

## CASE COMMENT

### THE NOT-SO-BRIGHT LINE RULE: LINGERING QUESTIONS ABOUT LAWYERS' DUTY TO AVOID CONFLICTING INTERESTS – CN RAILWAY v. McKERCHER

1.	Introduction . . . . .	423
2.	Background . . . . .	424
	(1) Conflicts Arising from the Possession of Confidential Information and the Supreme Court's Decision in Macdonald Estate . . . . .	425
	(2) The Duty of Loyalty and the Supreme Court's Decision in R. v. Neil . . . . .	426
	(3) Discussion Amongst the Profession Regarding the Appropriate Interpretation of Conflict of Interest Rules . . . . .	428
3.	Facts and Judicial History . . . . .	429
	(1) The Facts of McKercher . . . . .	429
	(2) Judgment and Reasons of the Saskatchewan Court of Queen's Bench . . . . .	431
	(3) Judgment and Reasons of the Saskatchewan Court of Appeal . . .	431
4.	Supreme Court Judgment and Reasons . . . . .	432
	(1) Clarification and Reformulation of the Bright Line Rule . . . . .	432
	(2) Application of the Bright Line Rule to McKercher . . . . .	435
	(3) Discussion of the Appropriate Remedy for Crossing the Bright Line . . . . .	436
5.	Discussion . . . . .	437
	(1) Clarification of the Bright Line Rule . . . . .	438
	(a) The Bright Line Rule is a Blanket Prohibition, Applying to Directly Adverse Legal Interests . . . . .	438
	(b) Factors to Consider in Assessing the Appropriate Remedy . .	439
	(2) Lingerin g Questions About the Bright Line Rule and Conflicts of Interest . . . . .	439
	(a) When Will Professional Litigants Fall Outside the Scope of the Bright Line Rule? . . . . .	439
	(b) How Will Courts Assess Whether Disqualification Motions Are Tactical? . . . . .	441
	(c) What Will It Take for the Courts to Disqualify a Lawyer Who Crosses the Bright Line? . . . . .	443
	(3) Understanding the Relationship Between the Bright Line Rule and Substantial Risk Principle . . . . .	445
6.	Conclusion . . . . .	449

## 1. Introduction

On July 3, 2013, the Supreme Court of Canada released its reasons for judgment in *Canadian National Railway Co. v. McKercher LLP*.<sup>1</sup> *McKercher* presented the Supreme Court with an opportunity to clarify and comment upon the law relating to lawyers' conflicts of interest. Specifically, *McKercher* raised the question: can a lawyer ever sue a current client?

In its 2002 decision in *R. v. Neil*,<sup>2</sup> the Supreme Court had created the "bright line" rule governing lawyers' duty of loyalty to current clients. The bright line rule provided 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 matters are unrelated".<sup>3</sup>

The Supreme Court's articulation of the bright line rule in *Neil* was insufficiently clear to be applied by lawyers and law firms on a practical level. It included potential exemptions for "professional litigants" and where invocation of the rule was for tactical reasons, but these exemptions were not fully described, making the circumstances in which they could be applied unclear. Moreover, as it did not arise on the facts, *Neil* did not address whether disqualification is the appropriate remedy if lawyers cross the bright line.

*McKercher* raised facts that fell squarely within the bright line rule, and provided an opportunity for the Supreme Court to guide the profession as to its application. Unfortunately, the Court did not take sufficient advantage of this opportunity. It remains unclear when the bright line is crossed where a professional litigant or tactical objection is concerned. The question of remedy is still unresolved; even though the Supreme Court held *McKercher* crossed the bright line by suing its current client, it declined to comment on the appropriate remedy on the facts, remitting this question back to the Saskatchewan Court of Queen's Bench.<sup>4</sup> Although the Court's reasons provide some further clarity to the bright line rule, the line is still not bright.

Moreover, in its pursuit of clarity the Court compromised precision. In *Neil*, the Court had stated two conflict rules – the bright line rule prohibiting acting against a current client, and the

1. *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, 360 D.L.R. (4th) 389, 42 C.P.C. (7th) 1 (S.C.C.) ("*McKercher*").

2. *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, D.L.R. (4th) 671 (S.C.C.) ("*Neil*").

3. *Supra* at para. 29 (emphasis in original).

4. To the date of writing, the Court of Queen's Bench had not considered this question.

“substantial risk principle”, which defines a conflict as a substantial risk of material and adverse effect to representation – without explaining the relationship between the two. The Court addressed this disconnect in *McKercher* with a framework that requires courts first to consider the bright line rule without further balancing, and then assess substantial risk only if the scenario falls outside the scope of the bright line rule. By separating rather than incorporating these analyses, it is not clear that the bright line rule properly addresses the harm of impaired representation it purports to prevent. We are left with a bright line rule that is both overbroad and under-inclusive, and out of step with other conflict analyses.

This comment will provide background on the law relating to conflicts of interest and lawyers’ duty of loyalty; discuss the key issues arising in the *McKercher* case; and highlight the lingering questions lawyers still face with respect to their duty of loyalty to current clients. It will conclude by discussing whether, in light of these lingering questions, the Court’s formulation of the bright line rule was the best way to target the harm of impaired representation the rule seeks to address.

## 2. Background

In *Neil*, the Supreme Court noted that our courts are most often concerned with conflicts of interest relating to the potential for use and abuse of confidential information.<sup>5</sup> Lawyers may also tend to hone in on confidential information as their primary concern when seeking to clear conflicts. *Neil* and *McKercher*, however, highlight that lawyers may still find themselves in a position of conflict even if they have not received any relevant confidential information from the client in question. In both cases the Court held that the law firm was in a position of conflict even though it possessed no confidential information that could be used to prejudice the client.<sup>6</sup>

There are two separate conflict of interest analyses, seeking to address two different types of prejudice. While a lawyer or law firm could be in a position of conflict with respect to former clients due to a risk of abuse of relevant confidential information, the duty of loyalty targets the risk of impaired representation of a current client.<sup>7</sup>

---

5. *Neil*, *supra* note 2 at para. 17.

6. *McKercher*, *supra* note 1 at para. 10. See also *Neil*, *ibid.* at para. 3.

7. *McKercher*, *ibid.* at para. 23.

### (1) Conflicts Arising from the Possession of Confidential Information and the Supreme Court's Decision in *Macdonald Estate*

In *Macdonald Estate v. Martin*,<sup>8</sup> the Supreme Court set out the law relating to disqualifying conflicts of interest arising from the possession of confidential information. In short, where a lawyer has shared a solicitor-client relationship with the client sufficiently related to the retainer in question, courts will infer that confidential information was imparted and automatically disqualify the lawyer from acting against that client, unless the lawyer can satisfy the court that no relevant confidential information was imparted. The Court held that lawyers seeking to dislodge this presumption will have “a difficult burden to discharge”.<sup>9</sup> Further, courts will infer that lawyers working on the previous matter shared confidences with other members of their firm, unless satisfied by clear and convincing evidence that all reasonable measures were taken to ensure there was no disclosure (including an effective conflict screen).<sup>10</sup>

A lawyer's duty of loyalty to current clients stems from the fiduciary relationship between client and professional advisor. It is a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role.<sup>11</sup>

Although the analysis of whether a conflict is present differs if there is no confidential information at stake, some considerations overlap. The Supreme Court in *Macdonald Estate* articulated helpful principles that must be considered when assessing whether disqualification is an appropriate remedy where a conflict of interest is present. Although stated in the context of a conflict arising from the receipt of confidential information, these principles may be even more relevant to breaches of the duty of loyalty; while disqualification is all but automatic where a client's confidential information can be misused, disqualification upon a breach of the duty of loyalty is context-dependant (as described further below).

In his reasons in *Macdonald Estate*, Justice Sopinka noted that when determining whether a lawyer should be disqualified from continuing to act by reason of a conflict of interest, the Court is concerned with competing values: it must balance the goal of maintaining the high standards of the legal profession and the

---

8. *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249, 48 C.P.C. (2d) 113 (S.C.C.) (“*Macdonald Estate*”).

9. *Ibid.* at pp. 1260-61.

10. *Ibid.* at pp. 1261-62.

11. *Neil, supra* note 2 at paras. 17-18.

integrity of the justice system against the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause.<sup>12</sup> The Court sought to strike a delicate balance between these competing policy factors with the test for a disqualifying conflict of interest in *Macdonald Estate*. As described further below, these factors are also relevant to the court's analysis respecting remedy, in the event a court finds that the bright line has been crossed.

## (2) The Duty of Loyalty and the Supreme Court's Decision in *R. v. Neil*

In *Neil*, an accused sought a stay of criminal prosecutions against him on the basis that his lawyers were in a position of a conflict of interest.<sup>13</sup> The facts in *Neil* relate to multiple indictments against the accused (the appellant before the Supreme Court). In brief, the appellant's lawyers had also accepted a retainer for his business associate who had been indicted in the same fraud matter, and allegedly sought to obtain a deal for the co-accused business associate in which she would testify against the appellant if the charges against her were dropped.<sup>14</sup>

The Supreme Court's analysis was based in a lawyer's duty of loyalty, which was articulated at least as early as 1821 as follows:<sup>15</sup>

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty . . .

This remains a defining principle to this day: a litigant must be assured of his lawyer's undivided loyalty, or else neither the litigant nor the public will have confidence that the legal system is a trustworthy and reliable means of resolving their disputes.<sup>16</sup> Further, the duty of loyalty is intertwined with a lawyer's fiduciary relationship; a client is entitled to expect that his lawyer will be

12. *Macdonald Estate*, *supra* note 8 at p. 1243.

13. *Neil*, *supra* note 2 at para. 1.

14. *Ibid.* at para. 8.

15. *Ibid.* at para. 12, citing the declaration of the duty of loyalty made by Henry Brougham, later Lord Chancellor, in his defence of Queen Caroline against the charge of adultery brought against her by King George IV: *Report of the Proceedings before the House of Lords, on a Bill of Pains and Penalties against Her Majesty, Caroline Amelia Elizabeth, Queen of Great Britain, and Consort of King George the Fourth*, vol. II, Part I (London: J. Robins, 1821), at p. 8 *per* Nightingale J.

16. *Neil*, *ibid.* at para. 12.

concerned solely with the client's interests, and not the lawyer's own.<sup>17</sup>

For these reasons, the Court noted that even without a concern relating to the use or abuse of confidential information, the duty of loyalty imposes a broad duty on lawyers, including to avoid conflicts of interest.<sup>18</sup> The duty of loyalty includes three aspects:<sup>19</sup>

- (1) the duty to avoid conflicting interests;
- (2) a duty of commitment to the client's cause; and
- (3) a duty of candour with the client on matters relevant to the retainer.

With respect to the duty to avoid conflicting interests, the Court stated: "Loyalty requires putting the client's business ahead of the lawyer's business".<sup>20</sup> A lawyer cannot give his exclusive, undivided attention to a client if he is torn between his client's interests and his own, or his client's interests and those of another client to whom he owes the same duty of loyalty, dedication, and good faith.<sup>21</sup>

On the basis of these principles, the Court set down a "general prohibition" often referred to as the bright line rule:<sup>22</sup>

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 in original.]

The Court noted exceptions where consent of the client may be inferred, stating that governments generally accept that private practitioners who do their work will act against them in unrelated matters, and that chartered banks and "entities that could be described as professional litigants" may also have a broad-minded attitude where matters are unrelated and there is no danger of confidential information being abused.<sup>23</sup>

The Court held that the firm breached the duty of loyalty and put itself in a position of conflict by acting on behalf of the appellant's co-accused, which required the firm to undertake duties to the co-accused that conflicted with the duty of loyalty it owed to the

---

17. *Ibid.* at para. 16.

18. *Ibid.* at para. 17.

19. *Ibid.* at para. 19.

20. *Ibid.* at para. 24.

21. *Ibid.* at para. 26.

22. *Ibid.* at para. 29.

23. *Ibid.* at para. 28.

appellant.<sup>24</sup> Importantly, the Court defined a conflict 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”.<sup>25</sup> The Court did not explain how the issue of “substantial risk” accorded with the bright line rule.

The Court in *Neil* considered the appropriate remedy, noting that a client whose lawyer breached the duty of loyalty can bring a complaint to the lawyer’s governing body (in that case the Law Society of Alberta), or bring an action against the lawyer for damages.<sup>26</sup> The Court discussed only briefly the possibility of disqualifying counsel—in the criminal context, where the proceedings are continuing.<sup>27</sup> The Court refused to grant the remedies the appellant sought—a stay of his conviction and of further proceedings—and dismissed the appeal.<sup>28</sup>

### **(3) Discussion Amongst the Profession Regarding the Appropriate Interpretation of Conflict of Interest Rules**

The bright line rule articulated in the Supreme Court’s decision in *Neil* created controversy in the profession as it appeared to impose new obligations on Canadian lawyers with respect to their current clients. This discussion amongst the profession is exemplified in the work done and statements issued by its professional associations and governing bodies. Both the Canadian Bar Association and the Federation of Law Societies of Canada issued reports suggesting the appropriate interpretation of the rule.<sup>29</sup>

The CBA took the position that the bright line rule ought to apply as a *presumptive* rule, applying unless it can be shown that client representation is not at risk of material impairment (as opposed to a categorical rule, applying in all circumstances). Or, in other words, a

24. *Ibid.* at paras. 31-32.

25. *Ibid.* at para. 31, citing §121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45.

26. *Ibid.* at para. 37.

27. *Ibid.* at para. 38. The Court’s failure to comment on civil remedies in *Neil* is, of course, understandable given the criminal case before them.

28. *Ibid.* at paras. 40-47.

29. See CBA Task Force on Conflicts of Interest, “Conflicts of Interest: Final Report, Recommendations & Toolkit”, August 2008, available online at: <[www.cba.org/CBA/groups/PDF/conflicts\\_finalreport.pdf](http://www.cba.org/CBA/groups/PDF/conflicts_finalreport.pdf)> (“CBA Report”); Federation of Law Societies of Canada, “Advisory Committee on Conflicts of Interest: Final Report”, June 2, 2010, available online at: <[www.flsc.ca/\\_documents/Conflicts-of-Interest-Report-June-2010.pdf](http://www.flsc.ca/_documents/Conflicts-of-Interest-Report-June-2010.pdf)> (“FLSC Report”).

lawyer may act against a current client in an unrelated matter so long as there is not a substantial risk of material and adverse effect on representation. The CBA noted in its report that a presumptive approach is consistent with the approach the Supreme Court laid out in *MacDonald Estate* with respect to confidential information obtained from related matters, and that such an approach aligns with the “substantial risk” principle the Court used as the basis for its definition of a conflict in *Neil*.<sup>30</sup>

The Federation of Law Societies of Canada – a body made up of the provincial and territorial law societies tasked with regulating the profession in the public interest and setting standards for professional conduct – took a different approach than the CBA. The FLSC adopted a categorical interpretation of the bright line rule, proposing a conflict of interest rule with respect to current clients in its Model Code of Professional Conduct based on the strict wording of para. 29 of *Neil*: “A lawyer must not represent a client whose interests are directly adverse to the immediate interests of a current client – even if the matters are unrelated – unless both clients consent.”<sup>31</sup> The FLSC noted in its report that its approach diverged from that of the CBA because the CBA limited the scope of the bright line rule as applying only where there is a “substantial risk of material and adverse effect” to client representation.<sup>32</sup>

Both the CBA and FLSC appeared before the Supreme Court as interveners in the *McKercher* appeal, asking the Court to endorse their own interpretations of the rule.<sup>33</sup>

### 3. Facts and Judicial History

#### (1) The Facts of McKercher

McKercher LLP is a large law firm in Saskatchewan that had acted for the Canadian National Railway Company (“CN”) on a variety of matters since at least 1999.<sup>34</sup> As of late 2008, McKercher represented CN in four matters: a personal injury claim, a real estate purchase, a receivership, and a power of attorney for service.<sup>35</sup>

30. CBA Report, *supra* at pp. iv-v.

31. FLSC Report, *supra* note 29 at pp. 7-8.

32. *Ibid.* at p. 8.

33. *McKercher*, *supra* note 1 at para. 17. The Court noted that it was not its role to “mediate the debate”, but would rather determine what principles should apply in the case before it, considering what is required for the proper administration of justice.

34. *Ibid.* at para. 2; *Wallace v. Canadian Pacific Railway*, 2011 SKCA 108, 340 D.L.R. (4th) 402, 9 C.P.C. (7th) 292 (Sask. C.A.), reversed *McKercher*, *supra* note 1. The C.A. decision will be referred to as “*Wallace SKCA*”.



At the same time, McKercher accepted a retainer from Gordon Wallace to act against CN in a proposed class action, alleging that CN had unlawfully overcharged western Canadian farmers for grain transportation. The proposed class action claimed \$1.75 billion in damages, including aggravated and punitive damages.<sup>36</sup>

CN learned of the Wallace action when it was served with a statement of claim on January 9, 2009. Between December 5, 2008 and January 15, 2009, various McKercher partners terminated their retainers with CN.<sup>37</sup>

CN gave evidence that McKercher was CN's "go-to" legal counsel in the province. Other evidence marshalled by McKercher suggested otherwise. In the five-year period preceding the events giving rise to the alleged conflict, McKercher had billed CN a total of \$64,462: less than one-third of CN's total fees to Saskatchewan law firms during that period, and less than 0.1% of the fees CN paid to all outside counsel. An affidavit of search of Saskatchewan court records showed that in 22 actions from 1999 to 2009 in which CN's Saskatchewan counsel could be identified, McKercher was counsel for CN in only one.<sup>38</sup>

CN is one of the largest corporations in Canada, operating a railway across Canada and the United States. It employs 23 in-house counsel and regularly consults with 50 to 60 outside law firms across Canada. In a given year, these outside firms bill CN for approximately 600 individual files, and the fees paid to these firms total many millions of dollars annually.<sup>39</sup>

CN applied for an order removing McKercher as the lawyer of record for Wallace in the class action, on the grounds that McKercher had breached its duty of loyalty to CN by placing itself in a conflict of interest, and had improperly terminated then-current CN retainers.<sup>40</sup>

35. *McKercher*, *supra* note 1 at para. 2.

36. *Ibid.* at paras. 1, 3.

37. *Ibid.* at paras. 4-5. Specifically, McKercher served CN with a notice of withdrawal with respect to the personal injury and power of attorney matters, and notified the receiver's counsel (but not CN) of its withdrawal from the receivership matter. The partner responsible for the real estate file, however, asked CN whether it wanted McKercher to continue to act on the real estate transaction, and CN directed that the file be transferred to another firm. See *Wallace SKCA*, *supra* note 34 at paras. 12-17.

38. *Wallace SKCA*, *ibid.* at paras. 7-9. When considering the question of CN's "go to" counsel, it is perhaps interesting to note that the firm representing CN in the conflict motion and appeals, McPherson Leslie & Tyerman, acted as counsel in 18 of the 22 actions; its billings were also significantly higher than McKercher's in the aforementioned five-year period.

39. *Ibid.* at paras. 5-6.

40. *McKercher*, *supra* note 1 at para. 5.

## (2) Judgment and Reasons of the Saskatchewan Court of Queen's Bench

At first instance, the motions judge granted CN's application. Justice Popescul (as he then was) held that McKercher had crossed the bright line, placing itself in a conflict of interest by accepting the adverse Wallace retainer while acting for CN on other unrelated matters.<sup>41</sup>

Justice Popescul held that the bright line rule is qualified by the substantial risk principle.<sup>42</sup> His Honour further held, however, that there was a substantial risk that McKercher's representation of CN was materially and adversely affected, thus crossing the bright line.<sup>43</sup> Justice Popescul held that the "professional litigant" exception did not apply in these circumstances; although convinced CN was a professional litigant, the nature of the matter was not such that consent could be inferred, and CN later expressly refused to waive the conflict.<sup>44</sup>

On remedy, Justice Popescul ruled that in light of McKercher's breach of the duty of loyalty, it was disqualified from acting further against CN in the class action.<sup>45</sup>

## (3) Judgment and Reasons of the Saskatchewan Court of Appeal

The Court of Appeal reversed the motions judge's decision, finding that McKercher had not breached its duty of loyalty: the professional litigant exception applied and it was reasonable for McKercher to infer CN's consent to act against it, even in a claim as large as the Wallace class action.<sup>46</sup> In the Court's view, this implied consent could not be vitiated by subsequent express refusal to consent; otherwise the

---

41. *Wallace v. Canadian Pacific Railway*, 2009 SKQB 369, 77 C.P.C. (6th) 24, [2009] 12 W.W.R. 157, reversed *Wallace SKCA*, *supra* note 34, reversed *McKercher*, *supra* note 1. The Q.B. decision will be referred to as "*Wallace SKQB*".

42. *Wallace SKQB*, *supra* at paras. 30-32.

43. *Ibid.* at para. 47.

44. *Ibid.* at paras. 53-57, 62.

45. *Ibid.* at para. 78. CN had further alleged that McKercher might misuse confidential information gained in the course of the solicitor-client relationship. The motions judge agreed and held that McKercher had received a unique understanding of CN's litigation strategy which constituted relevant confidential information, and that this further warranted disqualification. This was overturned by the Court of Appeal, and was not contested further on appeal to the Supreme Court.

46. *Wallace SKCA*, *supra* note 34 at paras. 90-95.

professional litigant exception would be meaningless.<sup>47</sup> The Court of Appeal further held that this was not a case where the public's confidence in the profession would be diminished by the application of the professional litigant exception because CN had a low dependency on McKercher for its legal representation and was not a vulnerable client.<sup>48</sup>

The Court of Appeal went on to find that McKercher had breached its duty of loyalty to CN by "dumping" CN as a client and by failing to be candid with CN about the Wallace retainer.<sup>49</sup> Disqualification was not an appropriate remedy for this breach, however, as there was no continuing client relationship left to protect.<sup>50</sup> Further, disqualifying McKercher would deprive Wallace of his choice of counsel, particularly where the proposed class action was the sort of complex matter generally undertaken by large firms offering the necessary specialization and resources – and CN had retained the three largest firms in Saskatchewan.<sup>51</sup> The Court of Appeal held that CN was not without a remedy, as it could sue McKercher for damages for its costs of having its files transferred, and complain to the Law Society of Saskatchewan for the alleged ethical breaches.<sup>52</sup>

#### 4. Supreme Court Judgment and Reasons

The Supreme Court allowed CN's appeal, holding that McKercher had crossed the bright line when it accepted the Wallace retainer, but remitted the question of the appropriate remedy for this breach to the Saskatchewan Court of Queen's Bench.<sup>53</sup> The Court's unanimous reasons, delivered by the Chief Justice, first stated the governing principles, including a reformulated bright line rule, before applying the rule to the facts of the case and discussing the issue of remedy.

##### (1) Clarification and Reformulation of the Bright Line Rule

The Supreme Court reaffirmed that the duty of loyalty includes three dimensions, as outlined in *Neil*: (1) a duty to avoid conflicting interests; (2) a duty of commitment to the client's cause; and (3) a duty

47. *Ibid.* at paras. 99-100.

48. *Ibid.* at para. 102.

49. *Ibid.* at para. 108.

50. *Ibid.* at para. 111.

51. *Ibid.* at para. 113.

52. *Ibid.* at para. 114.

53. *McKercher*, *supra* note 1 at paras. 10-11. As noted above, the Court of Queen's Bench had not considered this question by the date of writing.

of candour.<sup>54</sup> Its reasons focused primarily on the duty to avoid conflicting interests.

The Court began by stating that Canada's law of conflicts is rooted in English jurisprudence, which provided a pragmatic approach, considering whether there was a real risk of harm to the client from the lawyer's representation of an adverse party.<sup>55</sup> The Court further noted that its formulation of the conflicts rule in *Macdonald Estate* was similarly focused on protecting clients from real risks of harm,<sup>56</sup> while explaining that a lawyer's duty to avoid conflicting interests is concerned with two types of prejudice: the misuse of confidential information (addressed by *Macdonald Estate*), and the risk to effective representation.<sup>57</sup>

The Court described the second aspect of lawyers' duty to avoid conflicting interests as the concern that the lawyer serve as an effective representative, or "zealous advocate", which arises only with respect to current clients. The duty requires lawyers to avoid the temptation to prefer other interests over those of their clients, which would pose a risk to effective representation.<sup>58</sup> The Court explained that it had previously held that there was a "clear prohibition" on the concurrent representation of clients directly adverse in interest: the bright line rule.<sup>59</sup>

The Supreme Court reaffirmed the bright line rule, and while noting that it is possible to argue that a blanket prohibition against concurrent representation is not warranted with respect to unrelated matters, held that the rule as stated is advantageous because it is clear and recognizes the importance of trust in the solicitor-client relationship.<sup>60</sup> The Court rejected the various interpretations of the rule suggested by the parties and interveners (including that it is presumptive and that it attracts a balancing of circumstantial factors), stating: "Where applicable, the bright line rule prohibits concurrent representation. It does not invite further considerations".<sup>61</sup>

Therein lies the rub. The Court clarified that the bright line rule is not a rule of unlimited application, and that the real issue on appeal was the scope of the rule.<sup>62</sup>

---

54. *Ibid.* at para. 19.

55. *Ibid.* at para. 20.

56. *Ibid.* at paras. 21-22.

57. *Ibid.* at para. 23.

58. *Ibid.* at paras. 25-26.

59. *Ibid.* at para. 26.

60. *Ibid.* at paras. 27-28.

61. *Ibid.* at para. 29.

62. *Ibid.* at para. 30.

The Court held that the rule applies only “where the *immediate legal* interests of clients are *directly* adverse”.<sup>63</sup> It does not apply to prevent concurrent representation of different clients who are competitors in the same line of business.<sup>64</sup> As such, the Court suggested that the bright line rule will apply primarily in civil and criminal proceedings.<sup>65</sup>

Moreover, the rule will not apply to condone tactical abuses.<sup>66</sup> The Court noted the risk of tactical abuse by large institutional clients dealing with national law firms: the client could retain a significant number of firms, and retention of one lawyer in one city could disqualify all other lawyers within the firm across Canada from acting against that client. As a result, it held that clients who spread their retainers among scores of leading law firms in a purposeful attempt to deprive adversaries of their choice of counsel forfeit the benefit of the rule.<sup>67</sup>

The Court further delineated the scope of the bright line rule by stating that it will not apply in circumstances in which it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters. For example, lawyers may infer consent from the “professional litigants” described in *Neil*, as it would not be reasonable for those clients to claim that they expected a law firm to owe it exclusive loyalty and to refrain from acting against them in unrelated matters. The Court maintained that these cases will be the exception, and that factors such as the nature of the solicitor-client relationship, the terms of the retainer, and the types of matters involved may be relevant to consider in determining the client’s reasonable expectations (and thus whether the scenario would fall within the scope of the bright line rule).<sup>68</sup>

The Supreme Court also briefly spoke to the substantial risk principle, which had been articulated alongside the bright line rule in *Neil* without clarification of how it fit in the analysis. The Court held

63. *Ibid.* at para. 32 (emphasis in original).

64. *Ibid.* at para 35. The Court cited *Strother* for this proposition, noting Justice Binnie’s statements on behalf of the majority: “the conflict of interest principles do not generally preclude a law firm or lawyer from acting concurrently for different clients who are in the same line of business, or who compete with each other for business” and “The clients’ respective ‘interests’ that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity.” See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, 281 D.L.R. (4th) 640 (S.C.C.), at paras. 54-55 (“*Strother*”).

65. *McKercher*, *supra* note 1 at para. 35.

66. *Ibid.* at para. 32.

67. *Ibid.* at para. 36.

68. *Ibid.* at para. 37.

that in the event a situation falls *outside the scope* of the bright line rule, the question then becomes whether the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely affected. This requires a contextual assessment to determine whether the situation is likely to create conflicting pressures on the lawyer's judgment. The onus to establish a conflict on the basis of substantial risk falls upon the client.<sup>69</sup> The Court did not describe a client's potential remedies if it meets this burden.

The Court briefly discussed the other aspects of the duty of loyalty. The duty of commitment to the client's cause is closely related to the duty of avoid conflicting interests, and requires the lawyer to refrain from undermining the lawyer-client relationship. Specifically, a lawyer should not summarily drop a client in order to avoid conflicts of interest.<sup>70</sup> The duty of candour requires a lawyer to disclose to clients any factors relevant to the lawyer's ability to provide effective representation. This requires lawyers to advise existing clients before accepting a retainer to act against the client, even if the lawyer considers the situation to fall outside the scope of the bright line rule. If this is done, the existing client has the opportunity to take its business elsewhere if it feels the lawyer has damaged their relationship.<sup>71</sup>

## **(2) Application of the Bright Line Rule to McKercher**

The Court held that McKercher's concurrent representation of CN and Wallace fell squarely within the scope of the bright line rule.<sup>72</sup> Even though the Wallace retainer was legally and factually unrelated to the existing CN retainers, CN and Wallace's legal interests were directly adverse in the proposed class action.<sup>73</sup>

Moreover, the Supreme Court held that there was no evidence that CN was seeking to use the bright line rule tactically, stating: "Nothing suggests that CN has been purposefully spreading out its legal work across Saskatchewan law firms in an attempt to prevent Wallace or other litigants from retaining effective legal counsel."<sup>74</sup>

The Court also held that it was reasonable in the circumstances for CN to expect that McKercher would not act against it for Wallace. It based this finding on the motions judge's finding that CN used

69. *Ibid.* at para. 38.

70. *Ibid.* at paras. 43-44.

71. *Ibid.* at paras. 45-46.

72. *Ibid.* at para. 49.

73. *Ibid.* at paras. 50-51.

74. *Ibid.* at para. 51.

McKercher as its “go to” firm in Saskatchewan. Furthermore, the class action seeks substantial damages against CN, including both aggravated and punitive damages, which “connote a degree of moral turpitude on the part of CN”.<sup>75</sup> As such, the Court held, it was reasonable for CN to feel surprised and dismayed when McKercher sued it.<sup>76</sup>

The Court further held that McKercher breached its duty of commitment to the client’s cause by terminating certain of the CN retainers, and breached its duty of candour by failing to disclose to CN its intention to accept the Wallace retainer.<sup>77</sup>

### **(3) Discussion of the Appropriate Remedy for Crossing the Bright Line**

The Supreme Court noted that the courts have jurisdiction to remove law firms from pending litigation in the exercise of their supervisory jurisdiction over the administration of justice. It held that disqualification may be required:<sup>78</sup>

- (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.

The Court noted that disqualification is generally the only appropriate remedy to prevent misuse of confidential information, as set out in *Macdonald Estate*. Similarly, the Court held, disqualification will normally be required to address the concern of impaired representation if the law firm continues to concurrently act for both clients.<sup>79</sup>

With respect to the third purpose – to protect the integrity and repute of the administration of justice – the Court held that disqualification *may* be required, in order to send the message that disloyal conduct is not condoned by the courts. This would protect the public’s confidence in lawyers and deter other law firms from similar practices.<sup>80</sup>

The Court held that “all relevant circumstances should be considered” when assessing whether disqualification is warranted

---

75. *Ibid.* at para. 52.

76. *Ibid.* at para. 52.

77. *Ibid.* at paras. 55-59.

78. *Ibid.* at para. 61.

79. *Ibid.* at para. 62.

80. *Ibid.* at para. 63.

solely on the ground of protecting the integrity of the administration of justice. Although a breach of the bright line rule is a serious matter, it must be acknowledged that where the lawyer-client relationship has been terminated and there is no confidential information at risk, there is no longer a concern of continuing prejudice to the complaining party.<sup>81</sup> As such, the Court held that courts faced with a motion for disqualification on this basis should consider:<sup>82</sup>

- (1) behaviour disentitling the complaining party from disqualification, such as delay;
- (2) significant prejudice to the new client in retaining new counsel of its choice; and
- (3) whether the law firm accepted the new conflicting retainer in good faith, reasonably believing it fell outside the scope of the bright line rule.

The Court held that, on this appeal, disqualification was not required to prevent the misuse of confidential information, nor to avoid the risk of impaired representation – the representation had already ended when the retainers were terminated. As such, the only remaining question was whether disqualification was required to maintain public confidence in the administration of justice.<sup>83</sup>

The Court declined to answer that question. It stated that while a violation of the bright line rule on its face supports disqualification, it is also necessary to weigh the factors described above, which may suggest disqualification is inappropriate. The Supreme Court remitted the issue of remedy to the motions judge for determination in accordance with the Court's reasons.<sup>84</sup>

## 5. Discussion

The Supreme Court's decision in *McKercher* reaffirmed the bright line rule as stated in *Neil*, and provided some additional clarity by holding that the rule is categorical (rather than qualified by the substantial risk principle) and discussing the factors that could lead to disqualification for a breach of the bright line rule.

Unfortunately, the Court muddied the waters in a different way by holding that the rule is constrained by way of its scope. The Court's reasons leave something to be desired with respect to the practical application of the rule, particularly as it relates to "professional

---

81. *Ibid.* at para. 64.

82. *Ibid.* at para. 65.

83. *Ibid.* at para. 66.

84. *Ibid.* at para. 67.



litigants”, tactical use, and when disqualification will be available as a remedy for a breach.

Furthermore, the Court’s decision to separate the substantial risk principle from the bright line rule was curious in light of its comments in *Neil* and the conflicts analysis set out in *Macdonald Estate*. Without being qualified by the substantial risk principle, the rule is both overbroad and under-inclusive; it captures situations where there is no risk of impaired representation, but does not capture other situations where such risk is present. It is thus questionable whether the rule is the most appropriate way to target the harm it seeks to address.

### (1) Clarification of the Bright Line Rule

#### (a) The Bright Line Rule is a Blanket Prohibition, Applying to Directly Adverse Legal Interests

Whereas in *Neil* the bright line rule did not apply on the facts and was articulated in *obiter*, the Supreme Court in *McKercher* was able to apply the bright line rule to facts that fell squarely within its scope. In doing so, the Court clarified that the bright line rule is a “blanket prohibition” against concurrent representation, even where the matters at issue are legally and factually unrelated.<sup>85</sup> The Court rejected the notion that the bright line rule was presumptive.<sup>86</sup>

The Court also illustrated in *McKercher* the sorts of conflicting interests the bright line rule applies to by stating that the rule applies only “where the *immediate legal* interests of clients are *directly* adverse”.<sup>87</sup> Specifically, the Court stated that the rule does not apply to prevent concurrent representation of business competitors, but rather only where the clients’ *legal* interests are directly adverse. This statement was not, however, a new clarification. In its 2007 decision in *Strother*, the Supreme Court had already clarified that the bright line rule does not relate to competing commercial interests when the majority stated: “The clients’ respective ‘interests’ that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity.”<sup>88</sup>

---

85. *Ibid.* at paras. 27-28.

86. *Ibid.* at para. 29.

87. *Ibid.* at para. 32 (emphasis in original).

88. *Strother*, *supra* note 64 at para. 55. The majority also held that “the conflict of interest principles do not generally preclude a law firm or lawyer from acting concurrently for different clients who are in the same line of business, or who compete with each other for business”: see *Strother*, *ibid.* at para. 54.

## **(b) Factors to Consider in Assessing the Appropriate Remedy**

*Neil* offered no help to lawyers or the courts in assessing whether disqualification was the appropriate remedy for a breach of the bright line rule, as the client in that case had sought a stay of criminal proceedings. In *McKercher*, the Supreme Court outlined factors for courts to consider in determining whether disqualification is required: disqualification will normally be required where confidential information could be misused or if representation could be impaired because the law firm continues to act concurrently for adverse clients, and disqualification *may* be required to protect the integrity of the administration of justice.<sup>89</sup> The Court outlined three factors for courts to consider when facing a disqualification motion on the administration of justice ground alone.<sup>90</sup> As discussed further below, however, the Court did not take its analysis one step further to apply these factors to the case before it, but rather remitted the issue of remedy.

## **(2) Lingering Questions About the Bright Line Rule and Conflicts of Interest**

### **(a) When Will Professional Litigants Fall Outside the Scope of the Bright Line Rule?**

Although its reasons in *Neil* suggested that there was an exception to the bright line rule for governments, chartered banks, and “entities that could be described as professional litigants”,<sup>91</sup> the Supreme Court’s reframing of the bright line rule as a blanket prohibition changed this analysis. Professional litigants are no longer an exception. Instead, the Court held that the key question is the *scope* of this categorical rule: the rule will not apply if it would be unreasonable for a client to expect that its lawyer would not concurrently represent adverse parties in unrelated matters.<sup>92</sup> The Court demonstrated this limitation of scope with the example of “professional litigants” as described in *Neil*, and stated: “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.”<sup>93</sup>

---

89. *McKercher*, *supra* note 1 at para. 61.

90. *Ibid.* at paras. 64-65.

91. *Neil*, *supra* note 2 at para. 28.

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

93. *Ibid.* at para. 37.

The Supreme Court went on to find that it was reasonable in the circumstances for CN to expect that McKercher would not concurrently act for Wallace. It is not clear whether, in doing so, the Supreme Court found – or needed to find – that CN was a professional litigant.

In assessing CN's reasonable expectations the Supreme Court considered the motions judge's finding that CN used McKercher as its "go to" firm in Saskatchewan.<sup>94</sup> However, the Court neglected to address various countervailing facts that the Court of Appeal had highlighted. One of the largest corporations in Canada, CN employs 23 in-house counsel and regularly consults with 50 to 60 outside law firms across Canada.<sup>95</sup> Even considering Saskatchewan alone, the facts called into question CN's reasonable expectations of loyalty: McKercher had received less than one-third of CN's fees to Saskatchewan law firms in the previous five years, and had appeared as counsel for CN in only one of 22 actions commenced in Saskatchewan in the previous 10 years.<sup>96</sup>

If, in fact, the Supreme Court's determination on this issue was premised on a finding that CN is not a professional litigant, it would invite the question: If CN is not a professional litigant, who is?

However, the Supreme Court's decision that CN's expectations were reasonable in the circumstances likely hinged on the nature of the adverse matter: it specifically held that it was reasonable for CN to expect that McKercher would not concurrently represent a party *suing it for \$1.75 billion*.<sup>97</sup> Further, it was likely important to the Court's determination that the class action alleged both aggravated and punitive damages, which "connote a degree of moral turpitude on the part of CN".<sup>98</sup> The Court's articulation of this principle, coupled with its finding on the facts of this case, suggests that a client's status as a "professional litigant" is only part of the "reasonable expectations" analysis.

When the nature of the claim is put at the forefront, the Supreme Court's determination regarding CN's reasonable expectations appears to be the right one. It is consistent with the often-cited decision *Chiefs of Ontario v. Ontario*,<sup>99</sup> in which the Mnjikaning First Nation sought to disqualify its long-time law firm from acting against

---

94. *Ibid.* at para. 52.

95. *Wallace SKCA*, *supra* note 34 at paras. 5-6.

96. *Ibid.* at paras. 7-9.

97. *McKercher*, *supra* note 1 at paras. 9, 52.

98. *Ibid.* at para. 52, citing *Wallace SKQB*, *supra* note 41 at para. 56.

99. *Chiefs of Ontario v. Ontario* (2003), 63 O.R. (3d) 335, 2003 CarswellOnt 679, [2003] O.J. No. 580 (Ont. S.C.J.) ("*Chiefs of Ontario*").

it, even though it previously consented in writing to the representation in question. The Court held that while the consent was valid and binding, the “attack” at issue was outside the scope of this consent: it alleged breach of fiduciary duty, deception, and bribetaking in respect of closely related matters. Justice Campbell succinctly summarized his conclusion: “There are some things that a law firm simply cannot do.”<sup>100</sup>

Although the Supreme Court did not elaborate in its analysis, it is possible that it would have found that it was unreasonable for CN to expect McKercher to refrain from acting against it had the claim not sought aggravated and punitive damages; perhaps attacking a long-term institutional client is okay, so long as you do not assert bad faith.<sup>101</sup>

Unfortunately, one cannot be sure how courts should assess a sophisticated or large client’s reasonable expectations in future cases. The Supreme Court simply held that “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”.<sup>102</sup> The Court neglected to address any of the facts that suggested CN could qualify as a “professional litigant”, or engage in any discussion whatsoever about CN’s reasonable expectations as a large institutional client. The profession – including both judges determining conflicts motions, and lawyers attempting to clear conflicts on a day-to-day basis – remains without meaningful guidance as to the sorts of circumstances in which a sophisticated client’s consent to an adverse retainer may be inferred because it would be unreasonable for it to expect exclusive loyalty from its law firm.

### **(b) How Will Courts Assess Whether Disqualification Motions Are Tactical?**

The other limitation to the scope of the bright line rule as outlined by the Court in *McKercher* was that the rule could not be relied on in a

---

100. *Supra* at para. 146.

101. Although the Supreme Court referred to the fact that the Wallace claim was for \$1.75 billion multiple times in its decision, one wonders how much the value of damages claimed weighs into the analysis. Lawyers and courts are well aware that the damages asserted in a plaintiff’s Statement of Claim are a sort of “wish list”, and may be inflated and unrealistic. It could thus be troublesome if a court relied too heavily on the amount claimed in assessing how the claim fits with the client’s reasonable expectations of loyalty. The type of claims asserted, as discussed in *Chiefs of Ontario*, are a more appropriate aspect of the claim to point to in this analysis.

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

“tactical” manner. The Court acknowledged that there is a high possibility of tactical abuse of the bright line, as institutional clients could retain a significant number of firms, and because the retention of one lawyer in one city at a national firm could disqualify all other lawyers at that firm nationwide.<sup>103</sup>

The Court’s analysis of this issue on the facts before it was limited to two sentences. First, it held that “there is no evidence on the record that CN is seeking to use the bright line rule tactically”.<sup>104</sup> The Court gave no consideration to CN’s relatively low expectations of loyalty (considering the small proportion of its work McKercher carried – just four relatively inconsequential files at the time the conflict arose – as well as CN’s regular consultation with 50 to 60 law firms across Canada).<sup>105</sup> If this evidence did not suggest that CN could be seeking to use the bright line rule tactically, what sort of evidence would warrant that suggestion?

The Court suggested the answer to this inquiry in its second sentence on this point: “Nothing suggests that CN has been *purposefully* spreading out its legal work across Saskatchewan law firms in an attempt to prevent Wallace or other litigants from retaining effective legal counsel.”<sup>106</sup>

In both its statement of the principle and its application to CN, the Court seems to indicate that a motion to disqualify will be considered “tactical” only if the client had spread its retainers across multiple firms for the specific purpose of preventing its adversaries from retaining good counsel. This sets an impossibly high standard – it is hard to imagine a case where this could be proven – and fails to distinguish between a tactical retention strategy and a tactical motion.

The standard set by the Court for a motion to be considered “tactical” ignores the reality that while many large institutional clients – CN included – retain dozens of law firms for legitimate reasons (such as geography, strong solicitor-client relationships, and subject matter expertise), they can still use those legitimate retainers in a tactical manner by attempting to disqualify opposing counsel in an unrelated matter where there is no reasonable sense of betrayal or risk of impairment of representation. A disqualification motion can grind the progress of litigation to a halt, and thus serve as a successful delay tactic for a defendant. Moreover, a disqualification motion could be used by either party in an attempt to gain advantage by

---

103. *Ibid.* at para. 36.

104. *Ibid.* at para. 51.

105. *Wallace SKCA*, *supra* note 34 at para. 6.

106. *McKercher*, *supra* note 1 at para. 51 (emphasis added).

displacing particularly skilled or specialized counsel. Parties need not devise a strategy to spread their retainers in the hope of creating potential conflicts, as the Court suggested; institutional clients can simply take advantage of their legitimate retainers with 50 or 60 law firms to assert a conflict when it happens to be convenient. Even if a retainer is not tactical, an attempt to use it as the basis to apply the bright line rule may be.

The question thus ought not be whether the client spread out its retainers in a tactical manner; the courts ought to consider whether a client's attempt to disqualify opposing counsel is tactical, considering the interests at stake. One worries that, by asking the former question, the Court has rendered meaningless the "tactical" limitation of the scope of the bright line rule. Although the Court rightly acknowledged that there is a great deal of potential for tactical abuse of the bright line rule, its reasons fail to provide a framework that will realistically address this concern.

### **(c) What Will It Take for the Courts to Disqualify a Lawyer Who Crosses the Bright Line?**

Although *McKercher* provides more clarity than *Neil* as to when disqualification will be the appropriate remedy for a breach of the bright line rule, the Court stopped short of providing practical guidance to the profession by applying the factors it set out to the case before it. This was a missed opportunity.

Building on its decision in *Macdonald Estate*, which provided that disqualification is automatic where there is potential to misuse confidential information, the Court held in *McKercher* that disqualification will also generally be required to address the concern of impaired representation if the law firm continues to act concurrently for both clients at the time of hearing.<sup>107</sup> Where one of the conflicting retainers has ended and there is no ongoing representation to protect, however, the only purpose that may be served by disqualification is to preserve the integrity of the administration of justice. Disqualification on this ground alone is not automatic; the Court held that in these circumstances disqualification "may be required", and "all relevant circumstances should be considered" in making this determination.<sup>108</sup>

The Court proceeded to suggest a non-exhaustive list of three factors for courts faced with a motion for disqualification to consider, then ended its analysis there. The Court remitted the issue of remedy

---

107. *Ibid.* at para. 62.

108. *Ibid.* at paras. 63-64.

for the motions judge to determine in accordance with its reasons.<sup>109</sup> Although in doing so the Court implied that the motions judge would be better placed to determine the appropriate remedy, this does not actually appear to be the case. The facts relevant to these factors – CN's behaviour, the nature of the class action retainer, the effect on Wallace and the class action plaintiffs if McKercher were to be disqualified, and McKercher's knowledge when it accepted the Wallace retainer – had already been found and assessed by the courts below. There was no compelling reason for the Supreme Court to have held back on this. A practical application of the factors respecting disqualification would have provided real guidance to the profession; the Court's failure to provide such guidance is disappointing.

It is also curious that the Court suggested the role of the risk of impaired representation applies only where the lawyer *continues* to concurrently represent two clients with adverse interests; it held that disqualification was not required to avoid the risk of impaired representation in this case, as the termination of the CN retainers ended the representation.<sup>110</sup> It would be concerning if this holding was interpreted as allowing lawyers to dodge or minimize the risk of being disqualified by simply firing clients when a potential conflict arises, as McKercher did in this case.

Although the Court was undoubtedly correct that there was no longer a relationship left to protect between McKercher and CN, it does not necessarily follow that the analysis of impaired representation should end there. The risk of impaired representation could still be considered in determining whether disqualification is appropriate in circumstances where the representation ended in the time since the conflict arose. Where the client has ended the retainer, courts could ask whether representation *would have* been impaired, had the relationship continued (if "yes", this factor would weigh in favour of disqualification). Where the lawyer fired the client, courts could hold that representation was, in fact, impaired by the conflict, as the lawyer felt the representation had to end (this would also suggest disqualification would be appropriate).

Law societies have made clear in their rules of professional conduct that a lawyer cannot fire a client except in certain limited circumstances,<sup>111</sup> and the duty of commitment to the client's cause similarly prevents a lawyer from summarily dropping a client in order

109. *Ibid.* at para. 67. As stated above, the Saskatchewan Court of Queen's Bench had not rendered a decision on this matter by the time of writing.

110. *Ibid.* at para. 66.

to avoid a conflict of interest.<sup>112</sup> Of course, as the Court discussed in *McKercher*, courts and law societies have different roles in resolving conflicts of interest, and it is not the courts' place to discipline or punish lawyers.<sup>113</sup> Even still, in exercising their supervisory powers over lawyers to fulfill their role of protecting the integrity of the administration of justice, it does not seem appropriate for courts to ignore flagrant breaches of lawyers' duty of loyalty. By treating the issue of impaired representation as neutral where lawyers have fired clients in an attempt to avoid a conflict, the Supreme Court may be suggesting that these lawyers' evasion attempts can actually be successful and potentially without consequence.<sup>114</sup>

Although courts may address this concern in their application of the factors dealing with disqualification on the ground of the administration of justice, this remains unclear due to the Supreme Court's choice not to apply the factors to *McKercher*, who had fired its client. It would have been helpful for the Court to have taken a clearer stance on this issue.

### **(3) Understanding the Relationship Between the Bright Line Rule and Substantial Risk Principle**

The Supreme Court's reasons in *McKercher* clarify how the bright line rule and substantial risk principle fit together in Canadian law. Although in *Neil* the Court had described the two ideas without explaining their relationship, in *McKercher* the Court provided a framework: courts should first consider whether the situation falls within the scope of the bright line rule, and if it does not, they may go on to consider whether there is otherwise a substantial risk that the lawyer's representation will be materially or adversely affected.<sup>115</sup>

While the framework is clear, it is not clear that the framework is appropriate. Separating the substantial risk principle from the bright

---

111. See, e.g., Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 2.09.

112. *McKercher*, *supra* note 1 at para. 43.

113. *Ibid.* at para. 13.

114. As discussed by the Court of Appeal in this case, a client who has been "dumped" is not entirely without a remedy, as it can sue its former lawyer for damages for its costs of having its files transferred, and/or complain to the Law Society for ethical breaches of conduct rules (see *Wallace SKCA*, *supra* note 34 at para. 114). One questions whether many clients would, as a practical matter, make the effort to pursue these remedies, and as such whether they are sufficient to deter lawyers and law firms from ethical breaches and breaches of the duty of loyalty that threaten to bring the administration of justice into disrepute.

115. *McKercher*, *supra* note 1 at paras. 40-41.



line rule is somewhat inconsistent with the Court's statements in *Neil* and earlier in its reasons in *McKercher*, and creates a framework out of step with the *Macdonald Estate* analysis used to assess conflicts arising from possession of confidential information. Further, by taking substantial risk out of the equation, the bright line rule is both over-inclusive and under-inclusive; it does not properly hone in on the harm of adverse effect to representation.

In *Neil*, the Supreme Court articulated the substantial risk principle in the context of defining what constitutes a conflict of interest. Specifically, the Court stated it adopted the notion of a "conflict" 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".<sup>116</sup> If the substantial risk principle – the definition of a conflict of interest – is not an aspect of the bright line analysis, what harm is the bright line rule intended to address?

The bright line rule is, of course, *intended* to address conflicts of interest – specifically, potential prejudice to clients arising from a risk to effective representation. However, in light of the framework provided in *McKercher*, in which the substantial risk principle is a separate analysis from the bright line rule, the rule is both overbroad and under-inclusive; it can capture situations where there is no risk of adverse effect to the lawyer's representation of the client, and it can fail to catch situations where there is a substantial risk to representation.

The bright line rule's overbreadth can be illustrated by way of an example. As a blanket prohibition against concurrent representation – even when the two matters are unrelated – the rule would capture a lawyer in a rural community acting for a small business in obtaining a municipal retail permit while simultaneously advising an employee of that business with respect to her employment agreement, which may lead to litigation.<sup>117</sup> In this scenario, there is little or no risk that the lawyer's representation of the business in obtaining the permit will be compromised, and the lawyer may be one of few in the community. However, the Supreme Court has been clear: the bright line rule is not a "gateway to further internal balancing".<sup>118</sup> The employer in this example could have its lawyer disqualified from representing the employee.

---

116. *Neil*, *supra* note 2 at para. 31.

117. This example is a variation on one advanced by the Canadian Bar Association in its intervener factum in *McKercher*.

118. *McKercher*, *supra* note 1 at para. 29, citing *Strother*, *supra* note 64 at para. 51.

*Neil* and *Strother* illustrate how the bright line rule is under-inclusive in addressing the risk to impaired representation.<sup>119</sup> In neither case did the bright line rule apply on the facts; *Neil* related to adverse strategic interests, and *Strother* related to adverse commercial interests – not adverse legal interests.<sup>120</sup> These cases demonstrate that there are various potential conflicts of interest that are neither related to confidential information nor within the scope of the bright line rule. Such conflicts must be addressed using a third analysis, considering a lawyer’s fiduciary responsibilities.

The bright line rule apparently addresses a subset of the potential risks to impaired representation (those arising from concurrent representation of clients with adverse legal interests), while also covering situations in which there is little or no risk to material and adverse effect on representation. One wonders whether a bright line rule incorporating the substantial risk principle would better target the harms the bright line rule purports to address.

In *Macdonald Estate*, the Supreme Court developed a *presumptive* rule to address conflicts arising from the risk of abuse of confidential information: if a lawyer shared a solicitor-client relationship with the client sufficiently related to the retainer in question, courts will infer that confidential information was imparted and disqualify the lawyer from acting against the client – unless the lawyer can satisfy the court that no information was imparted that could be relevant.<sup>121</sup> The Court specifically rejected a categorical rule in that case, calling an irrebuttable presumption that relevant information was imparted “too rigid”.<sup>122</sup>

The Court in *McKercher* also recognized historical concerns with rigid conflicts rules. In laying the foundation for its analysis, the Court stated that Canada’s law of conflicts is rooted in English jurisprudence, and that traditionally courts’ main concern was that clients not suffer prejudice from a lawyer’s representation of parties adverse in interest. The Court specifically noted that the traditional rule was not “bright line”, but pragmatic: “Disqualification of a lawyer from a case was reserved for situations where there was a real

---

119. The facts of *Neil* are described in Section 2(2), above. *Strother* involved complex facts, a comprehensive explanation of which is not necessary for the purposes of this comment. In short, the case related to a lawyer’s personal financial interest in a tax shelter whose commercial interests were adverse to those of a current client, and the lawyer’s failure to advise the client of relevant information in light of his personal financial interest.

120. *McKercher*, *supra* note 1 at paras. 32-35. The Supreme Court in *McKercher* uses these examples to explain how the bright line rule is limited in scope.

121. *Macdonald Estate*, *supra* note 8 at pp. 1261-61.

122. *Ibid.* at p. 1260.

risk of harm to the client, as opposed to a theoretical possibility of harm.”<sup>123</sup>

One wonders whether a presumptive bright line rule, rather than a “blanket prohibition”, would better target the harm the rule purportedly addresses. The Supreme Court could have held that the bright line rule is qualified by the substantial risk principle, as follows: 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 the lawyer demonstrates there is no risk that the lawyer’s representation of the client would be materially and adversely affected, or both clients consent.

Of course, the Court noted in *Macdonald Estate* that defeating the inference that relevant confidential information was imparted will be a “difficult burden to discharge”.<sup>124</sup> If the bright line rule were similarly to be a presumptive one, the same high standard should be required to defeat the presumption of impaired representation. The protection of clients’ trust and confidences requires no less.

The Supreme Court acknowledged that it is arguable 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”.<sup>125</sup> It maintained this position, however, because of the advantages of the rule. The Court noted that the rule reflects the fact that the lawyer-client relationship is based on trust, and recognizes that it is difficult for a lawyer to neatly compartmentalize the interests of different clients.<sup>126</sup> However, these advantages would similarly be present in a presumptive rule with a strict burden placed on the lawyer seeking to displace the presumption of a conflict.

The Court’s primary justification for conceiving the bright line rule as categorical, rather than a presumptive rule incorporating the substantial risk principle, was that a blanket prohibition is “clear”.<sup>127</sup> In light of the many lingering questions about the application of the rule, it is not at all clear that this explanation is enough to support an overbroad and under-inclusive conception of the “bright line”.

---

123. *McKercher*, *supra* note 1 at para. 20.

124. *Macdonald Estate*, *supra* note 8 at p. 1260.

125. *McKercher*, *supra* note 1 at para. 28.

126. *Ibid.*

127. *Ibid.*

## 6. Conclusion

The Supreme Court's decision in *McKercher* offers some clarity to the issue of conflicts of interest arising from lawyers' duty of loyalty, but how the Court's judgment will be applied is uncertain. The Court explained that the bright line rule is a blanket prohibition on acting directly adverse to current clients' immediate legal interests, and set a framework for lower courts to consider when asked to disqualify counsel on the basis of a breach. Unfortunately, the Court introduced new uncertainties by holding that the bright line rule has a limited scope, without providing much practical guidance as to how this scope is constrained. Further, the Court stopped short of applying its disqualification analysis to the facts before it, which would have been a helpful illustration of the rule to guide the profession.

Many questions about the scope and application of the bright line rule remain unanswered. One hopes that further clarity will emerge as lower courts apply *McKercher* in future cases.

Brooke MacKenzie\*

---

\* B.A., J.D. (Queen's), of the Bar of Ontario. Ms. MacKenzie practises civil litigation at McCarthy Tétrault LLP in Toronto. Her firm represented the Canadian Bar Association as an intervener before the Supreme Court of Canada in *McKercher*. All opinions and any errors are the author's alone.

---

If you wish to subscribe or contribute to this publication,  
please contact us at:

## **CANADA LAW BOOK**

a Division of Thomson Reuters Canada Ltd.  
One Corporate Plaza  
2075 Kennedy Road  
Toronto, ON M1T 3V4  
Canada

Toronto: 1-416-609-3800  
Elsewhere in Canada/U.S.: 1-800-387-5164

Fax: 1-416-298-5082

e-mail: [www.carswell.com/email](http://www.carswell.com/email)

Website: [www.carswell.com](http://www.carswell.com)

---