

THREE STRIKES AND YOU'RE OUT ... OR MAYBE NOT: A COMMENT ON *CANADIAN NATIONAL RAILWAY CO V MCKERCHER LLP*

Brent Cotter* and Richard Devlin**

1. Introduction

*Canadian National Railway Co v McKercher*¹ is the fourth in a series of cases in the last twenty-three years in which the Supreme Court of Canada has articulated standards for the regulation of potential conflicts of interest by lawyers.² This comment examines and assesses the Supreme Court of Canada's recent decision in *McKercher* by placing it in the context of the jurisprudence and the conflicting professional perspectives that have developed in Canada during the last decade.

We begin in Part 2 by reviewing the state of the Canadian jurisprudence with a particular focus on the Supreme Court's "conflicts trilogy." We also examine the debates that have developed within the Canadian legal profession on the subject of conflicts of interest since the Supreme Court's 2002 decision in *R v Neil*,³ and the outcome of those debates within the legal profession. In Part 3, we review the *McKercher* case, the lower level decisions, and the basis upon which the Court reached its decision. In Part 4, we identify several strengths of the decision, and in Part 5 we note three concerns. Part 6 suggests some practical lessons that lawyers, law firms and regulators might learn from the decision. Part 7 offers a brief conclusion.

* Professor of Law, University of Saskatchewan. He advised the Federation of Law Societies of Canada in relation to the conflict of interest provisions of the Federation's *Model Code of Professional Conduct*.

** University Research Professor and Professor of Law, Schulich School of Law at Dalhousie University. Jessica Buhler, JD 2014, and Colin Jackson, PhD candidate, assisted the authors in the final review of this paper. We also benefitted from suggestions by an anonymous reviewer and Paul Miller. The financial support of the Schulich Academic Excellence fund is gratefully acknowledged.

¹ *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 [*McKercher*].

² The previous three cases are *MacDonald Estate v Martin*, [1990] 3 SCR 1235 [*Martin v Gray*]; *R v Neil*, 2002 SCC 70, [2002] 3 SCR 631 [*Neil*]; and *Strother v 3464920 Canada Inc*, 2007 SCC 24, [2007] 2 SCR 177 [*Strother*].

³ *Neil*, *ibid*.

2. *Setting the Context: Canadian Jurisprudence on Conflicts of Interest*

While the issue of lawyers and conflicts of interest has been appreciated by the legal profession for a very long time, the most meaningful jurisprudential consideration of conflicts in Canada began with the decision of the Supreme Court of Canada in *Martin v Gray* in 1990. Prior to that time, the governing principle for conflicts was whether a reasonably informed person would consider a lawyer's representation of a particular client to be unfair to, or have significant potential for prejudice to, another client. In most cases this turned on the question whether the lawyer possessed, or might possess, confidential information from one client that could jeopardize the interests of another present or former client. This invited a consideration of whether there was a risk (or the reasonable perception of a risk) of harm to the client whose information was now, at least potentially, able to be used against that client's interests. While these considerations continue to be important, *Martin v Gray* approached the question from a different perspective and launched the Canadian legal profession and judiciary on a conflicts journey that continues with *McKercher*.

Martin v Gray was a "transferring lawyer" case. A junior lawyer was involved in the representation of a client in estate litigation. The firm dissolved when the senior partner was appointed to the bench, and the lawyer subsequently joined the law firm that represented the adversary in the estate litigation.⁴ Sopinka J, writing for a bare majority in the case, was attentive to the risk to a client in a situation where the "conflicted lawyer" possessed relevant confidential information acquired from the vulnerable client and which could be used against that client – the so-called "probability of real mischief" test.⁵ But he began by placing the issues squarely within a public policy context. Sopinka J identified three public policy issues at stake – respect for the integrity of the administration of justice, the interest of lawyers in reasonable mobility within the legal profession, and the right of clients to choice of counsel.⁶ His view was that while all three were important, respect for the administration of justice was the paramount public policy value.⁷ He concluded that where a reasonable possibility exists that confidential information might be compromised, a high standard is called for in order to maintain public confidence in the administration of justice. The test for absence of conflict was that the relationship "must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information

⁴ *Martin v Gray*, *supra* note 2 at 1239-40.

⁵ *Ibid* at 1246-47.

⁶ *Ibid* at 1243.

⁷ *Ibid* at 1243-44.

would occur.”⁸ Such a possibility existed in the case, and the offending law firm was disqualified. Recognizing the high bar set by this test, and the fact that it offered little room for consideration of the other public policy values he articulated, Sopinka J invited the legal profession to develop rules that might better protect clients’ confidential information and make it possible for lawyers and law firms to avoid disqualification in future cases of a similar nature.⁹ Law societies took up this challenge and developed extensive professional rules to better protect confidential information, reduce the risk of its inappropriate disclosure within a law firm¹⁰ and reduce the consequent risk of disqualification of a lawyer or law firm from representation of a client adverse in interest.¹¹

Martin v Gray and the associated law society rules and commentaries were the governing framework for “current client” conflicts of interest until 2002 when the Supreme Court of Canada rendered its decision in the unusual case of *Neil*. This was a case in which a lawyer, in advancing the cause of one client, Lambert, egregiously violated his duties owed to another client, Neil. These violations included the lawyer’s acquisition of confidential and privileged information from his client, Neil, to assist in the defence of Lambert, to the clear disadvantage of Neil, and the strategic use of certain non-confidential information, again to the advantage of Lambert and to the disadvantage of the Neil.¹² Neil sought to have certain criminal convictions associated with these circumstances set aside on the basis of that his lawyer’s acquisition and use of the information was an abuse of process against Neil.

Writing for a unanimous Court, Binnie J declined to grant the unusual remedy sought by Neil,¹³ but addressed at length the nature of the

⁸ *Ibid* at 1260. Cory J, in a concurring judgment, would have set the standard even higher; see *ibid* at 1266-67.

⁹ *Ibid* at 1262.

¹⁰ *Martin v Gray* and subsequent regulatory initiatives introduced “cones of silence” and “ethical screens” into formal legal usage. “Ethical screens” are law society-approved mechanisms that insulate certain lawyers and client files from other lawyers in a law firm so that the law firm can represent or continue to represent a client. Absent these screens, the information possessed by certain lawyers in the firm would lead to a disqualifying conflict of interest.

¹¹ In a number of jurisdictions, a separate chapter was added to the law society’s code of professional conduct. For example, in April of 1995 the Law Society of Saskatchewan developed a new Chapter of its Code, Chapter V A, focused solely on the management of “transferring lawyer” conflicts. In the Federation of Law Societies of Canada *Model Code of Professional Conduct*, adopted in November 2011, Rules 3.4 (17-26) address “transferring lawyer” conflicts.

¹² *Neil*, *supra* note 2 at para 8.

¹³ *Ibid* at paras 44-47.

offending lawyer's conduct. In the course of the judgment, Binnie J elevated the standards to be applied in matters involving lawyers and alleged conflicts of interest. While acknowledging the legitimacy of the public policy factors identified by Sopinka J in *Martin v Gray*,¹⁴ Binnie J grounded his analysis on first principles regarding the lawyer's duty to his or her client. In this respect he emphasized the fiduciary nature of this duty and set out in some detail the governing principle – the lawyer's duty of loyalty.¹⁵ The components of this duty of loyalty include a duty to preserve confidences, a duty to avoid conflicts of interest, a duty of commitment to the client's cause and a duty of candour to the client.¹⁶ In Binnie J's view, violations of this duty of loyalty could occur even in cases where confidential information was not compromised.¹⁷

The most significant, and controversial, dimension of *Neil* builds upon this principle of loyalty. In the decision, Binnie J articulated the test to be applied to “current client” conflicts of interest. He referred to this as a “bright line” rule:

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.¹⁸

In a later part of the judgment, Binnie J offered a definition of conflict consistent with the second part of the “bright line” rule:

I adopt, in this respect, the notion of a “conflict” in s. 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.”¹⁹

¹⁴ *Ibid* at paras 12-15.

¹⁵ *Ibid* at para 16.

¹⁶ *Ibid* at para 19.

¹⁷ *Ibid* at para 17.

¹⁸ *Ibid* at para 29 [emphasis in original].

¹⁹ *Ibid* at para 31.

As Adam Dodek has recounted in detail, conflicting interpretations of these two statements have generated a major tension within the legal profession since *Neil*.²⁰

The third case in the trilogy was *Strother v Monarch Entertainment Ltd*, a case in which Monarch, a client of Strother, sued Strother and his law firm for an alleged breach of Strother's fiduciary duty. Strother had represented Monarch with respect to extensive financing of Hollywood films made in Canada which generated attractive tax benefits for investors in the production of these films.²¹ When the tax benefits appeared to have been closed off through amendments to the tax laws of Canada,²² Monarch wound down its business but continued to use Strother's and the law firm's services.²³ At about this time, Strother, in concert with Darc (a former Monarch employee) applied for an advance tax ruling²⁴ in the hope that a portion of the generous tax treatment of these film financing investments might still be available. Strother and Darc secretly intended to start up their own film financing business if they received a positive ruling.²⁵ Upon receiving that favourable ruling, Strother and Darc launched their own business, a venture that proved to be highly successful.²⁶ Strother never disclosed to Monarch (or to his law firm) that he had made an application for an advance tax ruling or that, if a favourable ruling was obtained, he planned to leave the law firm and, with Darc, launch a business in competition with Monarch. When Monarch learned, some months later, of what had occurred, it sued Strother and his law firm for breach of fiduciary obligations owed to Monarch.

In assessing Strother's duty to Monarch, the Supreme Court of Canada, by a bare majority, concluded that a lawyer's fiduciary duty to a client can extend beyond the strict terms of a retainer, and can include a penumbra beyond the scope of the retainer itself. Binnie J, writing for the majority, stated:

The solicitor-client relationship thus created [by the retainer] is, however, overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. The Davis factum puts it well:

²⁰ Adam Dodek, "Conflicted Identities: The Battle over the Duty of Loyalty in Canada" (2011) 14 *Legal Ethics* 193.

²¹ *Strother*, *supra* note 2 at para 3.

²² *Ibid* at para 8.

²³ *Ibid* at paras 9, 16.

²⁴ *Ibid* at para 13. Advance tax rulings are decisions sought from the Government of Canada that enable citizens to know in advance that, if they organize their financial affairs in a certain way, their affairs will be given a pre-determined tax treatment.

²⁵ *Ibid*.

²⁶ *Ibid* at para 19.

The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence from which flow obligations of loyalty and transparency.²⁷

In the case itself, the majority concluded that it is legitimate, and not a breach of the duty of loyalty to a client, for a law firm to concurrently represent the interests of competitors, provided always that the rights and interests of the clients – for example, the rights of each client to expect unqualified commitment from its lawyer, and to expect that its confidences will be honoured – are properly protected. As a consequence, the mere fact that the law firm may have represented competitors did not establish a conflict of interest on the part of the firm. In this respect the case introduced a qualification or modification to the *Neil* test by limiting the definition of what constitutes “direct adversity” between clients, essentially articulating that conflicting “business” interests between clients do not necessarily constitute an “adverse interest” within the “bright line” rule. However, the majority found that Strother had put his own personal and financial interests into conflict with his client, Monarch, and, given the nature of the duty owed by Strother, had accordingly breached his fiduciary duty to Monarch.²⁸ Ultimately then, *Strother* is a case of a conflict between a client’s interests and the interests of his or her lawyer.

Even with the qualification set out in *Strother*, the “bright line” rule established in *Neil* with respect to “current client” conflicts continued to generate one of the greatest controversies within the Canadian legal profession in recent times. Debates regarding the meaning and application of the “bright line” rule have continued for a decade, pitting high profile constituencies within the legal profession against one another. Specifically, the Canadian Bar Association (CBA) and its advisors strongly opposed a literal interpretation of the “bright line” rule and argued variously that the rule is *obiter*; that it should be interpreted narrowly; and that it should be interpreted exclusively through the lens of “substantial risk” as referred to in the definition of “conflict of interest” adopted by Binnie J in the *Neil* decision.²⁹ In contrast, the Federation of Law Societies of Canada (FLSC), in the final version of the conflict of interest provisions in its *Model Code of Professional Conduct*, adopted an interpretation of *Neil* that is closer to a literal interpretation and application of the “bright line” rule, though

²⁷ *Ibid* at para 34, quoting the Davis & Company factum at para 95.

²⁸ *Ibid* at paras 50, 67.

²⁹ CBA Task Force on Conflicts of Interest, *Conflicts of Interest: Final Report, Recommendations & Toolkit* (2008, Canadian Bar Association), ch 2, esp at 35-51.

taking into account the *Strother* qualification by adding the requirement of “legal” adversity between current clients before the rule could be triggered.³⁰

To say that the disagreement has been heated would be an understatement. Aside from the questions of principle that are raised by the debate, the ability of law firms to represent clients adverse in interest has dramatic implications for lawyers and their clients from both business and access to justice perspectives. As a consequence, *McKercher* became a lightning rod for this debate, and a much-needed opportunity for the Supreme Court of Canada to clarify, modify or restate its views on the question.

3. *Wallace: The Facts, the Issues and the Decisions*

A) *The Facts of the Case*

In late 2008, the McKercher law firm commenced a class action on behalf of a farmer, Gordon Wallace, against the Canadian National Railway (CN) and others, alleging that they had systematically overcharged farmers in relation to grain transportation charges over the previous twenty-five years, and sought \$1.75 billion in damages.³¹ The plaintiff alleged various forms of reprehensible behaviour on the part of the defendants, including CN. The McKercher firm had, from time to time, been one of a number of law firms providing legal services to CN in Saskatchewan.³² In the previous five years McKercher LLP had billed CN approximately \$70,000 in legal fees, slightly less than one-third of the total legal fees paid by CN to Saskatchewan law firms over that time.³³ At the time of the commencement of the Wallace class action, McKercher was representing CN on four matters:

- a real estate transaction, in which McKercher, shortly after the commencement of the *Wallace* litigation, sought but was refused CN's consent to continue the representation;³⁴

³⁰ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, 2012, rule 3.4-1 and commentary [FLSC Model Code]. This was achieved by including “loyalty” in the Commentary 1 description of a conflict of interest, and by referencing *Neil* and *Strother* in restating the substance of the “bright line” rule (modified by the *Strother* qualification) in Commentary 6.

³¹ *Wallace v Canadian Pacific Railway*, 2009 SKQB 369 at paras 13, 16, [2009] 12 WWR 157 [*Wallace SKQB*].

³² *Ibid* at para 9.

³³ *Wallace v Canadian Pacific Railway*, 2011 SKCA 108 at para 7, (2011), 375 Sask R 218 [*Wallace SKCA*].

³⁴ *Ibid* at para 15.

- a litigation matter, in which, just prior to the commencement of the *Wallace* litigation, McKercher notified CN that it was withdrawing as counsel;³⁵
- the representation of CN in a receivership matter, in which, shortly after the commencement of the *Wallace* litigation, McKercher withdrew (though without direct notification to CN);³⁶ and
- the holding of powers of attorney for CN by two McKercher lawyers, which the lawyers terminated shortly after the commencement of the *Wallace* litigation.³⁷

CN did not generally give consent to law firms to act against its interests, but had not shared this policy with McKercher.³⁸ None of the above-noted matters were related to the *Wallace* litigation that McKercher had commenced. McKercher had gained information about CN's "approach to litigation, its business practices and its risk perspective and tolerance," but was not privy to specific confidential information related to the *Wallace* matter.³⁹ In this context, CN brought an application to disqualify McKercher from representing *Wallace* in the class action against it.

B) The Trial Court Decision

Popescul J disqualified McKercher. Although he preferred a more limited interpretation of the "bright line" rule in *Neil*, requiring the establishment of a substantial risk to the complaining client before the rule is contravened,⁴⁰ he found that such a risk to CN existed by virtue of McKercher's representation of *Wallace* against CN. He based his decision on a number of factors: (a) there was a long-standing relationship between McKercher and CN; (b) CN relied primarily on McKercher as its "go-to" firm in Saskatchewan; (c) the magnitude of the *Wallace* claim was substantial and not minor and had the potential for significant damages; (d) the *Wallace* claim was a litigation matter which would necessarily be adversarial; (e) the *Wallace* claim was a class action, which would marshal numerous litigants against CN and the other defendants; (f) the remedy sought included aggravated and punitive damages, implying reprehensible behaviour on the part of CN; (g) CN was especially sensitive to conflicts of interest among its counsel and felt betrayed by McKercher, which in the

³⁵ *Ibid* at para 12.

³⁶ *Ibid* at para 17.

³⁷ *Ibid* at para 16.

³⁸ *Ibid* at paras 20-21.

³⁹ *Wallace SKQB*, *supra* note 31 at paras 47 ("The sensitivity of CN"), 81.

⁴⁰ *Ibid* at paras 30-32.

course of acting for CN had received information, which Popescul J found to be confidential information, about CN's attitudes and approaches to legal problems; and (h) because of the nature of class actions, a law firm tends to gain or lose significantly and have a greater interest than mere advocates.⁴¹ Popescul J also determined that there was no evidence that CN was bringing the application for "tactical reasons."⁴²

C) The Court of Appeal Decision

McKercher appealed the disqualification order. The Saskatchewan Court of Appeal, in a unanimous decision, concluded that McKercher had violated certain aspects of its duty of loyalty to CN, notably its duties of candour and commitment to the client's cause, but was not in a conflict of interest.⁴³ Ottenbreit JA, writing for the Court, adopted the submissions of Wallace's and McKercher's counsel that the "bright line" rule was qualified by the requirement that "substantial risk to the client" must be established. He found that the information available to McKercher about CN's approaches to litigation and its general litigation strategies did not constitute "confidential information" that could establish "substantial risk," and that McKercher's breaches of its duties of candour and commitment were not suitably remedied by disqualification.⁴⁴ He preferred to leave to the Law Society of Saskatchewan any consideration of sanction for McKercher's breaches of these duties.⁴⁵

Ottenbreit JA also found that CN fell into the category of "professional litigant." This was an exception to the "bright line" rule identified by Binnie J in *Neil* on the basis that, for reasons of expediency, certain institutional clients impliedly consent to their law firms acting against them in unrelated matters.⁴⁶ In the view of Ottenbreit JA, CN, as a professional litigant, could not subsequently withdraw its implied consent and challenge McKercher's decision to act against it in the Wallace class action. CN, unsurprisingly, appealed to the Supreme Court of Canada.

D) The Supreme Court Decision

In a unanimous and relatively brief decision, written by McLachlin CJC, the Supreme Court set the stage by identifying its role to delineate and

⁴¹ *Ibid* at para 47.

⁴² *Ibid*.

⁴³ *Wallace SKCA*, *supra* note 33 at para 2.

⁴⁴ *Ibid* at paras 76-80, 106-108, 116.

⁴⁵ *Ibid* at para 114.

⁴⁶ *Ibid* at para 90.

apply legal principles in matters that come before the courts.⁴⁷ The Court described the role of law societies, on the other hand, to be to fulfill their legislatively mandated responsibility to “establish general rules applicable to all members to ensure ethical conduct, protect the public and discipline lawyers who breach the rules – in short, the good governance of the profession.”⁴⁸ At the same time, the Chief Justice asserted that its role was not as a mediator between conflicting views in the legal profession regarding the rules applicable to conflicts of interest.⁴⁹

In its analysis the Court did five things. First, confirming *Neil* and the principle of loyalty upon which it is based, it made clear that the operation of the “bright line” rule was a freestanding test, whereas the requirement to establish “substantial risk” only applies where the “bright line” rule is inapplicable.⁵⁰ Second, the Court clarified and consolidated the four situations or circumstances where the “bright line” rule is inapplicable, describing this as the “scope” of the rule.⁵¹ Third, the Court addressed two other dimensions of the duty of loyalty – the lawyer’s duty of commitment to the client, and the lawyer’s duty of candour. Fourth, the Court made it clear that the remedy of disqualification, while “generally the only appropriate remedy” for a breach of the duty of loyalty, is not automatic.⁵² The question should be answered after consideration of a series of other factors: accommodating law society rules; the continued concurrent representation of the client adverse in interest; harm to the repute of the administration of justice; risk of misuse of confidential information; behaviour that might disentitle the complaining party to the remedy of disqualification; significant prejudice to the new client’s interest in obtaining it counsel of choice or obtaining new counsel; and the good faith of the law firm sought to be disqualified.⁵³ Fifth, in its application of these principles, the Court found *McKercher* to have violated the “bright line” rule and to have breached its duties of commitment and candour.⁵⁴ Nevertheless, the Court, as a matter of “fairness,” referred the matter back to the chambers judge to reconsider the application for disqualification in light of the principles it enunciated.⁵⁵

47 *McKercher*, *supra* note 1 at paras 13-15.

48 *Ibid* at para 15.

49 *Ibid* at para 17.

50 *Ibid* at paras 8, 38-40.

51 *Ibid* at paras 30-37, 41.

52 *Ibid* at paras 60-65.

53 *Ibid* at paras 62-65.

54 *Ibid* at paras 51-53, 55, 57.

55 *Ibid* at para 67.

4. Home Runs

There are three aspects of this case that are to be commended: the analytical approach adopted by the Supreme Court; the relative clarity of the decision on the nature of the “bright line” rule; and the elaboration of two key elements of the duty of loyalty – the duties of commitment and candour.

A) The Analytical Approach

A comparison of the Court of Queen’s Bench decision, the Court of Appeal decision and the Supreme Court of Canada decision in *McKercher* sheds some light on how best to approach cases involving the duty of loyalty.

McLachlin CJC was clear in her analytical approach. She began by outlining the “Governing Principles” such as the duty of loyalty to clients, and then highlighted its “three salient dimensions: (1) a duty to avoid conflicting interests; (2) a duty of commitment to the client’s cause; and (3) a duty of candour.”⁵⁶ She then proceeded to unpack the specifics of each of these three dimensions, particularly emphasizing the centrality of the “bright line” rule, but also identifying some significant limitations.⁵⁷ She then applied each of the three dimensions of the duty of loyalty to facts of the case and, without qualification, found that McKercher had crossed the bright line, violated its commitment to its client’s cause, and breached its duty of candour.⁵⁸ She found no basis upon which to invoke any of the limitations on the duty of loyalty.

By contrast, the analytical approaches adopted by the trial judge, Popescul J, and by Ottenbreit JA in the Saskatchewan Court of Appeal, were much less coherent. Although the trial judge sought to articulate fundamental principles, the decision tended to get bogged down in working through the “bright line” rule, the “professional litigant” exception, the “substantial risk” principle, the “unrelated matter” rule and the “materially and adversely affected” test. Although he was sympathetic to limitations on the “bright line” rule and preferred to rely on the “substantial risk” test, Popescul J ultimately found that McKercher should be disqualified on the basis that it possessed confidential information about CN’s attitudes and strategies toward litigation,⁵⁹ and that its “dumping” of its client would be

⁵⁶ *Ibid* at para 19, citing *Neil*, *supra* note 2 at para 19.

⁵⁷ *Ibid* at paras 20-47.

⁵⁸ *Ibid* at paras 48-59.

⁵⁹ *Wallace SKQB*, *supra* note 31 at paras 79-85.

an “affront to fair play and decency.”⁶⁰ As a result, one comes away from the case feeling that one has been dragged through a lawyer’s quagmire.

The Court of Appeal decision was less sympathetic to the complaining litigant, CN, and largely rejected CN’s concerns about the dimension of loyalty that relates to conflict of interest. Ottenbreit JA was highly solicitous of the position of the CBA and appeared to be more interested in establishing boundaries around the “bright line” rule by limiting its application to cases where there is also a proven “substantial risk” to the client, as opposed to developing and articulating a principled approach to its analysis. The case for rejection of the “bright line” rule is both weak and unconvincing⁶¹ and the analysis of *Neil* is, accordingly, almost non-existent.⁶² Wrestling with many of the issues faced by the trial judge, Ottenbreit JA also struggled with a) the basis upon which to sustain the professional litigant exception in the face of CN’s “withdrawal of consent;” b) McKercher’s breaches of commitment and candour; and c) the appropriate remedy. The Court of Appeal seems to have gotten lost in the same quagmire that swallowed Popescul J. To the credit of the Supreme Court, *McKercher* now offers us an approach that is principled, logical, concise and clear.

B) Clarification of the Law

Secondly, *McKercher* clarified the “bright line” rule and the context and circumstances in which it does not apply. As we have seen, this rule had been initially articulated by Binnie J in *Neil* when he stated:

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.⁶³

⁶⁰ *Ibid* paras 68-69.

⁶¹ *Wallace SKCA*, *supra* note 33 at para 59, Ottenbreit JA observed that the Law Society of Saskatchewan “has never adopted the literal interpretation of the ‘Bright Line’ Rule,” suggesting the Law Society’s opposition to such a rule. Despite his awareness of the heated debate on the issue, he either ignored, or was unaware of, the fact that law societies across the country were awaiting the finalization of the Model Code provisions on conflicts of interest before modifying their respective codes of professional conduct on the point in contention in *McKercher*.

⁶² The analysis on this point is limited to the recitation of the CBA’s position and the adoption of Popescul J’s statement of the law; see *ibid* at para 60.

⁶³ *Neil*, *supra* note 2 at para 29 [emphasis in original].

As we have also seen in his reasons for decision in *Neil*, however, Binnie J adopted “substantial risk” as the definition of a conflict.⁶⁴ Though a literal reading of the whole of the “bright line” rule appears to make clear that “substantial risk” is an additional basis for finding a breach of the duty of loyalty on the basis of conflict of interest, even where the bright line is not compromised (a penumbral test, so to speak), some commentators had chosen to interpret *Neil* to mean that only a situation of “substantial risk” to the client led to a breach of the duty of loyalty and consequent disqualification.⁶⁵ Most significantly, this interpretation led to an historic confrontation between the CBA and the FLSC as to the proper test to govern conflicts of interest in Canada.⁶⁶

The unanimous Supreme Court decision in *McKercher* now clarifies the law. The starting point is a “clear prohibition”⁶⁷: the “bright line” rule, as articulated by Binnie J. The Chief Justice stated:

The rule expressly applies to both related *and* unrelated matters. It is possible to argue that a blanket prohibition against concurrent representation is not warranted with respect to unrelated matters, where the concrete duties owed by the lawyer to each client may not actually enter into conflict. However, the rule provides a number of advantages. It is clear. It recognizes that it is difficult – often impossible – for a lawyer or law firm to neatly compartmentalize the interests of different clients when those interests are fundamentally adverse. Finally, it reflects the fact that the lawyer-client relationship is a relationship based on trust. The reality is that “the client’s faith in the lawyer’s loyalty to the client’s interests will be severely tried whenever the lawyer must be loyal to another client whose interests are materially adverse.”: *Restatement of the Law Third: The Law Governing Lawyers* (2000), vol. 2, §. 128(2), at p. 339.⁶⁸

⁶⁴ *Ibid* at para 31.

⁶⁵ See, for example, the CBA Task Force on Conflicts of Interest (2007), and the opinion of Michel Bastarache, attached as an appendix to the Federation of Law Societies of Canada, Special Advisory Committee on Conflict of Interest, *Supplementary Report*, February 2011, online: <www.flsc.ca/_documents/Supplementary-Report-Conflicts-of-Interest-Feb-2011.pdf>

⁶⁶ See Dodek, *supra* note 20 at 206-13. In our view, the core of the controversy revolved around the reluctance of some to acknowledge the role of the Supreme Court of Canada as a “policy-making” Court, preferring instead to parse the ratio of the case and seek, as lawyers commonly do, to limit the application of *Neil* to its specific, and some would say, unique circumstances. As Dodek notes, the conflicting views led to a multi-year delay in the FLSC’s concluding its *Model Code of Professional Conduct*; see *ibid* at 210-13. Both the CBA and the FLSC intervened in *McKercher*.

⁶⁷ *Wallace*, *supra* note 1 at para 26.

⁶⁸ *Ibid* at para 28.

She then continued:

The parties and interveners to this appeal disagreed over the substance of the bright line rule. It was variously suggested [by the CBA] that the bright line rule is only a rebuttable presumption of conflict, that it does not apply to unrelated matters, and that it attracts a balancing of various circumstantial factors that may give rise to a conflict. These suggestions must be rejected. Where applicable, the bright line rule prohibits concurrent representation. It does not invite further considerations. As Binnie J. stated in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, “[t]he ‘bright line’ rule is the product of the balancing of interests not the gateway to further internal balancing”: para. 51. To turn the rule into a rebuttable presumption or a balancing exercise would be tantamount to overruling *Neil* and *Strother*. I am not persuaded that it would be appropriate here to depart from the rule of precedent.⁶⁹

In short, the “bright line” rule “reflects the essence of the fiduciary’s duty of loyalty.”⁷⁰

The Chief Justice then proceeded to articulate four circumstances in which the “bright line” rule does not apply. The first is where the interests of the parties are either not immediate or not directly adverse.⁷¹ This is itself a restatement – with emphasis – of one part of the “bright line” rule in *Neil*. The second circumstance in which the “bright line” rule does not apply is if the interests at stake are not “*legal*” interests.⁷² The italics are those of the Chief Justice. She cited both *Neil* (a strategic interest) and *Strother* (a commercial or business interest) as examples in which the “bright line” rule was not applicable.⁷³ It is to be noted that the FLSC has incorporated the first two limitations in its Model Code provisions dealing with conflicts of interest.⁷⁴

The third qualification is where a party has engaged in tactical abuse of the “bright line” rule, essentially using it to seek, illegitimately, to impose burdens on the party adverse in interest and/or to delay proceedings.⁷⁵ This is a consolidation of the limitations of the “bright line”

⁶⁹ *Ibid* at para 29.

⁷⁰ *Ibid* at para 31.

⁷¹ *Ibid* at para 33.

⁷² *Ibid* at para 35.

⁷³ *Ibid*.

⁷⁴ FLSC Model Code, rule 3.4-1, Commentary 6, states in part “a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent.”

⁷⁵ *McKercher*, *supra* note 1 at para 36.

rule articulated in Sopinka J's reference in *Martin v Gray* to the ways in which a party may organize its affairs or advance its interests, promoting "form at the expense of substance, and tactical advantage instead of legitimate protection."⁷⁶

The fourth limitation arises in the circumstances where it would be unreasonable for a client to expect that its law firm will not act against it in unrelated matters.⁷⁷ This, in our opinion, is a subtle but important revision of the previously articulated "professional litigant" exception as first mentioned in *Neil* and embraced by Ottenbreit JA in *Wallace SKCA*. It expands the reach of this limitation to the "bright line" rule. In *Neil*, Binnie J spoke of the basis for this exception being 'implied consent.'⁷⁸ That is, certain large institutional clients, such as governments and banks, depending on the circumstances, "accept" that their lawyers will act against them in unrelated matters, and impliedly consent to this adverse representation.

While this basis for the so-called "professional litigant" exception seems attractive, it has proven to be a difficult concept to apply, as *McKercher* itself illustrated. In *McKercher*, CN essentially withdrew its consent immediately upon being sued by a plaintiff represented by its law firm, *McKercher*. Where disgruntled clients can withdraw consent on any basis in order to assert that their law firm is in a conflict of interest, it makes a mockery of the idea of implied consent. At the same time, the idea that a person, having given a consent to something, is unable to withdraw that consent flies in the face of the general principles of autonomy at the core of many of our fundamental societal principles. In facing this problematic choice, Ottenbreit JA found that CN, once it fell into the category of "professional litigant" and consequently having been presumed to have consented to *McKercher* acting directly adverse to its interests, could not withdraw its consent.⁷⁹

In the Supreme Court decision, McLachlin CJC offered an elegant and more workable solution – a standard of "client unreasonableness" – presumably to be determined objectively so that a law firm can make a fair and balanced determination of whether, in the circumstances, a client's objection to its acting against a client would be unreasonable. She stated:

⁷⁶ *Martin v Gray*, *supra* note 2 at para 15; in the *McKercher* decision, *supra* note 1 at para 36 [emphasis added in *McKercher*], this is erroneously attributed to Binnie J.

⁷⁷ *McKercher*, *ibid* at para 37.

⁷⁸ *Neil*, *supra* note 2 at para 28.

⁷⁹ *Wallace SKCA*, *supra* note 33 at paras 90-100 .

Finally, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters....In some cases, it is simply not reasonable for a client to claim that it expected a law firm to owe it exclusive loyalty and to refrain from acting against it in unrelated matters. As Binnie J. stated in *Neil*, these cases are the exception, rather than the norm. 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.⁸⁰

Noting that these cases will be the exception, the Court has nevertheless articulated a more stable, less arbitrary, client-determined basis (through the granting or withholding of consent) for the application of the previously described “professional litigant” exception.⁸¹

However, this limitation to the application of the “bright line” rule does seem to noticeably expand the range of circumstances in which law firms could be justified in continuing to act against a current client in an unrelated matter. The language of the decision focusses on the client’s reasonableness and not on the client’s “size,” or previous or present level of litigation activity, as was the case with the “professional litigant” exception. These latter features will likely be relevant considerations in the application of the “client unreasonableness” assessment, but will not be the only ones to be considered in assessing this question.

If any of these four situations is triggered the “bright line” rule is inapplicable and the appropriate test is “substantial risk of impaired representation.”⁸²

In short, the Supreme Court. has unequivocally confirmed that the “bright line” rule accurately states the law in relation to “current client” conflicts of interest and that it is the starting point for all analysis. If a party can establish the existence of one of the four limitations, conflicts analysis leads to the second level, the “substantial risk” test. In rearticulating the “bright line” rule, the Court has taken the high road in recommitting the legal profession to principles of professionalism by demanding an intense

⁸⁰ *McKercher*, *supra* note 1 at para 37.

⁸¹ In light of the criteria set out by McLachlin CJC in relation to an assessment of the reasonableness or unreasonableness of the client’s objection to its lawyers acting adverse to its interests, it seems likely that describing such a client as a “professional litigant” is less suitable and that such shorthand will fall out of use.

⁸² *McKercher*, *supra* note 1 at para 32.

standard of loyalty to clients. At the same time, the Court has succinctly identified and consolidated several workable qualifications to a lofty and principled standard.

C) *The Duties of Commitment and Candour*

Although most of *McKercher* focuses on the duty to avoid conflicts of interest, the Supreme Court also engaged with, and emphasized the importance of, the duties of commitment to the client's cause and the duty of candour.⁸³ In particular, the latter obligation is given an expansive interpretation; it "requires the law firm to disclose *any* factors relevant to the lawyer's ability to provide effective representation."⁸⁴ This is consistent with the approach taken by the Court of Appeal. The problem presented by the Court of Appeal judgment, however, is the failure to reconcile this obligation with, or even to note the existence of, the co-existent obligation of loyalty and commitment to the new client. The Supreme Court recognized this tension. McLachlin CJC concluded on this point:

I add this. The lawyer's duty of candour towards the existing client must be reconciled with the lawyer's obligation of confidentiality towards his new client. In order to provide full disclosure to the existing client, the lawyer must first obtain the consent of the new client to disclose the existence, nature and scope of the new retainer. 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.⁸⁵

In sum, the decision in all of its aspects is a resounding endorsement of the duty of loyalty and of the Court's expectation that professionalism, not business, continues to be the hallmark of the legal profession.

5. *Dropped Balls*

There are, however, some weaknesses in the decision: the ambiguity created by the Court's selection of language by appearing to propose a "scope" test for the "bright line" rule; the Court's conception of its role in the articulation of standards to govern the profession; and the Court's decision to send the case back to the trial judge to determine the appropriate remedy.

⁸³ *Ibid* at paras 43-47.

⁸⁴ *Ibid* at para 45 [emphasis added].

⁸⁵ *Ibid* at para 47.

A) *The Language of “Scope”*

In Part 4 A), we argued that the Court has clarified the primacy of the “bright line” rule and the residual nature of the “substantial risk test,” and that this is an improvement in the law. We are somewhat concerned, however, about the way in which the Chief Justice has articulated the nature of the relationship between the two tests. Her chosen descriptor is “the scope” of the “bright line” rule.⁸⁶ The language of scope suggests variability, fungibility and malleability and therefore has the potential to occlude the brightness of the line. Such language has the potential to invite challenges to the operation of the “bright line” rule. For example, some commentators immediately described the decision as a diminishment of the bright line and a victory for the advocates of client choice of counsel. The *Financial Post* reported:

“The result is a great one for advocates of choice, because the court ruled that clients were free to choose their lawyers and lawyers were free to act for them unless there was a real risk of mischief,” says Malcolm Mercer of McCarthy Tétrault LLP, who represented the Canadian Bar Association. The decision, *Canadian National Railway v. McKercher LLP*, affects a wide range of clients...It is also a blow to those who advocated a bright line rule forbidding lawyers from acting against current clients or former clients without first obtaining their consent.⁸⁷

We acknowledge that good lawyers can always explore and exploit the indeterminacy of legal language. But rather than using the language of “scope,” we suggest that the better way to think about the relationship between the “bright line” rule and situations where the substantial risk test might apply is the discourse of “rules and exceptions.” Indeed, this is, in our opinion, what the Court has actually done. Circumstances such as lack of “legal” adversity, tactical challenges to client representation and clients unreasonably objecting to their law firm’s acting against them could be consolidated as “exceptions to the rule,” or circumstances in which the rule is simply inapplicable.⁸⁸

Some might respond that in challenging the language of “scope” we are merely quibbling, perhaps dancing on pinheads, but we want to resist

⁸⁶ *Ibid* at paras 31-37.

⁸⁷ Julius Melnitzer, “Supreme Court modifies conflicts of interest rules for lawyers,” *Financial Post* (5 July 2013), online: <<http://www.financialpost.com>>.

⁸⁸ This approach to legal categorization exercises is pervasive. For example, in contract law most of the basic rules emanate from the principle of freedom of contract, but then are subject to exceptions such as promissory estoppel, duress, frustration, mistake, and unconscionability. Similarly, in constitutional law, the basic architecture of the *Charter* is a series of principled rights, which can be subject to the exceptions justified through a section 1 analysis.

such a charge. In the modern world the pressures on, and temptations for, lawyers to maximize their own (or their firm's interests) at the expense of their clients' interests can be intense. By emphasizing the duty of loyalty and the correlative "bright line" rule as the governing principle for structuring the *relationship* between the lawyer and her client, and then articulating appropriate identifiable exceptions, we can help lawyers to resist these pressures and temptations in a way that the language of "scope" does not.

B) The Court's Conception of its Role in the Articulation of Standards to Govern the Legal Profession

The Chief Justice commenced her analysis with a policy consideration of "The Role of the Courts in Resolving Conflicts Issues."⁸⁹ She began by reiterating a point made by the Court previously, that the courts' role *vis-à-vis* the legal profession is limited and supervisory, whereas the law societies' roles are more wide-ranging and regulatory.⁹⁰ This is relatively uncontroversial. She then added:

In recent years the Canadian Bar Association and the Federation of Law Societies of Canada have worked toward common conflict rules applicable across Canada. However, they have been unable to agree on their precise form: see, for example, A. Dodek, "Conflicted Identities: The Battle over the Duty of Loyalty in Canada" (2011), 14 *Legal Ethics* 193. That debate was transported into the proceedings before us, each of these interveners asking this Court to endorse their approach. 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.⁹¹

In our opinion, this is a curious statement for several reasons. First, though the Court was not explicit, its decision did in fact take sides in the debate between the FLSC and the CBA. When the Court determined that "[w]here applicable, the bright line rule prohibits concurrent representation. It does not invite further considerations ... [and t]o turn the rule into a rebuttable presumption or a balancing exercise would be tantamount to overruling *Neil and Strother*,"⁹² it was without doubt rejecting the position advanced by the CBA.

⁸⁹ *McKercher*, *supra* note 1 at paras 13-17.

⁹⁰ *Ibid* at paras 13-16.

⁹¹ *Ibid* at para 17.

⁹² *Ibid* at para 29.

Secondly, the tone of the paragraphs characterized the difference between the CBA and the FLSC as the equivalent of lovers' tiff or a squabble between petulant children. The debate has been about much more than that, however; it has been a debate about the core obligations of lawyers as fiduciaries for their clients and, we would argue, in some respects about the soul of the legal profession itself. Indeed, to the credit of both organizations, and from the perspective of their differing interests,⁹³ the FLSC and CBA assisted the Court by advancing thoughtful arguments by distinguished counsel that sought to convey the implications of various interpretations of the "bright line" rule – exactly the role that interveners are entitled and expected to play.

Historically in Canada, law societies have been laggardly in developing conflicts rules to govern their members, and have often awaited judicial direction. As a consequence the judiciary has often taken the lead – hence this very quartet of cases – and law societies have been playing catch-up. The debate between the FLSC and the CBA has been a debate about what the Court has meant by the "bright line" rule. So in this case, the Court was not being asked to "mediate." Rather, it was being asked to clarify what was fundamentally crucial, but hitherto debatably unclear, jurisprudence. And in fact the Court has done so in this case, as it was bound to do given its authority and responsibility to ensure the "proper administration of justice," to use its own phraseology.⁹⁴

C) *The Remedy*

Equally concerning is the Court's decision on the remedy. The Court found: strike one, McKercher breached its duty to avoid conflicts of interest; strike two, McKercher failed to commit to its client's cause; and strike three, McKercher had failed in its duty to be candid with its client. Despite these three strikes, however, it elected not to reach a decision on whether McKercher should be disqualified from representing Wallace. Instead it determined that because the trial judge did not "have the benefit of these reasons," it should be sent back for further consideration.⁹⁵

⁹³ The FLSC is the umbrella organization of the Law Societies across the country empowered by legislation to regulate the legal profession in the public interest. The rules and directives of provincial and territorial law societies carry the force of law. The CBA is a national voluntary organization of lawyers, historically a leader in the articulation of lawyers' ethical standards, but its mandate is to advance the interests of members of the legal profession, which it does effectively and honourably.

⁹⁴ *McKercher*, *supra* note 1 at paras 16-17.

⁹⁵ *Ibid* at para 67.

This failure to bring closure to the issue is disconcerting for three reasons. First, this is not one of those cases where the Court has articulated a brand new test, and where it is therefore essential that it be sent back to the trial judge. This case really only reconfirms and clarifies the test articulated by Binnie J in *Neil*. Second, it drags out what has already been an extended litigation process, raising concerns that justice delayed is justice denied. Third, it continues to escalate the costs for all the parties involved. Much has been made by the Canadian judiciary of the prohibitive costs of access to justice and here we witness the Supreme Court itself contributing to the problem.

An examination of the Court's critique of McKercher's behaviour makes it clear that the "bright line" rule has been violated and that none of the exceptions apply.⁹⁶ In what conceivable circumstances might McKercher argue that it should be allowed to stay on the file? It is true that McKercher is no longer in a "current client" conflict, in the sense that CN has essentially withdrawn its files due to its well-founded sense of disloyalty on the part of its (former) lawyers. The reason why McKercher is no longer "burdened" by a "current client" conflict is that the firm contravened its duty to CN with respect to the "three c's" – conflict avoidance, candour and commitment – and essentially drove CN away. This action likely fits within what is known in the US as the "hot potato" doctrine: "a firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."⁹⁷ It is disappointing that the Court refused to grasp the remedial nettle and make a decision on the application to disqualify McKercher.⁹⁸

6. *Same Game: New Signs, New Signals*

The *McKercher* decision appears to generate lessons for two constituencies – practitioners and regulators.

⁹⁶ The conflict is a direct "legal" conflict; see *McKercher*, *ibid* at para 51. CN was not unreasonable in its objection to the McKercher representation of Wallace (*ibid* at para 52) and the challenge to the McKercher representation was not tactical (*ibid* at para 51).

⁹⁷ John Leubsdorf, "Conflicts of Interest: Slicing the Hot Potato Doctrine" (August 19, 2010). Rutgers School of Law-Newark Research Paper No 079, online: <<http://ssrn.com/abstract=1662130>> or <<http://dx.doi.org/10.2139/ssrn.1662130>>. Apparently this quote originated with the judgment in *Picker Int'l Inc v Varian Associates*, 670 F Supp 1363, 1365 (ND Ohio 1987), *aff'd*, 869 F 2d 578 (Fed Cir 1989).

⁹⁸ As a consequence of the Court's decision not to grant a remedy the case remained in a state of limbo, presumably with some expense to all the parties. In October 2013, McKercher LLP did, in fact, terminate its representation of Wallace.

A) *Practical Consequences for Lawyers and Law Firms*

Now that the Supreme Court has clarified the significance of the “bright line” rule, lawyers and law firms will have to be even more careful as to who are their current clients. There is an obvious, and understandable, desire on the part of lawyers and law firms to want to maintain an ongoing relationship with clients even when matters are finished. Now, if lawyers want to be able to take on new clients, they will have to be clearer as to who is a current client and who is not. The easiest way to do this will be by providing clear termination letters once matters are concluded. This might be unattractive from the business perspective, but it may be essential, from the ethical perspective, to avoid “current client” conflicts.

Alternatively, lawyers and law firms may want to turn to the principle of freedom of contract to resolve this dilemma. Such an option, referred to as “consent in advance,” is set out as an option in the FLSC *Model Code of Professional Conduct*, though the Code identifies a set of cautions related to its use and effectiveness.⁹⁹ Law firms might choose to include carefully crafted advance waivers for future adverse representation.¹⁰⁰ This solution obviously generates a whole other set of issues: Will sophisticated and deep-pocketed clients like CN agree to such terms? Even if this might be legitimate in the context of “professional litigants” would it be acceptable in the context of “non-professional” litigants? How do we dovetail the principles of freedom of contract with the law of fiduciary obligations?¹⁰¹ Absent these more proactive approaches, law firms will be left attempting to analyze the circumstances in which it would be “unreasonable” for one of their clients to object to a concurrent, legally adverse representation.

B) *Implications for Law Societies: Two Regulatory Opportunities*

McKercher might also signal that the time is ripe for two new regulatory initiatives: a revision of the conflicts rules in Codes of Conduct and the embrace of ethical infrastructures.

⁹⁹ FLSC Model Code, Commentary 4 to Rule 3.4-2.

¹⁰⁰ See e.g. *Macy's Inc v JC Penney Corp*, NY Sup Ct App Div 1st Dep't, No 10486N, 6/27/13.

¹⁰¹ See, in general, American Bar Association *Model Rules of Professional Conduct*, Comment 22 to Rule 1.7. For a thoughtful examination of this question in the US, see Formal Opinion 2006-1 of the Association of the State Bar of the City of New York, Committee on Professional and Judicial Ethics, “Multiple Respresentations: Informed Consent: Waiver of Conflicts,” online: <http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=442>; William Freivogel, *Freivogel on Conflicts – Waivers/Consents*, “Advance Waivers,” online: <<http://www.freivogelonconflicts.com/waiversconsents.html>>.

1) *Redrafting the Model Code*

While it appears that the FLSC's 2011 *Model Code of Professional Conduct* largely captured the principles enunciated in *McKercher*, there is a need to revisit the Model Code and the authoritative provincial and territorial codes that have relied on the Model Code.¹⁰² The goal, in our view, would be i) to consolidate, restate and revise some aspects of the conflict of interest provisions in order to align lawyers' general legal and ethical framework with that of the Supreme Court, wherever possible; and ii) to capture some of the contextual observations of the Court in more general statements about the role of law societies and the duties of lawyers in relation to clients.

First, the Supreme Court has made clear the primacy of the "bright line" rule and the residual role of the "substantial risk" test. The Model Code, while maintaining commitment to this understanding, used language in its Rule and Commentary that softened its references to the "bright line" rule. In responding to questions before the Court, counsel for the FLSC had to explain in complicated detail how the Model Code did in fact capture the substance of the "bright line" rule. If the Model Code's language was not sufficiently clear to judges of the Supreme Court of Canada in a case where they were seized with the issue, consider the challenge faced by a lawyer dealing with a "current client" conflict situation, trying to read the existing provisions and quickly understand his or her obligations. Clarity could be brought to this by a more direct statement of the "bright line" rule and its relationship to the subsidiary "substantial risk" test.

Second, with respect to consolidation, the Model Code's drafters might wish to bring together in one provision the various limitations and subtleties associated with the application of the "bright line" rule – direct legal adversity, strategic linkages, and no tactical use. This could be done by continuing with the language of "direct legal" adversity in a clarified rule, providing explanatory language in commentaries regarding the meaning of "direct" and "legal" adversity (in doing so borrowing from *Neil, Strother* and *McKercher*) and setting out *in a rule* the illegitimacy of using "conflicts challenges" for tactical advantage.

Third, *McKercher* made clear that disqualification will be the likely, but not always the most appropriate, remedy in circumstances where a law

¹⁰² The FLSC has indicated that it might be open to such a revision; see Federation of Law Societies of Canada, E-Briefing, "Supreme Court of Canada Confirms 'Bright-Line' Conflicts Rule" (Summer 2013), online: <<http://www.industrymailout.com/Industry/LandingPage.aspx?id=1324795&p=1>>.

firm acts for current clients and the “bright line” rule is violated.¹⁰³ There is a need for a nuanced commentary that identifies the likelihood of disqualification from client representation and the factors that now come into play in determining this question.¹⁰⁴ Given that codes of professional conduct have application to lawyers in all aspects of their work, this requires general language, not solely tied to litigation and court decision-making. Code provisions must capture the wide range of circumstances where “current client” conflicts arise or may arise.

Fourth, the Model Code needs to address the evolution away from the sole focus of “client consent” as the lens through which a lawyer may address and avoid what would otherwise be “current client” conflicts. More specifically, the provisions related to client consent need to be rewritten to make clear that “client unreasonableness” in allowing its lawyer or law firm to act against it – essentially the unreasonable withholding of consent – is a foundational principle upon which the legitimacy of an otherwise conflicted representation may rest.

Fifth, the Court provided a more substantial commentary on the duties of candour and commitment.¹⁰⁵ Codes of professional conduct might incorporate this commentary, or at least make reference to the language of *McKercher* in the existing Code language related to these obligations. Of particular importance here is the delicate balance between the duty of commitment to one client and the duty of candour to the other when conflicts or potential conflicts present themselves. *McKercher* offers a mandated approach. Candour to the existing client requires that the new client consent to the disclosure to the existing client of the nature and scope of the new (and conflicting) retainer.¹⁰⁶ This balance should be reflected in a new rule in codes of professional conduct.

Finally, and contextually, McLachlin CJC has articulated some of the framing principles that delineate i) Court authority and the oversight responsibilities of law societies with respect to lawyers’ conduct;¹⁰⁷ ii) the status of rules of professional conduct as “an expression of a professional standard in a code of ethics [that] ... should be considered an important statement of public policy;”¹⁰⁸ and iii) an acknowledgment that law societies may set higher standards for lawyers than courts would apply.¹⁰⁹

¹⁰³ *McKercher*, *supra* note 1 at paras 61-65.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* at paras 43-47.

¹⁰⁶ *Ibid* at para 47.

¹⁰⁷ *Ibid* at paras 15-17.

¹⁰⁸ *Ibid* at para 16, quoting Sopinka J. in *Martin v Gray*, *supra* note 2 at 1246.

¹⁰⁹ *Ibid* at para 16.

In addition, the judgment emphasized that the whole issue revolves around “the fact that the lawyer-client relationship is a relationship based on trust.”¹¹⁰ These statements might be well be captured, and referenced, in a rewritten preface to codes of professional conduct.

2) *Establishing and Enforcing Ethical Infrastructures*

The facts of *McKercher* seem to be quite stark – McKercher LLP dumped CN like a hot potato because Wallace, with his massive class action law suit, walked in its door. One is forced to ask how a law firm – particularly a large and sophisticated law firm – could not see the potential problem with such a move. Is this an example of the hegemony of the business model in directing decision-making within law firm?

In other jurisdictions, over the course of the last decade, there has been an increasing focus on the idea of law firms developing ethical infrastructures. For example, in the United States, some law firms are creating institutional structures to enhance the culture of, and processes for encouraging, ethical decision making within law firms.¹¹¹ Some Australian states have gone even further by making ethical infrastructures mandatory for incorporated legal practices.¹¹² Recently the CBA has launched a guide to help law firms think about what an ethical infrastructure might look like

¹¹⁰ *Ibid* at para 28.

¹¹¹ See e.g. William J Wernz, “The Essentials of a Law Firm Ethics Program” [1999] *The Professional Lawyer: Symposium Issue 29*. Indeed, the American Bar Association recognized the role of law firm management in promoting ethical decision making in the early 1980s; see Ted Schneyer, “On Further Reflection: How ‘Professional Self-Regulation’ Should Promote Compliance with Broad Ethical Duties of Law Firm Management” (2011) 53 *Ariz L Rev* 577 at 582-83 (discussing the ABA *Model Rules of Professional Conduct* of 1983). Moreover, two states, New York and New Jersey, have rules that allow law firms as entities, in addition individual lawyers, to be disciplined for breaches of professional conduct: see Susan Saab Fortney, “Systematically Thinking About Law Firm Ethics: Conference on the Ethical Infrastructure and Culture of Law Firms” (2013) *Hofstra L Rev* [forthcoming]; Julie Rose O’Sullivan, “Professional Discipline for Law Firms?: A Response to Professor Schneyer’s Proposal” (2002-2003) 16 *Geo J Legal Ethics* 1 at 2-4.

¹¹² For a helpful review of the details of the system in place in New South Wales, see Schneyer, *ibid* at 620-23. For more on the experience in New South Wales, see Steve Mark, “Views from an Australian Regulator” (2009) *Journal of the Professional Lawyer* 45. Other Australian states are following NSW’s lead. For example, Queensland requires that “[e]ach legal practitioner director of an incorporated legal practice must ensure that appropriate management systems are implemented and kept to enable the provision of legal services” in compliance with professional obligations; see *Legal Profession Act 2007* (Qld), s 117(3).

in the Canadian context.¹¹³ Nova Scotia has just commenced a process of regulatory reform that plans to consider outcomes focused regulation.¹¹⁴ It is such outcomes-focused regulation that has led Australia to mandating ethical infrastructures for some types of law firms. *McKercher* might serve as a signal to Canadian law societies that the time has now come to mandate ethical infrastructures in order to counter balance the business infrastructures that have come to dominate the mindframe of many Canadian law firms.

7. Conclusion

The duty of loyalty, and its constitutive subcomponents, goes to the core of the lawyer-client relationship. Its importance is both instrumental and symbolic – not only does it tell us something about the specific obligations that lawyers and law firms owe their clients, it also communicates something very important about who we are as a profession in a liberal democratic society. Despite some shortcomings, the Supreme Court of Canada’s decision in *McKercher* is to be welcomed.¹¹⁵ It tells us *how* we as lawyers are to address our specific obligations. And it tells us *who* we are as professionals. While it will undoubtedly make some lawyers and law firms unhappy because it calls into question some preferred business practices, it reconfirms that the legal profession holds a public trust that trumps private interest. And that is a good thing. We lawyers are, after all, stewards of the public interest.¹¹⁶

¹¹³ See Canadian Bar Association, Ethics and Professional Responsibility Committee, “Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide,” online: <<http://www.cba.org/CBA/activities/pdf/ethicalinfrastructureguide-e.pdf>>.

¹¹⁴ Nova Scotia Barristers’ Society, News Release, “Council considering options for regulatory reform in the public interest” (4 November 2013), online: NSBS <<http://nsbs.org>>. The background for these deliberations includes Victoria Rees, *Transforming Regulation and Governance in the Public Interest*, Report for Council of the Nova Scotia Barristers’ Society (15 October 2013), online: NSBS <<http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf>>.

¹¹⁵ To be clear, we are not suggesting that debates on the duty of loyalty and the “bright line” rule have been put to rest by *McKercher*. Undoubtedly there will be further litigation on the meaning and practical significance of various concepts such as “directly adverse,” “commitment,” “candour” and “client unreasonableness.” Indeed, we predict that “client unreasonableness” will be the most contested exception, given its highly situationalist character. It is beyond the scope of this paper to try to unpack these concepts further. Such indeterminacy is inevitable in the common law method, and tends to emerge contextually as new situations emerge from the complexity and variety of everyday social relations.

¹¹⁶ See Richard Devlin and Jocelyn Downie, “Law as Vocation” in Fiona Westwood and Karen Barton, eds, *The Calling of Law* (London: Ashgate, 2014).