See paras. 1-2, 4, 9, 15-16, 25-28

Case Name:

Robertson v. Slater Vecchio

Between
Linda Jane Robertson, David Thomas Barrett, Primus Automotive Financial Services Canada Company, Vesna Zivkovic, Miroslav Zivkovic, Lise Kenderdine, Alison Baker, VW Credit Canada, Inc./Credit VW Canada, Inc., Jasvir Singh Sidhu, Ashok Grewal, Rupinder Singh Grewal, Amy Yin Tong and Insurance Corporation of British Columbia, Appellants (Petitioners), and Slater Vecchio (a Partnership) and Patrick T. Gordon, Respondents (Respondents)

[2008] B.C.J. No. 1353

2008 BCCA 306

295 D.L.R. (4th) 472

81 B.C.L.R. (4th) 46

258 B.C.A.C. 100

[2008] 11 W.W.R. 260

2008 CarswellBC 1496

168 A.C.W.S. (3d) 192

Docket: CA035285

British Columbia Court of Appeal
Vancouver, British Columbia

M.V. Newbury, R.E. Levine and P.A. Kirkpatrick JJ.A.

Heard: June 5, 2008.

Judgment: July 18, 2008.

(29 paras.)

Legal profession -- Barristers and solicitors -- Relationship with client -- Confidentiality -- Conflict of interest -- Lawyer joining another firm -- Appeal by the petitioners from an order dismissing their application to have a law firm enjoined from continuing to act on certain files -- Appeal concerned application of "firewall" guidelines -- Appeal dismissed -- Measures taken by the lawyer were sufficient to displace any real risk that confidences would be disclosed.

Professional responsibility -- Professional duties -- Particular duties -- Avoiding conflicts of interest -- Confidentiality -- Appeal by the petitioners from an order dismissing their application to have a law firm enjoined from continuing to act on certain files -- Appeal concerned application of "firewall" guidelines -- Appeal dismissed -- Measures taken by the lawyer were sufficient to displace any real risk that confidences would be disclosed.

Appeal by the petitioners from an order dismissing their application to have a law firm enjoined from continuing to act on certain files. The jurisprudence had established that where a lawyer had received confidential information attributable to a solicitor-client relationship at one firm and then transferred to a new firm whose files would place him in a position of conflict, the law would infer that confidences would likely be disclosed unless one could be satisfied, on the basis of "clear and convincing evidence", that all reasonable measures had been taken to eliminate such risk. Objective and verifiable standards had to be in place such that, "the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur." To that end, the Canadian Bar Association formulated a set of guidelines that had been adopted by law societies across Canada. In British Columbia, Chapter 6 of the Law Society's Professional Conduct Handbook was devoted to conflicts arising as a result of the transfer of lawyers between firms. In this case, the transferring lawyer and his "new" firm were aware of the Guidelines and took extensive measures to comply with them. However, there were some delays in the full imposition of some of the measures described in the Guidelines. In particular, those measures requiring the physical and professional "quarantine" of the lawyer were not followed. The chambers judge ruled that those deficiencies were not fatal and that there was "compliance in spirit and substantial compliance" with the Guidelines.

HELD: Appeal dismissed. The question was not whether each of the Guidelines had been followed to the letter, but whether on the facts of the case the lawyer and his or her firm had met the "difficult burden" of the "reasonable member of the public" test formulated by the Supreme Court of Canada. In this case, the chambers judge balanced the delays and deficiencies in compliance with the Guidelines against the other factors that "influence the risk". He concluded that the measures taken by the lawyer were sufficient to displace any real risk that confidences would be disclosed. There was no basis on which it could be said that his decision, which involved an exercise of some discretion, was "so clearly wrong as to amount to an injustice."

Counsel:

T. Robertson, Q.C. and M.G. Thomas: Counsel for the Appellant.

D. G. Cowper. Q.C. and K. Gammon: Counsel for the Respondents.

Reasons for Judgment

The judgment of the Court was delivered by

1 M.V. NEWBURY J.A.:-- Since the seminal decision of the Supreme Court of Canada in ***MacDonald Estate v. Martin*** [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249, so-called "Chinese walls" or "firewalls" have become common phenomena in Canadian law firms. The basic tenets of ***MacDonald Estate*** are well known: where a lawyer has received confidential information attributable to a solicitor-client relationship at one firm and then transfers to a new firm whose files would place him in a position of conflict, the law will infer that "confidences are likely to be disclosed" unless one can be satisfied, on the basis of "clear and convincing evidence", that all reasonable measures have been taken to eliminate such risk. It is not sufficient for the lawyer merely to provide assurances or to swear an affidavit that no disclosure has occurred or will occur, or even to give an undertaking to this effect. Objective and verifiable standards must be in place such that "the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur." (***MacDonald Estate***, 1259-60.)

2 It is also well known that in response to the Court's comments in ***MacDonald Estate***, the Canadian Bar Association formulated a set of guidelines that have been adopted substantially by law societies across the country, to assist lawyers and their firms in meeting this high standard. In British Columbia, much of Chapter 6 of the Law Society's *Professional Conduct Handbook* is devoted to conflicts arising as a result of the transfers of lawyers between firms. For purposes of this appeal, para. 7.4(b) of that chapter is most relevant. It provides:

Firm disqualification

7.4

If the transferring lawyer actually possesses confidential information relevant to a matter referred to in paragraph 7.2(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client, or

(b) the new law firm establishes, in accordance with Rule 7.8, that:

(i) it is in the interests of justice that its representation of its client in the matter continue, having regard to all relevant circumstances, including:

(A) the adequacy of the measure taken under subparagraph (ii),
(B) the extent of prejudice to any party,
(C) the good faith of the parties,
(D) the availability of alternative suitable counsel, and
(E) issues affecting the national or public interest, and

(ii) <u>it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm</u>. [Emphasis added.]

3 Appendix 5 to the Handbook, headed "Conflicts Arising as a Result of Transfer Between Law Firms", states that it is not possible to offer a "set of reasonable measures" for purposes of the Rule that will be appropriate or adequate in every case, but that the "new" law firm seeking to implement such measures must exercise professional judgement in determining what steps are necessary. The Appendix provides a set of 12 Guidelines adapted from the CBA Task Force report, "*Conflict of Interest Disqualification: Martin v. Gray and Screening Methods"*, dated February 1993. The Handbook comments that the adoption of only some of the Guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others. The Guidelines are as follows:

1. The screened lawyer should have no involvement in the new law firm's representation of its client.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the prior representation with the screened lawyer.
4. The current client matter should be discussed only within the limited group that is working on the matter.
5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support

staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.
7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by the admonition that violation of the policy will result in sanctions, up to and including dismissal.
8. Affidavits should be provided by the appropriate firm members, setting out that they have adhered to and will continue to adhere to all elements of the screen.
9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised:

   (a) that the screened lawyer is now with the new law firm, which represents the current client, and
   (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

10. The screened lawyer should not participate in the fees generated by the current client matter.
11. The screened lawyer's office or work station should be located away from the offices or work stations of those working on the matter.
12. The screened lawyer should use associates and support staff different from those working on the current client matter.

4 In the case at bar, the transferring lawyer and his "new" firm were clearly aware of the Guidelines and took extensive measures to comply with them. However, there were some delays in the full imposition of some of the measures described in the Guidelines, and the final two -- those requiring the physical and professional "quarantine" of the lawyer -- were not followed, perhaps not surprisingly in a firm of only nine lawyers. The chambers judge below, Mr. Justice Rice, ruled that these deficiencies were not fatal and that from the date the lawyer commenced employment at the new firm, "there was compliance in spirit and substantial compliance" with the Guidelines. He concluded that the knowledgeable and reasonable client, witnessing the new firm's good faith efforts to protect against disclosure, would conclude that no unauthorized disclosure of confidential information had occurred or was likely to occur as a result of the lawyer's transfer.

5 The appellants (petitioners below) challenge Rice J.'s order dismissing their application to have the new firm enjoined from continuing to act on the "conflict" files. The appellants submit not only that the court below erred in brooking any delay in the completion of all firewall measures at the

new firm, but also that the Guidelines must be followed in all respects, whether the firm is large or small. Indeed, while counsel for the appellants was reluctant to concede that it would be "practically impossible" for small firms to comply with all the Guidelines, his basic premise was that the chambers judge erred "in principle" in failing to take into account "the risks of disclosure of ... confidential information in a small firm".

Factual Background

6 The chambers judge stated the facts of the case at paras. 4-29 of his reasons, which are indexed as 2007 BCSC 987. The lawyer in question was Mr. Gordon, who was an associate at Hartshorne Mehl. The firm acts for the appellants, who are defendants in the various lawsuits in which they seek to restrain the new firm from acting as counsel for the plaintiffs. There is no doubt that when he was working at Hartshorne Mehl, Mr. Gordon received confidential information as a result of solicitor-client relationships with the appellants.

7 Slater Vecchio is a firm of nine lawyers who practice mainly in the field of personal injury litigation, acting usually for plaintiffs (and consequently, often against I.C.B.C., one of the appellants). In September and early October 2006, Mr. Gordon had discussions with Slater Vecchio about joining them. On the morning of October 12, he received an offer of employment from them. He did not respond immediately but waited for the partners of Hartshorne Mehl to return from lunch. As luck would have it, he was scheduled to attend a meeting that afternoon with two of the appellants, Ms. Robertson and Mr. Barrett, to prepare them for a discovery which was to take place on October 13. He attended the meeting and did not advise anyone that he "anticipated" leaving his firm to join Slater Vecchio. At some point in the afternoon, he also met with Mr. Hartshorne and Ms. Mehl and advised them of the offer he had received. The next day, he advised Slater Vecchio that he was accepting their offer, and sent an e-mail to Mr. Hartshorne and Ms. Mehl confirming his resignation. He said he planned to leave on October 27. Ms. Mehl phoned him that afternoon objecting to the short notice he had given the firm and told him he should leave the office that day. It was later agreed, however, that Mr. Gordon would complete two matters scheduled for October 16 and 17 and leave the firm immediately after that.

8 The appellants alleged below that Mr. Gordon's failure to advise Ms. Robertson and Mr. Barrett about his offer from Slater Vecchio on the afternoon of October 12 was a breach of his professional duty, and in particular of paras. 2 and 7 of Chapter 1(3) of the Handbook. The chambers judge did not regard the incident as a major concern: although agreeing that Mr. Gordon's "better choice" might have been to postpone the meeting and report the matter to his firm, he concluded that if there was a breach, it was not a "major breach bearing on the larger question of confidentiality." (Para. 12.)

9 Immediately upon Mr. Gordon's acceptance of their offer, Slater Vecchio set about to install a firewall. The firm's office administrator, Ms. Cook, asked Mr. Gordon to supply a list of all files in which Hartshorne Mehl were acting for the defence and told him a firewall would be needed. Mr.

Gordon asked a legal assistant at Hartshorne Mehl to compile a list of all files in which they were counsel and Slater Vecchio were opposing counsel. He asked for the list to be sent to his new firm as soon as possible. On October 16, he was told that a list had been prepared, but that the office manager had been instructed not to provide it to Slater Vecchio -- a response that was repeated after further inquiries by Mr. Gordon on October 17, 18 and 24.

10 On October 25, Hartshorne Mehl faxed a letter to Slater Vecchio including a list of what it considered to be "conflict files". It included not only matters conducted by Mr. Gordon personally but other files where it was possible that Mr. Gordon had received confidential information.

11 As noted by the chambers judge at para. 17 of his reasons, Mr. Slater instructed Ms. Cook the following day to locate all other files in which Hartshorne Mehl were opposing counsel and to implement the same firewall procedures that had been previously used by the firm when it had hired another lawyer, Mr. Parsons. These procedures were not lacking in sophistication. They included the following:

> (a) The identification of the relevant Slater Vecchio files and the preparation of a firewall list.
> (b) In the course of preparation of the firewall list, the administrator speaks to the staff responsible for each file to ensure the information is correct and the list is exhaustive. It is at this point that staff become aware of conflict issues relating to specific files.
> (c) Data file restrictions are set up by the office staff at Slater Vecchio for the various litigation support software programs, namely, the file management software, Amicus Attorney and Primafact, the file image management software.
> (d) The external IT support company sets up computer data restrictions for other client folders, which mainly include word processing documents.
> (e) Every folder, subfolder and binder in the firewalled files are labelled with large labels indicating restriction and are then filed in cabinets and drawers segregated from the firm's central filing.
> (f) The entire process of establishing the firewalls involves much dialogue within the office among all staff and lawyers to ensure that all files are accounted for, labelled and relocated. [At para. 19.]

12 In accordance with these procedures, Ms. Cook began on October 26 to review Slater Vecchio's files to ensure that the firewall list was exhaustive. She completed that process on November 8, 2006. However, on October 31, she forwarded by e-mail to all lawyers at Slater Vecchio a list of all files that Hartshorne Mehl had identified as "to be firewalled". She asked the lawyers to review the list and provide information regarding any other files that should be added.

13 Mr. Gordon began his employment at Slater Vecchio the following day and was given a copy of the list. On it he noted three files that were not Slater Vecchio files at all, and he informed

Hartshorne Mehl of this on November 1 or 2. Hartshorne Mehl removed the files from their copy of the list. The chambers judge described subsequent events with respect to the "firewalled files" as follows:

> During the course of the first couple of weeks of Mr. Gordon's employment, a lawyer at Slater Vecchio began compiling a list of files that would be assigned to Mr. Gordon. Ms. Cook reviewed this list November 9, 2006.
>
> On November 7, 2006, Slater Vecchio instructed its external IT services company to put in place the restrictions on the client folders. Confirmation that this had been done was received on November 8, 2006. By November 8, 2006, restrictions had been placed internally on the other databases.
>
> On November 8, 2006, and again on November 16, 2006, Ms. Cook e-mailed Slater Vecchio staff and lawyers the final internal list of files for firewalling. Staff were instructed to label and relocate files as necessary. On November 17, 2007, an e-mail from a Slater Vecchio associate, James Buckley, went out to everyone in the firm advising that anyone breaching the firewall may face discipline, up to and including possible dismissal.
>
> On November 19, 2006, Ms. Cook e-mailed Slater Vecchio staff and lawyers requesting confirmation of completion of the labelling and relocating of hardcopy firewalled files. ...
>
> On November 20, 2006, Ms. Cook conducted an inventory of the hardcopy firewalled files in the designated cabinets to confirm that all had been properly labelled and relocated. [At paras. 24-7 and 29.]

14 During his first few weeks at the new firm, Mr. Gordon was assigned to work on one major products liability matter and had no involvement on any of the firewalled files. However, the chambers judge noted, it was "unclear on the evidence" whether his work at Slater Vecchio was "kept far enough away from other lawyers and staff, and whether he avoided working with associates and staff involved in the [appellants'] lawsuits." (Para. 51.) Given this comment, we should assume for purposes of this appeal that Mr. Gordon's work area was not a segregated one and that he is likely to have worked with lawyers and staff members who were working on those matters. On the other hand, the chambers judge noted at para. 57:

> Mr. Gordon swore a statutory declaration on November 21, 2006

> confirming that he had complied with all elements of the firewall to that date and would continue to do so. That evidence does not stand alone. The other evidence supports it. It was deposed that at no time after November 1, 2006 did Mr. Gordon: work on any files on the conflict list; nor did he access or attempt to access any of the computer files on the conflict list; nor did he have any discussion with any lawyer or staff member of Slater Vecchio about any of the files on the conflict list; nor did he [in] any way disclose confidential information with respect to the matters on the conflict list to anyone at Slater Vecchio. [At para. 57.]

The Judgment Below

15 In the court below, the appellants placed primary emphasis on the fact that Slater Vecchio's firewall procedures had not been completely in place prior to Mr. Gordon's commencement of employment there. They noted in particular the judgment of the New Brunswick Court of Appeal in ***Bank of Montreal v. Dresler***, 2002 NBCA 69, 224 D.L.R. (4th) 337, where Robertson J.A. suggested (at para. 77) that in all but exceptional cases, a failure to erect a screen at the time of transfer "will be fatal to the screen's effectiveness" -- a suggestion echoed in ***Poehler v. Langer***, [1999] B.C.J. No. 217 (S.C.) (QL), by Pitfield J. at para. 45. The chambers judge here noted, however, that in most of the cases cited by the appellants, the delays in question had lasted several weeks and often several months, during which no conflict or potential for conflict had been recognized. (Para. 43.) Further, he found that it was chiefly Hartshorne Mehl's delay in providing a complete and accurate list of the conflicting files that had prevented Slater Vecchio from "completing the firewall on time" in this case. Overall, he said, there had been a "concerted effort" by all staff at the new firm to segregate the conflict files, and the office administrator had "applied herself anxiously to the process of establishing the firewall." (Para. 50.)

16 The chambers judge also noted that while the protection of confidentiality was the foremost consideration, the authorities made it clear that perfection is not required and that disqualification is "not automatic except for persons actually possessed of the confidential information." In his analysis:

> ... For all others, the courts must also consider the plaintiff's basic right to counsel, and whether the consequences of disclosure, the mischief, is actual and not speculative. If there is no prejudice, no mischief, the courts may deny injunctive relief. The court must analyze all relevant factors. In *Dreco Energy Services v. Wenzel Downhole Tools Ltd.*, 2006 ABQB 718, the Alberta Court of Queen's Bench per Lefsrud, J. reviewed *Allied Signal Inc. v. Dome Petroleum Ltd.* (1997), 193 A.R. 273 (C.A.), 144 D.L.R. (4th) 30, and *MacDonald Estate, supra*, and held at paras. 40-41:

> I conclude that the law binding on this Court is to the effect that where there is a delay in implementing a screen, the particular circumstances of the case must be considered. I have found that the late file-specific screen was reasonable to prevent prospective disclosure of confidential information. However, obviously such a late screen is not a full answer to the allegation of conflict of interest in this case.
>
> The issue before this Court is whether a reasonably informed person would be satisfied that no confidential information was communicated to other counsel or used during the time period in question, so as to undermine the efficacy of the subsequent screen. Clear and convincing evidence is required to discharge the onus on the respondent in this regard. [At para. 44.]

17 Without reaching an express conclusion on the question of delay, the chambers judge then turned to the issue of firm size. Again, the appellants relied heavily on ***Bank of Montreal v. Dresler***, *supra*, where it was suggested that "in an ideal legal world", the screened lawyer would not have daily contact with those working on the screened files, and that he or she "must be able to practise law independently of those representing the current client". (Para. 81.) At the same time, the Court agreed with the CBA Task Force's rejection of the American position that a firewall will not be effective if the firm has fewer than 30 lawyers. In Robertson J.A.'s words, "A smaller number may suffice. Each case must be judged on its own facts." (Para. 80.)

18 The chambers judge in the case at bar acknowledged that if Mr. Gordon could be "tucked away" on a separate floor, then any indiscretion that he might commit "at the water cooler" would be less likely to cause harm. But Rice J. was not persuaded that the law firm's size was determinative. In his analysis:

> ... there are other factors that can also readily influence the risk, and more than enough in some instances to compensate for a size disadvantage, for example configuration of the workplace, and closer supervision and training of staff. Also, it should not be overlooked how much contemporary inter office communication there is by telephone and email as compared to personal contact. Size is irrelevant in that respect. Neither should it be presumed that individuals in smaller firms tend to be any more casual about their professional responsibilities or reputations than their colleagues in big firms. In any event I find that Slater Vecchio because of its good management of the office environment was not, for lack of size, any more susceptible to disclosure than other bigger firms.
>
> Slater Vecchio says that measures actually in place November 1, 2006,

> were effective to protect confidential information, and there was no leak of confidential information after November 1, 2006. All of the firm, including professional members and staff, were made aware that the firewall was being set up, they knew what it was for and understood its utmost importance. [At paras. 55-6.]

19 Rice J. was also conscious of two other values competing with the paramount objective of protection of client confidentiality. These had been described by Chief Justice Esson (as he then was) in ***Manville Canada Inc. v. Ladner Downs*** (1992), 63 B.C.L.R. (2d) 102 (S.C.), aff'd 76 B.C.L.R. (2d) 273 (C.A.), who observed that an order depriving a litigant of the services of the lawyer it had chosen and who might have represented it for years, was a drastic measure that in many cases could work an injustice on the innocent client. The Chief Justice suggested that the imposition of such hardship and injustice could be justified only "if it is inflicted to prevent the imposition of a more serious injustice on the party applying. It follows that the injunction should be granted only to relieve the applicant of the risk of "real mischief", not a mere perception." (At para. 51.) As well, the majority in ***MacDonald Estate*** recognized (at 1243) the "desirability of permitting reasonable mobility in the legal profession" -- a value important to firms of all sizes. It was because of the importance of the three objectives, as well as the overarching need to protect the integrity and effectiveness of the justice system, that Esson C.J.B.C. in ***Manville*** warned against the imposition of a disqualification order in every case where an "appearance of impropriety" can be 'conjured up':

> ... I return to the first value, the concern to maintain the high standards of the legal profession in the integrity of our system of justice. There are many references in the judgments in *MacDonald Estate v. Martin* to that very broadly stated value, which is treated as being at risk only from conflict of interest by lawyers. I do not discount the seriousness of that risk but I suggest with respect that, if the rules for disqualification invite applications of this kind wherever the ingenuity of the legal mind can conjure up a possibility of an appearance of impropriety, the result will be to damage the profession's reputation and the integrity of the system by adding to the already intolerable length and cost of litigation. [At para. 53.]

20 Rice J. did not find that such "tactical" considerations were present in this case. But having considered all the relevant factors, he found that although ideally the firewall should have been completed by the time Mr. Gordon had arrived at Slater Vecchio on November 1, 2006, the new firm had complied "in spirit" and substantially by that date and that a reasonably informed member of the public, seeing the efforts and measures taken, would conclude that no unauthorized disclosure of confidential information had occurred or was likely to occur. He dismissed the application to disqualify Slater Vecchio from acting on the conflict files.

On Appeal

21 Leave was granted to the appellants to appeal on the following grounds, namely:

(a) the judge did not properly take into account the risks of disclosure of the confidential information in a small firm, particularly where all conflict safeguards had not been in place at the relevant time;

(b) the judge did not place any weight on Mr. Gordon's actions in representing the appellants after he was negotiating with Slater Vecchio for employment, and after he had received an offer of employment from Slater Vecchio, as a relevant consideration in applying the "knowledgeable and reasonable client test"; and

(c) the judge was in error and misstated the test for restraining a law firm from acting; namely, whether unauthorized disclosure was "likely to occur" as opposed to whether there was a "risk of real mischief" that disclosure would occur.

22 In his oral argument, Mr. Robertson on behalf of the appellants referred only briefly to the second ground, and rightly so in my view. Mr. Gordon was in a delicate position on the afternoon of October 12. He had not accepted Slater Vecchio's offer at the time he attended the meeting with Ms. Robertson and Mr. Barrett, and there was no evidence that he had decided to do so, assuming an uncommunicated decision of that kind could ground an imputation of conflict of interest. In any event, his actions that day are unrelated to the question of disclosure of information confidential to these clients. As Mr. Cowper, counsel for the respondents, pointed out, Mr. Gordon was already in possession of such information, and his attending the meeting certainly did not change that fact. (See also ***Berg v. Bruton***, 2005 SKQB 525, 273 Sask.R. 181 at para. 18.)

23 Mr. Robertson placed primary emphasis on the first ground of appeal, highlighting Slater Vecchio's failure to comply with Guidelines 11 and 12, quoted above at para. 3. Although he was reluctant to agree with the suggestion that it is "practically impossible" for a small firm to comply with these requirements, he submitted that such firms must organize themselves so as to comply with all the Guidelines without exception. Not having done so, Slater Vecchio left open the risk that, for example, a legal assistant who had prepared a document on the impugned files might also work for Mr. Gordon, or that Mr. Gordon would have lunch with one of his co-workers or even socialize with them outside the office.

24 With respect, this submission comes perilously close to treating the Guidelines in Appendix 5 to the Handbook as if they were mandatory rules that must be met in every case and in every detail -- essentially the position adopted by Cory J. for the minority in ***MacDonald Estate***. That position did not prevail. As mentioned earlier, Appendix 5 itself says that it is not possible to formulate "reasonable measures" that will be appropriate or adequate in every case and that adoption of only some of the Guidelines may be adequate in some cases. Thus Robertson J.A. observed for the Court in ***Bank of Montreal v. Dresler***, *supra*, that there is no authority for the proposition that to avoid disqualification, the "tainted firm" must comply with all twelve Guidelines. (Para. 59.) He

continued:

> ... The Task Force observed that the greater the number of guidelines implemented the greater the chance of a screen's success. There is no reason to quibble with this proposition. It is consistent with clause 4(b)(i)(A) of the Law Society's conflict rules, which speaks of the "adequacy" of the measures taken to prevent disclosure of confidential information. However, this understanding does not detract from the reality that some guidelines are mandatory. Others are not. Some are more significant than others. Some relate to ethical matters. Others focus exclusively on the erection of an effective screen. ...
>
> In summary, disqualification is not automatic because of a failure to comply with all twelve of the Law Society's guidelines. To hold otherwise would be tantamount to saying that the professional bodies concerned were intent on adopting a comprehensive code of conduct. That approach is too impractical. The diversity of factual circumstances that can arise is documented in the law reports. This is one area of the law in which flexibility is required. [At paras. 56 and 60; emphasis added.]

The court must determine, then, not whether each of the Guidelines has been followed to the letter, but whether on the facts of the case the lawyer and his or her firm have met the "difficult burden" of the "reasonable member of the public" test formulated by the majority in ***MacDonald Estate.***

25 In a case such as this, where the only concern is the disclosure of information by the lawyer -- as opposed to disclosure to him or her -- compliance with Guideline 11 is in my view virtually irrelevant, and should certainly not be regarded as "mandatory". Guideline 12 on the other hand is relevant, but its application poses some questions. Obviously, it creates a particular challenge for small firms, who function with a limited number of professionals and staff, and often look to 'new hires' to assume an immediate role in the existing practice. The Guideline is limited to professional interactions and does not purport to prohibit purely social or even administrative contact, contrary to the suggestion of counsel for the appellants in this court. Again adverting to ***Bank of Montreal v. Dresler***, I adopt with respect the Court's statement that the law does not purport to prohibit all interaction, such as participation in management activities or even socializing, between the lawyer and his new colleagues. If it were otherwise, Robertson J.A. said, disqualification "would be a virtual given" and the minority opinion of Cory J. in ***MacDonald Estate*** would become the "de facto law". (Para. 82.)

26 Another issue arises from the word "use" in Guideline 12. It directs that the new lawyer "use" associates and support staff other than those working on the 'conflict files'. The word may be appropriate for partners or senior associates who are 'using' the services of junior lawyers, but does not fit comfortably with a new associate. Guideline 12 can, however, apply to a lawyer who "uses"

the services of support staff, and the respondents acknowledge that it was not complied with in this case.

27 At the end of the day, the essential question for us is whether the chambers judge erred in not regarding this non-compliance as fatal to the new firm's position. In order to interfere with his conclusion, we would have to be persuaded that he misdirected himself or that his decision was clearly wrong. I am not so persuaded. Rice J. was clearly aware of the relevant law: he referred at length to the majority and minority judgments in ***MacDonald Estate***, to the *Law Society Rules* and to the Guidelines in Appendix 5 to the Handbook. After examining all the facts in detail, he correctly stated the ***MacDonald Estate*** standard and found that Slater Vecchio had acted diligently to establish the firewall from the date Mr. Gordon accepted the firm's offer; that because of the firm's "good management", it was not any more susceptible to disclosure than bigger firms; and that there was "compliance in spirit and substantial compliance" by November 1, 2006. (Para. 61.) These are findings of fact that have not been seriously challenged. Applying the ***MacDonald Estate*** standard to the facts, the chambers judge balanced the delay and the deficiencies in compliance with the Guidelines against the other factors that "influence the risk". (Para. 55.) He concluded that the measures taken by Slater Vecchio were sufficient to displace any "real risk" that confidences would be disclosed, and that accordingly, the respondents had discharged the onus on them. I see no basis on which it could be said that his decision, which involved the exercise of some discretion, was "so clearly wrong as to amount to an injustice". (***Elsom v. Elsom*** [1989] 1 S.C.R. 1367, at 1375.) Indeed, I agree with his conclusion.

28 With respect to the appellants' third ground of appeal, which focuses on the chambers judge's use of the phrase "likely to occur" at para. 62 of his reasons, I agree with the respondents that this appears to be more a matter of semantics than substance. As the respondents note in their factum, even Sopinka J. in his reasons in ***MacDonald Estate*** phrased the "reasonable person" test in terms of whether confidences were "likely to be disclosed" despite institutional efforts to prevent it. (*Supra*, at 1262.) In the case at bar, the chambers judge quoted extensively from key passages of ***MacDonald Estate*** and correctly applied the formulations provided by the Supreme Court.

29 In the result, I would dismiss the appeal, with thanks to counsel for their very helpful submissions.

M.V. NEWBURY J.A.
R.E. LEVINE J.A.
P.A. KIRKPATRICK J.A.