in any event to terminate the existing retainer.

Yet lawyers cannot breach their duty of confidentiality either. Consent is required from the new client to make the required disclosure to the current client. Where consent is not available, disclosure is not permitted. But to be clear, the absence of consent is not an excuse but rather is a "problem". Where a lawyer cannot obtain consent to make disclosure, the lawyer may not accept the adverse retainer. As the Court plainly said in *McKercher* at para. 47:

... 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.

Fiduciary Law, the Administration of Justice and the roles of the Courts and the Law Societies

In its intervention, the Canadian Bar Association raised the issue of the use of fiduciary law in *Neil* both as to the development of fiduciary law and the respective roles of the Courts and the Law Societies. None of the other parties addressed these issues which were not part of the oral argument. Nevertheless, the reasons in *McKercher* touch on this issue.

In contrast to *Neil* and like *MacDonald Estate*, the Court in *McKercher* addressed role of the Courts in resolving conflicts issues as a matter of the proper administration of justice. As the Court said at para. 16:

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: (citation omitted) 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” ...

The Court went on to refer to the “debate” between the Federation of Law of Law Societies and the Canadian Bar Association as to the appropriate regulatory conflicts rule. At para. 17, the Court stated:

... 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.

These reasons suggest a narrower approach to conflicts regulation by the courts than suggested by *Neil* and, like *MacDonald Estate*, a greater respect for the separate role of the law societies by limiting the role of the courts to protection of the administration of justice rather than general regulation through a nominate fiduciary law of lawyers.

The Response of the Law Societies

What remains to be seen is the regulatory response to *McKercher*. The Federation of Law Societies immediately announced that the Model Code was consistent with *McKercher*. But the Federation argued in *McKercher* that the intent of the Model Code was to specifically prohibit

retainers directly adverse to the immediate legal interests of current clients. While that proposition is controversial, it is not consistent with the narrowed scope of the rule established in *McKercher* nor with the judicial approach to disqualification. Perhaps the point is that the Model Code, in its commentary, attempts to describe the law and therefore evolves with the law. I think that is a fair read of the commentary but that remains to be seen.

Conclusion

In my view, the decision of the Court in *McKercher* is significant and not a mere reaffirmation of *Neil*. The Court has effectively established the primacy of the “substantial risk principle” which must be applied whether or not the “bright line” rule is engaged. Where a substantial risk of material impairment of client representation arises from a retainer adverse to a current client⁶, the lawyer may not act absent proper consent. This is well established fiduciary law that makes the client sovereign in deciding which risks to accept and which not to accept.

It is difficult to imagine circumstances where the “substantial risk principle” will not apply yet the lawyer would be disqualified by the Courts because of the “bright line” rule; taking into account (i) the narrowness of the “directly adverse to immediate legal interests” test, (ii) the limiting of the scope of the rule to “reasonable expectations”, (iii) the statement that the rule applies mainly to civil and criminal litigation and (iv) the principled basis for disqualification.

While it may be that the “bright line” rule provides a simpler and more straight-forward rule for day-to-day conflicts clearance than the “substantial risk principle”, I doubt that there is now much, if any, difference between the two. I think this entirely appropriate believing that clients should only be deprived of their choice of counsel, and lawyers should not be disqualified, absent any genuine risk of mischief.

Of course, the Chief Justice noted in her reasons that “[u]ltimately, courts must conduct a case-by-case assessment” with respect to reasonable expectations and the ambit of “directly adverse to immediate legal interests” remains to be fully elaborated. My interpretation of the *McKercher* reasons is only that. The proof in the pudding will be what courts do, no doubt influenced by the facts before them.

⁶ or because of a personal interest or a duty to any current client, former client or anyone else.

Most significant though is the application of the duty of candour to matters adverse to current clients. If there was any doubt, there is no longer. Clients are entitled to know when their lawyers are acting adverse to them. And if the lawyer can't make disclosure then the lawyer can't act.