Indexed as:

MacDonald Estate v. Martin

William Steward Arnold Martin, appellant;
v.
William Hamilton Gray, administrator with will annexed
of the estate of John Edwin MacDonald, respondent.

[**1990**] **3 S.C.R**. **1235**

[1990] 3 R.C.S. 1235

[1990] S.C.J. No. 41

[1990] A.C.S. no 41

1990 CanLII 32

File No.: 21469.

Supreme Court of Canada

1990: May 4 / 1990: May 10*.

Present: Dickson C.J. and Wilson, La Forest,**
L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA (75 paras.)

* Reasons delivered December 20, 1990. ** Chief Justice at the time of hearing.

Barristers and solicitors -- Conflict of interest -- Former junior solicitor for appellant joining law firm acting for respondent -- Whether law firm may continue to act as solicitors of record for respondent -- Test to be applied in determining whether disqualifying conflict of interest exists.

Respondent brought an action against appellant for an accounting. Appellant's solicitor was assisted by a junior member of his firm who was actively engaged in the case and was privy to many

confidences disclosed by appellant to his solicitor. The junior member later joined the law firm which represents respondent in this action. Appellant applied to the provincial superior court for a declaration that the law firm was ineligible to continue to act as solicitors of record for respondent. The court granted the application and ordered the firm removed as solicitors of record. The Court of Appeal reversed that decision. This appeal is to determine the appropriate standard to be applied in deciding whether a law firm should be disqualified from continuing to act in the litigation by reason of a conflict of interest.

Held: The appeal should be allowed.

Per Dickson C.J. and La Forest, Sopinka and Gonthier JJ.: In determining whether a disqualifying conflict of interest exists, the Court is concerned with three competing values: (1) the concern to maintain the high standards of the legal profession and the integrity of our system of justice; (2) the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause; and (3) the desirability of permitting reasonable mobility in the legal profession. The "probability of mischief" standard, which is the [page1236] traditional English test, is not sufficiently high to satisfy the public requirement that there be an appearance of justice. The use of confidential information is a matter usually not susceptible of proof, and the test must therefore be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. Two questions must be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client? In answering the first question American courts have adopted the "substantial relationship" test: once it is established that there is a "substantial relationship" between the matter out of which the confidential information is said to arise and the matter at hand, there is an irrebuttable presumption that confidential information was imparted to the lawyer. This test is too rigid, however. Rather, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. The degree of satisfaction must withstand the scrutiny of the reasonably informed member of the public. This will be a difficult burden to discharge.

In answering the second question, whether the confidential information will be misused, a lawyer who has relevant confidential information is automatically disqualified from acting against a client or former client. With respect to the partners or associates in the firm, the concept of imputed knowledge is unrealistic in the era of the mega-firm. The court should therefore draw the inference that lawyers who work together share confidences, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence. Until the governing bodies of the legal profession have approved of

these and adopted rules with respect to their operation, it is unlikely that a court would accept them as evidence of effective screening. Undertakings and conclusory statements in affidavits are not sufficient, since affidavits of lawyers are difficult to verify objectively and the public is not likely to be satisfied without some [page1237] additional guarantees that confidential information will under no circumstances be used.

In this case the lawyer actively worked on the very case in respect of which her new firm is acting against her former client, and she is therefore in possession of relevant confidential information. With respect to misuse of the information, there is nothing in the affidavits filed to indicate that any independently verifiable steps were taken by the firm to implement any kind of screening, and the firm may therefore not continue to act.

Per Wilson, L'Heureux-Dubé and Cory JJ.: Where a lawyer who has had a substantial involvement with a client in an ongoing contentious matter joins another law firm which is acting for an opposing party, there is an irrebuttable presumption that the knowledge of such lawyer, including confidential information disclosed to him or her by the former client, has become the knowledge of the new firm. Such an irrebuttable presumption is essential to preserve public confidence in the administration of justice.

Neither the merger of law firms nor the mobility of lawyers can be permitted to affect adversely the public's confidence in the judicial system. At this time, when the work of the courts is having a very significant impact upon the lives and affairs of all Canadians, it is fundamentally important that justice not only be done, but appear to be done in the eyes of the public. While the necessity of selecting new counsel will certainly be inconvenient and worrisome to clients, and reasonable mobility may well be important to lawyers, the integrity of the judicial system is of such fundamental importance that it must be the predominant consideration. Our judicial system cannot function properly if doubt or suspicion exists in the mind of the public that the confidential information disclosed by a client to a lawyer might be revealed. No matter what form of restrictions were sought to be imposed on individual lawyers and law firms involved, the public would, quite properly, remain skeptical of their efficacy since lawyers in the same firm meet frequently and have numerous opportunities for the private exchange of confidential information.

Cases Cited

By Sopinka J.

Not followed: Rakusen v. Ellis, Munday & Clarke, [1912] 1 Ch. 831; referred to: Morton v. Asper (1987), 49 Man. R. (2d) 167, aff'd (1987), 51 Man. R. (2d) 207; Law Society of Manitoba v. Giesbrecht (1983), 24 Man. R. (2d) 228; [page1238] Re a Solicitor, unreported, Chancery Division, March 31, 1987, summarized at 131 Sol. J. 1063; T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (1953); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (1973); E. F. Hutton & Co. Inc. v. Brown, 305 F. Supp. 371 (1969); Nemours Foundation v. Gilbane, Aetna, Federal Ins. Co., 632 F. Supp. 418 (1986); U.S.A. for the Use and Benefit of Lord Electric Co. v. Titan Pacific

Construction Corp., 637 F. Supp. 1556 (1986); In re Asbestos Case, 514 F. Supp. 914 (1981); Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (1983); Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186 (1955); Akerly v. Red Barn System, Inc., 551 F.2d 539 (1977); Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322, certiorari denied, 429 U.S. 861 (1976); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (1975); Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, 224 F.2d 824 (1955), certiorari denied, 350 U.S. 932 (1956); City of Cleveland v. Cleveland Electric Illuminating Co., 440 F. Supp. 193 (1977), aff'd mem., 573 F.2d 1310, certiorari denied, 435 U.S. 996 (1977); Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (1958); D & J Constructions Pty. Ltd. v. Head (1987), 9 N.S.W.L.R. 118; National Mutual Holdings Pty. Ltd. v. Sentry Corp. (1989), 87 A.L.R. 539; In the Marriage of Thevanaz (1986), 11 Fam. L.R. 95; Re the Marriage of R.P. and A.A. Gagliano (1989), 12 Fam. L.R. 843; Steed & Evans Ltd. v. MacTavish (1976), 12 O.R. (2d) 236; Canada Southern Railway Co. v. Kingsmill, Jennings (1978), 8 C.P.C. 117; Falls v. Falls (1979), 12 C.P.C. 270; Goldberg v. Goldberg (1982), 141 D.L.R. (3d) 133; Lukic v. Urquhart (1984), 11 D.L.R. (4th) 638, aff'd in part (1985), 15 D.L.R. (4th) 639; O'Dea v. O'Dea (1987), 68 Nfld. & P.E.I.R. 67; Fisher v. Fisher (1986), 76 N.S.R. (2d) 326; Thomson v. Smith Mechanical Inc., [1985] C.S. 782; Canada v. Consortium Designers Inc. (1988), 72 Nfld. & P.E.I.R. 255, aff'd (1989), 80 Nfld. & P.E.I.R. 12; Farmers Mutual Petroleums Ltd. v. United States Smelting, Refining & Mining Co. (1961), 28 D.L.R. (2d) 618; R. v. Burkinshaw (1967), 60 D.L.R. (2d) 748; Devco Properties v. Sunderland, [1977] 2 W.W.R. 664; Mercator Enterprises Ltd. v. Mainland Investments Ltd. (1978), 29 N.S.R. (2d) 703; Christo v. Bevan (1982), 36 O.R. (2d) 797; Schmeichel v. Saskatchewan Mining Development Corp., [1983] 5 W.W.R. 151; International Electronics Corp. v. Woodside Developments Ltd., unreported, British Columbia Supreme Court, June 26, 1985; Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599; United States Surgical Corp. v. Downs Surgical Canada Ltd. (1982), 141 D.L.R. (3d) 157.

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By Cory J.

Followed: Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (1983).

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Canadian Bar Association. Code of Professional Conduct. Adopted August 25, 1974.
Dean, Miriam R. and Christopher F. Finlayson. "Conflicts of interest: When may a lawyer act against a former client?", [1990] N.Z.L.J. 43.
"Developments in the Law -- Conflicts of Interest in the Legal Profession" (1981), 94 Harv. L. Rev. 1247.
Kryworuk, Peter William. "Acting Against Former Clients -- A Matter of Dollars and Common Sense" (1985), 45 C.P.C. 1.

Steele, Graham. "Imputing Knowledge From One Member of a Firm to Another: 'Lead Us Not Into Temptation'"(1990), 12 Adv. Q. 46.

APPEAL from a judgment of the Manitoba Court of Appeal (1989), 57 Man. R. (2d) 161, 58 D.L.R. (4th) 67, [1989] 3 W.W.R. 653, reversing the judgment of the Court of Queen's Bench granting a declaration that a firm of lawyers was ineligible to continue to act as solicitors of record for the respondent and removing the firm as solicitors of record. Appeal allowed.

R.A. Dewar and R.A. Watchman, for the appellant. A.D. MacInnes, Q.C., for the respondent.

Solicitors for the appellant: Pitblado & Hoskin, Winnipeg. Solicitors for the respondent: Thompson, Dorfman, Sweatman, Winnipeg.

The judgment of Dickson C.J. and La Forest, Sopinka and Gonthier JJ. was delivered by

1 **SOPINKA J.**:-- This appeal is concerned with the standard to be applied in the legal profession in determining what constitutes a disqualifying conflict of interest. The issue arose in the context of a lawsuit in which a former junior solicitor for the appellant transferred her employment to the law firm acting for the respondent.

Facts

2 The respondent, Gray, is the plaintiff in an action for an accounting against the appellant and Rossmere Holdings. In 1983, the appellant retained the services of A. Kerr Twaddle, Q.C., [page1240] who served in the capacity of solicitor and counsel until his appointment to the bench in 1985. While acting for the appellant, Twaddle was assisted by Kristin Dangerfield, a graduate articled student and later a junior member of his firm. She was actively engaged in the case and was privy to many confidences disclosed by the appellant to Twaddle. Dangerfield was in attendance at numerous meetings between Mr. Twaddle and the appellant Martin, assisted in the preparation of many documents, prepared and attended examinations for discovery, was present when a settlement was discussed by the parties and during discussions of a settlement with representatives of the law firm of Thompson, Dorfman, Sweatman, and participated in the taking of de bene esse evidence. Upon Twaddle's appointment to the bench in 1985, Dangerfield joined the firm of Scarth, Dooley. Eight out of eleven members of that firm, including Dangerfield, joined the Thompson firm in 1987. The Thompson firm represents the respondent in this action.

3 Both Dangerfield and senior members of Thompson, Dorfman, Sweatman have sworn affidavits that the case has not been discussed since Dangerfield joined the firm and will not be

discussed.

4 The appellant brought an application in the Court of Queen's Bench in which he sought a declaration that the Thompson firm was ineligible to continue to act as solicitors of record for the respondent and an order removing that firm as solicitors of record. Hanssen J. allowed the application.

5 The respondent's appeal from the decision of the motions judge was allowed by the Court of Appeal of Manitoba, Monnin C.J.M. dissenting: (1989), 57 Man. R. (2d) 161.

Judgments

Court of Queen's Bench

6 Hanssen J., the motions judge, observed that the respondent's right to retain counsel of his choice is [page1241] not an absolute right but, rather, it is subject to reasonable limits. In his view, the court has a duty not only to the parties to the litigation but also to the public "to ensure that lawyers observe the highest standards of professional conduct with respect to cases before the court". Where those high standards are not observed, the Court has jurisdiction to intervene and remove a lawyer from the record. In granting the order requested, the motions judge applied the principles enunciated by Jewers J. in Morton v. Asper (1987), 49 Man. R. (2d) 167 (Q.B.), aff'd (1987), 51 Man. R. (2d) 207 (C.A.).

7 Hanssen J. stated that, while he was satisfied that Dangerfield had not passed on confidential information to other members of the Thompson firm and that the likelihood of her so doing, either intentionally or unintentionally, was remote, the appearance of conflict or possible impropriety had to be avoided. In his opinion, there was an obvious conflict of interest and the continued participation of the Thompson firm as solicitors of record would constitute a "threat to the integrity of the trial and create the appearance of impropriety".

Court of Appeal

Monnin C.J.M. (dissenting)

8 The Chief Justice agreed with the conclusion of the trial judge that there was, in the circumstances, a conflict of interest. He found no reason to distinguish between the confidences obtained by either a senior or a junior counsel as both are members of the profession and bound by the rules of secrecy. In his view, the Morton decision was applicable in the circumstances of the case at bar. While the test propounded in that case may be a rigid one, it is a test which is clear and easily applied.

Huband J.A.

9 Huband J.A. was of the view that there is no absolute rule to the effect that, where there is an

appearance of impropriety, the solicitor involved in [page1242] the apparent conflict must be declared ineligible. He observed that the only absolute rule is that information given by a client to a solicitor must remain confidential. Beyond that absolute rule, however, each case must be considered on its facts: Rakusen v. Ellis, Munday & Clarke, [1912] 1 Ch. 831.

10 In arriving at his conclusion, Huband J.A. distinguished on its facts the decision in Morton. He stated that, while there could be cases where appearances alone might be determinative, a case such as Morton constitutes an exception to the general rule and does not establish a principle of law giving rise to a new rule, general or absolute. In the circumstances of the case at bar, "where there is no real danger of prejudice or impropriety, where the nature of the litigation is complex, and where a sense of confidence has developed between the client and his solicitors as a consequence of a six year relationship, this factor deserves additional consideration" (p. 171).

Philp J.A. (concurring with Huband J.A.)

11 Philp J.A. agreed with the conclusion arrived at by Huband J.A. and substantially with his reasons. He added, however, that he had been a member of the Court of Appeal which upheld the decision of Jewers J. in Morton. In his view, Jewers J. did not pronounce or apply a test or rule to be automatically and rigidly applied regardless of the circumstances in which impropriety or unfairness is alleged to exist. Jewers J. had considered the nature of the litigation, the extent to which it had progressed and the inconvenience and the expense to be suffered by the party required to retain and instruct new counsel. In his opinion, Jewers J. had come to the correct conclusion on the facts before him. He found, in the circumstances, that Hanssen J. erred in holding that "the appearance of fairness is the overriding consideration".

The Issue

12 The sole issue in this appeal is the appropriate standard to be applied in determining whether Thompson, Dorfman, Sweatman are disqualified [page1243] from continuing to act in this litigation by reason of a conflict of interest.

Legal Ethics -- Policy Considerations

13 In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession. The review of the cases which follows will show that different standards have been adopted from time to time to resolve the issue. This reflects the different emphasis placed at different times and by different judges on the basic values outlined above.

14 The legal profession has changed with the changes in society. One of the changes that is most

evident in large urban centers is the virtual disappearance of the sole practitioner and the tendency to larger and larger firms. This is a product of a number of factors including a response to the demands of large corporate clients whose multi-faceted activities require an all-purpose firm with sufficient numbers in every area of expertise to serve their needs. With increase in size come increasing demands for management of a law firm in accordance with the corporate model. These changes in the composition and management practices of law firms are reflected in changes to ethical practices of the profession. Some of the old practices have been swept aside as anachronistic, perhaps with justification. Advertising to inform the public in a tasteful way of the services provided by a firm and of its fee schedule is but one example.

15 Merger, partial merger and the movement of lawyers from one firm to another are familiar features of the modern practice of law. They bring with them the thorny problem of conflicts of interest. [page1244] When one of these events is planned, consideration must be given to the consequences which will flow from loss of clients through conflicts of interest. To facilitate this process some would urge a slackening of the standard with respect to what constitutes a conflict of interest. In my view, to do so at the present time would serve the interest of neither the public nor the profession. The legal profession has historically struggled to maintain the respect of the public. This has been so notwithstanding the high standards that, generally, have been maintained. When the management, size of law firms and many of the practices of the legal profession are indistinguishable from those of business, it is important that the fundamental professional standards be maintained and indeed improved. This is essential if the confidence of the public that the law is a profession is to be preserved and hopefully strengthened. Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. The legal profession has distinguished itself from other professions by the sanctity with which these communications are treated. The law, too, perhaps unduly, has protected solicitor and client exchanges while denying the same protection to others. This tradition assumes particular importance when a client bares his or her soul in civil or criminal litigation. Clients do this in the justifiable belief that nothing they say will be used against them and to the advantage of the adversary. Loss of this confidence would deliver a serious blow to the integrity of the profession and to the public's confidence in the administration of justice.

16 An important statement of public policy with respect to the conduct of barrister and solicitor is contained in the professional ethics codes of the governing bodies of the profession. The legal profession is self-governing. In each province there is a governing body usually elected by the lawyers practising in the province. The governing body enacts rules of professional conduct on behalf of those it represents. These rules must be taken as expressing the collective views of the profession as to the appropriate standards to which the profession should adhere.

[page1245]

17 While there exists no national law society, the Canadian Bar Association, a national society representing lawyers across the country, adopted a Code of Professional Conduct in 1974. The Code has been adopted by the Law Society of Manitoba and by the Law Societies of other provinces. Chapter V, entitled "Impartiality and Conflict of Interest", commences with the following rule:

> The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, he should not act or continue to act in a matter when there is or there is likely to be a conflicting interest. A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interests of a client or prospective client.

The rule is followed by thirteen commentaries. The most relevant of these are Commentaries 11 and 12, which state:

> 11. A lawyer who has acted for a client in a matter should not thereafter act against him (or against persons who were involved in or associated with him in that matter) in the same or any related matter, or place himself in a position where he might be tempted or appear to be tempted to breach the Rule relating to Confidential Information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work he has previously done for that person.
> 12. For the sake of clarity the foregoing paragraphs are expressed in terms of the individual lawyer and his client. However it will be appreciated that the term "client" includes a client of the law firm of which the lawyer is a partner or associate whether or not he handles the client's work.

18 A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example, Law Society of Manitoba v. Giesbrecht (1983), 24 Man. R. (2d) 228 (C.A.). The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. [page1246] Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy. The statement in Chapter V should therefore be accepted as the expression by the profession in Canada that it wishes to impose a very high standard on a lawyer who finds himself or herself in a position where confidential information may be used against a former client. The statement reflects the principle that has been accepted by the profession that even an appearance of impropriety should be avoided.

The Law

19 The law in Canada and in other jurisdictions has adopted one of two basic approaches in determining whether a disqualifying conflict of interest exists: (1) the probability of real mischief, or (2) the possibility of real mischief. The term "mischief" refers to the misuse of confidential information by a lawyer against a former client. The first approach requires proof that the lawyer was actually possessed of confidential information and that there is a probability of its disclosure to the detriment of the client. The second is based on the precept that justice must not only be done but must manifestly be seen to be done. If, therefore, it reasonably appears that disclosure might occur, this test for determining the presence of a disqualifying conflict of interest is satisfied.

England

20 The "probability of real mischief" test is the traditional English approach based on Rakusen v. Ellis, Munday & Clarke, supra. Rakusen was terminated from his employment. He retained Mr. Munday to discuss his legal position. When several months later Rakusen instituted proceedings with the assistance of new solicitors, the defendant company retained Munday's associate, Clarke. The court accepted the evidence that Clarke knew nothing about what had transpired between Rakusen and Munday. The passages set out below [page1247] are most often quoted in support of the "probability" test. Cozens-Hardy M.R. stated, at p. 835:

> I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client; but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act. [Emphasis added.]

Fletcher Moulton L.J. expressed himself as follows, at p. 841:

> As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the Court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere and say that a solicitor shall not act. [Emphasis added.]

21 There have been few cases in England since Rakusen, but the most recent case, Re a Solicitor, unreported, Chancery Division, March 31, 1987, summarized at 131 Sol. J. 1063, reaffirmed "the probability of real mischief test". The court noted that it was not actually suggested that the solicitor had acquired "relevant knowledge concerning a former client" and the latter could not "think of any

confidential information which he [had] communicated ... and which might be relevant in connection with" the case (p. 4).

United States

22 The courts in the United States have generally adopted the stricter "possibility of real mischief" test. According to this approach, once it is established that there is a "substantial relationship" between the matter out of which the confidential information is said to arise and the matter at hand, [page1248] there is an irrebuttable presumption that the attorney received relevant information. If the attorney practises in a firm, there is a presumption that lawyers who work together share each other's confidences. Knowledge of confidential matters is therefore imputed to other members of the firm. This latter presumption can, however, in some circumstances, be rebutted. The usual methods used to rebut the presumption are the setting up of a "Chinese Wall" or a "cone of silence" at the time that the possibility of the unauthorized communication of confidential information arises. A "Chinese Wall" involves effective "screening" to prevent communication between the tainted lawyer and other members of the firm. A "cone of silence" is achieved by means of a solemn undertaking not to disclose by the tainted solicitor. Other means which would constitute clear and convincing evidence that no improper disclosure has or can take place are not ruled out. See T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953), Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); E. F. Hutton & Co. Inc. v. Brown, 305 F. Supp. 371 (S.D. Texas 1969); Nemours Foundation v. Gilbane, Aetna, Federal Ins. Co., 632 F. Supp. 418 (D. Delaware 1986); U.S.A. for the Use and Benefit of Lord Electric Co. v. Titan Pacific Construction Corp., 637 F. Supp. 1556 (W.D. Washington 1986); In re Asbestos Cases, 514 F. Supp. 914 (E.D. Virginia 1981); P. W. Kryworuk, "Acting Against Former Clients -- A Matter of Dollars and Common Sense" (1985), 45 C.P.C. 1; "Developments in the Law -- Conflicts of Interest in the Legal Profession" (1981), 94 Harv. L. Rev. 1247, at pp. 1315-34.

23 In Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983), Posner J., set out the rationale for the "substantial relationship" test which gives rise to an irrebuttable presumption that confidences have been disclosed by the client. He states, at p. 1269:

> The "substantial relationship" test has its problems, but conducting a factual inquiry in every case into whether confidences had actually been revealed would not be a satisfactory alternative, particularly in a case such as this where the issue is not just whether they have been revealed but also whether they will be revealed [page1249] during a pending litigation. Apart from the difficulty of taking evidence on the question without compromising the confidences themselves, the only witnesses would be the very lawyers whose firm was sought to be disqualified (unlike a case where the issue is what confidences a lawyer received while at a former law firm), and their interest not only in retaining a client but in denying a serious breach of professional ethics might outweigh any felt obligation to "come clean." While "appearance of impropriety" as a principle

> of professional ethics invites and maybe has undergone uncritical expansion because of its vague and open-ended character, in this case it has meaning and weight. For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public -- or for that matter the bench and bar -- by the filing of affidavits, difficult to verify objectively, denying that improper communication has taken place or will take place between the lawyers in the firm handling the two sides. [Emphasis added.]

24 The rigidity and overinclusiveness of the irrebuttable presumption have been criticized and some courts have departed from it in special circumstances. These criticisms are summarized in "Developments in the Law -- Conflicts of Interest in the Legal Profession", op. cit., at pp. 1355-59:

> In situations involving large firms, the maintenance of an irrebuttable presumption of sharing among affiliates can become sorely strained. Suppose that a young litigator, now out on his own, was briefly associated with a big firm and that the firm included among its members a specialist in corporate law who once, perhaps many years before, represented a client in some affair. The young lawyer is now asked to represent a second client against the first in a suit involving a substantially related matter. If the firm is large enough, the corporate specialist may never have been more than a name on the letterhead to the young litigator, who was his nominal affiliate. In most instances, the affiliate will not have been familiar with the corporate lawyer's old client or with any of the details of that client's affairs during the affiliate's association with the firm. In this case, forbidding the young litigator's representation of a second [page1250] client in a suit against the first client is an empty gesture.
>
> As the structure of legal practice changes and such cases become increasingly common, one must ask whether the putative benefits of the strict rule justify its costs. Proscription of successive representation, including representation by a former affiliate, imposes significant losses on would-be clients, including effective deprivation of their first choice of counsel. A further objection to the categorical rule is its effect on the professional mobility of young attorneys, who frequently begin their careers with a stint at a large firm. A rule irrebuttably imputing to every former affiliate of such a firm synoptic knowledge of the matters it has handled is not merely unrealistic, but is potentially a serious impediment to an attorney (like the young litigator in the previous example) who seeks either to establish his own practice or to affiliate himself with a new firm. Especially when the former affiliate has specialized during his tenure with his old colleagues, an irrebuttable presumption may block his attempt to use his training to the advantage of new clients; indeed, it may transform his specialized skills

> from an asset into a serious liability.
>
> The need for a more flexible approach to imputation of client confidences is widely acknowledged. The liberalized rule allows the traditional presumption to be rebutted in an enforcement proceeding by evidence suggesting a low probability that the lawyer who was materially involved in representing a client actually shared any relevant information with his affiliate. ...
>
> Critics of a rebuttable imputation rule have generally relied on the need to prevent any representation that involves even an "appearance of impropriety." Operating on the view that appearances must be protected at nearly any price, some courts have rejected former affiliates' attempts to rebut the presumption of shared knowledge. Under the "appearance of impropriety" doctrine, the "non-existence of actual conflict is presumed," and the mere appearance of conflict is sufficient to taint the representation. Yet there seems to be a trend, even among those courts that accept the policy behind the doctrine, to allow "any initial inference of impropriety" to be "dispelled" by evidence rebutting the presumption that knowledge was shared among former affiliates. As the role of appearances in determining whether a given representation ought to be proscribed continues to [page1251] decline, objections to a rebuttable presumption will presumably dissipate. This liberalized approach reduces unnecessary proscription and its associated costs while affording former clients a reasonable degree of security from the threat of fiduciary breach. [Footnotes omitted.]

25 In support of this position, the author cites considerable authority. See for example: Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186 (7th Cir. 1955) (en banc); Akerly v. Red Barn System, Inc., 551 F.2d 539 (3rd Cir. 1977); Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322 (9th Cir.), certiorari denied, 429 U.S. 861 (1976); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, 224 F.2d 824 (2d Cir. 1955), certiorari denied, 350 U.S. 932 (1956); City of Cleveland v. Cleveland Electric Illuminating Co., 440 F. Supp. 193 (N.D. Ohio 1977), aff'd mem., 573 F.2d 1310 (6th Cir.), certiorari denied, 435 U.S. 996 (1977); Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (S.D.N.Y 1958).

26 Typical of the statements in these cases is the following made in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra, at pp. 753-54:

> It is unquestionably true that in the course of their work at large law firms, associates are entrusted with the confidences of some of their clients. But it

> would be absurd to conclude that immediately upon their entry on duty they become the recipients of knowledge as to the names of all the firm's clients, the contents of all files relating to such clients, and all confidential disclosures by client officers or employees to any lawyer in the firm. Obviously such legal osmosis does not occur. The mere recital of such a proposition should be self-refuting... .
>
> Thus, while this Circuit has recognized that an inference may arise that an attorney formerly associated with a firm himself received confidential information transmitted by a client to the firm, that inference is a rebuttable [page1252] one. Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, 224 F.2d 824, 827 (2d Cir. 1955)... .

And in Analytica, supra, Coffey J., said, at p. 1277:

> Reliance upon antiquated notions of disqualification such as irrebuttable presumptions simply will no longer suffice in today's specialized practice of law.
>
> My concern in this area lies in the effect a disqualification motion has on both a law firm as well as a newly hired individual in a firm... .
>
> If prior representation of a particular client will irrebuttably disqualify an entire firm from handling certain cases, the result could easily be whole law firms of "Typhoid Marys." This would have a drastic impact on the careers of attorneys in entire firms, would impede clients' rights to be represented by attorneys of their choice and would discourage attorneys with expertise in a particular field of law from handling cases in their respective specialties.

Australia

27 In Australia as in Canada courts appear to vacillate as to the proper test. In D & J Constructions Pty. Ltd. v. Head (1987), 9 N.S.W.L.R. 118, Bryson J. approved of the Rakusen test. But in National Mutual Holdings Pty. Ltd. v. Sentry Corp. (1989), 87 A.L.R. 539, Gummow J. expressed the view that the Australian position was perhaps no less stringent than the American position. He also referred to a paper by Dr. Finn, "Conflicts of Interest and Professionals" (published by the New Zealand Legal Research Foundation in the volume Professional Responsibility) in which Dr. Finn refers to the Rakusen test as "untenable". Dr. Finn considers whether it is preferable to adopt the American concept of the irrebuttable presumption or the less rigid approach of a presumption rebuttable by the lawyer. The learned writer opts for the latter.

28 Several cases in the Family Court of Australia have applied a test stricter than Rakusen. See In the Marriage of Thevanaz (1986), 11 Fam. L.R. 95, [page1253] and Re the Marriage of R.P. and A.A. Gagliano (1989), 12 Fam. L.R. 843.

New Zealand

29 There are no reported cases on the point but, in "Conflicts of interest: When may a lawyer act against a former client?", Dean and Finlayson, [1990] N.Z.L.J. 43, the learned authors review several judicial statements and conclude, at p. 52:

> It is the authors' submission that the appropriate test to be applied in this country in conflict of interest situations is the "possibility of real mischief or prejudice" test, developed by the American Courts and adopted and approved in at least the Canadian jurisdiction. Even if the American test is not followed to its fullest extent, it is at the very least essential that the Courts now place a greater onus on solicitors (and counsel) to avoid situations of conflict of interest including situations where there may be only the appearance of a conflict. Times have changed dramatically since Rakusen. As Bryson J observed in the D & J Constructions case "... each court must to some extent interpret its own times and manners and the conduct which it should expect or even fear from its practitioners" in deciding the degree of control to be exerted.

Canada

30 In Canada, some courts have applied Rakusen but the trend is to apply a stricter test which reflects the concern for the appearance of justice. P. W. Kryworuk, op. cit., points out that Canadian courts are largely applying the stricter American test or are applying a stricter version of Rakusen "in light of current attitude towards conflict of interest, justice and the appearance of justice and even the concept of "fairness"".

31 A few statements from recent cases will serve to illustrate the judicial mood in Canada. In Steed & Evans Ltd. v. MacTavish (1976), 12 O.R. (2d) 236, Goodman J. stated, at pp. 237-38:

> The applicant in proceedings of this kind must come to Court with clean hands and justice must not only be done but it must be seen to be done.
>
> ...In my view it would be almost impossible for them to cleanse from their minds any information which they [page1254] may have received while acting on behalf of any of the defendants in the past relating in any way to the subject-matter of these proceedings. It is true that there has been no allegation or submission made by counsel for the defendants herein indicating any specific use or misuse of information obtained confidentially by reason of a

> solicitor-and-client relationship, but the fact remains that the possibility of that occurring is very real.

32 In Canada Southern Railway Co. v. Kingsmill, Jennings (1978), 8 C.P.C. 117, Southey J., after considering Rakusen and Emle Industries v. Patentex, supra, concluded, at p. 122:

> It will be seen that the authorities emphasize the unfairness arising out of a solicitor acting against a former client where the solicitor might have received confidential information from that former client. That possibility, for all practical purposes, does not exist in the case at Bar, in my judgment.

33 In Falls v. Falls (1979), 12 C.P.C. 270, Fanjoy Co. Ct. J. applied Rakusen with the following caveat, at pp. 272-73:

> From this judgment [Rakusen] I come to the conclusion that the Court must be satisfied that real mischief and real prejudice will, in probability, result if the solicitor is allowed to act.
>
> I must apply this principle in light of present day practices and decisions with respect to conflict of interest, justice and the appearance of justice and even the concept of "fairness". My observation is that the Courts are requiring higher and stricter standards in all these areas. [Emphasis added.]

34 In Goldberg v. Goldberg (1982), 141 D.L.R. (3d) 133, Callaghan J. (now C.J.H.C.), after reviewing the competing considerations with respect to the probability and possibility tests, stated, at pp. 135-36:

> Of more importance, however, is the fact that the principles involved herein are designed not only to protect the interests of the individual clients but they also protect the public confidence in the administration of justice. This is particularly so when the litigation involves a family dispute. Furthermore, when the public interest is involved, the appearance of impropriety overrides any private interest claimed by waiver.

[page1255]

35 In Lukic v. Urquhart (1984), 11 D.L.R. (4th) 638 (Ont. H.C.), aff'd in part (1985), 15 D.L.R. (4th) 639 (Ont. C.A.), a solicitor had been consulted by a party involved in a motor vehicle accident but swore that he had received no confidential information. O'Brien J., whose reasons were adopted by the Court of Appeal, stated, at p. 640:

> I am satisfied in this case there is a very real appearance of professional impropriety and this is clearly a situation where the solicitor might have received confidential information from the defendant, which could be used against the defendant in these proceedings.

I think it would be difficult for the parties in this lawsuit to have confidence in a just result where the solicitor has been placed in that position and now intends to continue against one of his former clients. I am satisfied the solicitor should be removed from the record.

36 In O'Dea v. O'Dea (1987), 68 Nfld. & P.E.I.R. 67 (Nfld. Unif. Fam. Ct.), aff'd Nfld. C.A. June 6, 1988 (unreported), the solicitor, Mr. Day, was consulted by the defendant to obtain a second opinion with respect to the case. Subsequently, her husband retained another lawyer in the firm to act against his wife. Hickman C.J. granted the wife's application. After referring to the relevant rule of professional conduct, he concluded as follows, at p. 75:

> In this case Mr. David C. Day, Q.C. was given confidential information by the plaintiff [sic], based upon which he gave her professional advice on some, if not all the issues, which will be coming before this court during trial. He was paid a fee for such professional services. A solicitor-client relationship existed relating to the matters in dispute. While Mr. Day may never be in a position to pass on such confidential information to his partner, Ms. Dawe, yet, the perception is such that the defendant, as a reasonable person, could, in my view, conclude that her interests will be jeopardized should Ms. Dawe or any member of her firm continue to act for her husband in this case. That fact, coupled with the apprehension the defendant has toward the justice system, as a result of her husband's allegations of "connections within the legal profession" makes it all the more necessary that it be made clear that no possibility exists of a conflict of interest.

[page1256]

> I conclude, as well, that to permit the plaintiff's law firm to continue to act in this case would be perceived by the public as placing the defendant in an unfair position when this action goes to trial. The sina qua non of the justice system is that there be an unqualified perception of its fairness in the eyes of the

> general public. In order to sustain that salutary precept, it is essential that the integrity and absolute independence of the courts and its [sic] officers be maintained in such a way as to assure a discerning public that the principle of equality before the law is not in danger of being comprised [sic]. The door must remain firmly shut against any possibility of comprising [sic] that principal [sic]. To allow the plaintiff's law firm to continue to act in this case would open that door, albeit ever so slightly, to the possibility of compromising the impartial administration of justice -- something which a court is duty bound to prevent. [Emphasis added.]

37 In Fisher v. Fisher (1986), 76 N.S.R. (2d) 326, the Nova Scotia Court of Appeal disqualified a law firm which, while acting for a husband, was consulted by the wife. Different lawyers in the firm were involved. Although the court agreed that the conduct throughout was of the high standard expected in the legal profession, it refused to accept assurances that confidential information would not be shared.

38 In Thomson v. Smith Mechanical Inc., [1985] C.S. 782, Gonthier J. (now a member of this Court) found a conflict of interest where counsel for the plaintiff had previously advised both parties in respect of the transaction giving rise to the litigation. He stated, at p. 785:

> [TRANSLATION] This is the cost of ensuring that justice not only is done but is seen to be done, in accordance with the well-known maxim on which the integrity of the judicial system is based, and lawyers are an essential part of that system. Such a practice may also be contrary to the right of the parties to a full and equal hearing as required by s. 23 of the [Quebec] Charter.

39 In Canada v. Consortium Designers Inc. (1988), 72 Nfld. & P.E.I.R. 255 (P.E.I.S.C.T.D.), aff'd (1989), 80 Nfld. & P.E.I.R. 12, a lawyer who had been actively involved in the case for the plaintiff became a partner in the law firm representing the defendant. In acceding to the application to [page1257] disqualify the defendant's law firm, McQuaid J. propounded the following test, at pp. 257-62:

> ... the court has a duty to balance the expected high standards of professional integrity against the realities of life. Where, in the opinion of the court, there exists, or may exist, or may be reasonably anticipated to exist a danger of a breach of confidentiality, then an injunction will issue. Strict proof of the likelihood of breach is not the standard; the standard is the perceived, or reasonably anticipated "danger" of such a breach.
>
> ...
>
> ... if he [the transferred lawyer] has a duty to all parties to the litigation, as well as to the public, to avoid the very appearance of the possibility of any conflict of

> duty, which the law would appear to indicate that he has, then not only he, but his new colleagues as well, who are, may, or might be perceived to be, privy to the confidential information, then all would be tainted with the brush of conflict of interest.
>
> ...
>
> I consider the more appropriate approach to be, not the narrow and rigid approach of Cozens-Hardy, M.R., "that real mischief and real prejudice will in all human probability result", but with the broader, and I think more relevant approach in today's society that "the court ought to be concerned not only with the actual possibility of a conflict of duty, but also with the appearance of such a possibility", as expressed by Saunders, J., in Brown.
>
> ...
>
> The issue is: Can the court reasonably infer, given all of the facts, that it might reasonably be perceived primarily by the client, and secondarily, but possibly equally important, by the public, that such did, might, or could have taken place to the prejudice of the client, and to the prejudice of the public's perception and high expectations of the profession.

40 Finally, in Morton v. Asper, supra, which was applied by Hanssen J. in this case, Jewers J. stated, at pp. 173-74:

> For myself, I prefer to follow those cases which have extended the principle in Rakusen to include considerations of public policy, the interest of the public in the proper administration of justice and the perception of fairness by the public and individual litigants. I see [page1258] nothing in the appellate decisions which would prevent this approach and indeed, in my view, it is encouraged by Re Speid [(1984), 43 O.R. (2d) 596 (C.A.)] and Fisher v. Fisher (supra). I believe that these broad principles are reflected in the Code of Professional Conduct, in particular Clause 11 which speaks of a solicitor placing himself in a position where he might be tempted or appear to be tempted to breach the rule relating to confidential information.
>
> It reduces itself to a matter of appearance and perception: The plaintiffs' former solicitors have now joined the other side. They have a great deal of confidential information going to the very heart of the plaintiffs' case which would be of inestimable value to the opposition. I have already said that I am confident that they have not and will not divulge this information; however, the Code of Ethics says that they should not be in a position where they might be

> tempted or appear to be tempted to do so. I don't say they might be tempted to do so, but to the plaintiffs and to interested members of the public, they might very well appear to be tempted.

41 A number of courts, however, have continued to follow the Rakusen test. These decisions include: Farmers Mutual Petroleums Ltd. v. United States Smelting, Refining & Mining Co. (1961), 28 D.L.R. (2d) 618 (Sask. C.A.); R. v. Burkinshaw (1967), 60 D.L.R. (2d) 748 (Alta. S.C.); Devco Properties Ltd. v. Sunderland, [1977] 2 W.W.R. 664 (Alta. S.C.); Mercator Enterprises Ltd. v. Mainland Investments Ltd. (1978), 29 N.S.R. (2d) 703 (S.C.T.D.); Christo v. Bevan (1982), 36 O.R. (2d) 797 (H.C.); Schmeichel v. Saskatchewan Mining Development Corp., [1983] 5 W.W.R. 151 (Sask. C.A.); and International Electronics Corp. v. Woodside Developments Ltd., unreported, British Columbia Supreme Court, June 26, 1985.

42 Nevertheless it is evident from this review of authorities that the clear trend is in favour of a stricter test. This trend is the product of a strong policy in favour of ensuring not only that there be no actual conflict but that there be no appearance of conflict.

43 A number of cases have specifically addressed the question as to whether possession of confidential information on the part of one member of a [page1259] firm should be imputed to the rest of the firm. The strict application of the appearance principle has led some courts to apply it so that the presumption that "the knowledge of one is the knowledge of all" is irrebuttable. In this category are Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599 (C.A.); Fisher v. Fisher, supra; and Morton v. Asper, supra. Other courts have allowed the principle to be rebutted: see United States Surgical Corp. v. Downs Surgical Canada Ltd. (1982), 141 D.L.R. (3d) 157 (F.C.T.D.), and Law Society of Manitoba v. Giesbrecht, supra. These cases are analyzed by Graham Steele in "Imputing Knowledge From One Member of a Firm to Another: 'Lead Us Not Into Temptation'" (1990), 12 Adv. Q. 46. He concludes, at p. 58:

> Some judges (and lawyers) find the rigid application of test (2) to be too hard on lawyers and law firms, particularly in today's climate of mergers and megafirms. For the purpose of determining whether there is a conflict of interest, they would advocate what might be called a "rebuttable imputation" of a lawyer's knowledge.

The Appropriate Test

44 What then should be the correct approach? Is the "probability of mischief" standard sufficiently high to satisfy the public requirement that there be an appearance of justice? In my opinion, it is not. This is borne out by the judicial statements to which I have referred and to the desire of the legal profession for strict rules of professional conduct as its adoption of the Canadian Code of Professional Conduct demonstrates. The probability of mischief test is very much the same as the standard of proof in a civil case. We act on probabilities. This is the basis of Rakusen. I am, however, driven to the conclusion that the public, and indeed lawyers and judges, have found that

standard wanting. In dealing with the question of the use of confidential information we are dealing with a matter that is usually not susceptible of proof. As pointed out by Fletcher Moulton L.J. in Rakusen, "that is a thing which you cannot prove" (p. 841). I would add "or disprove". If it were otherwise, then no doubt the public would be satisfied upon proof that no prejudice would be occasioned. Since, however, it is not susceptible of proof, the test must be such [page1260] that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.

45 Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

46 In answering the first question, the court is confronted with a dilemma. In order to explore the matter in depth may require the very confidential information for which protection is sought to be revealed. This would have the effect of defeating the whole purpose of the application. American courts have solved this dilemma by means of the "substantial relationship" test. Once a "substantial relationship" is shown, there is an irrebuttable presumption that confidential information was imparted to the lawyer. In my opinion, this test is too rigid. There may be cases in which it is established beyond any reasonable doubt that no confidential information relevant to the current matter was disclosed. One example is where the applicant client admits on cross-examination that this is the case. This would not avail in the face of an irrebuttable presumption. In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the [page1261] specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.

47 The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about

personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

48 The answer is less clear with respect to the partners or associates in the firm. Some courts have applied the concept of imputed knowledge. This assumes that the knowledge of one member of the firm is the knowledge of all. If one lawyer cannot act, no member of the firm can act. This is a rule that has been applied by some law firms as their particular brand of ethics. While this is commendable and is to be encouraged, it is, in my opinion, an assumption which is unrealistic in the era of the mega-firm. Furthermore, if the presumption that the knowledge of one is the knowledge of all is to be applied, it must be applied with respect to both the former firm and the firm which the moving lawyer joins. Thus there is a conflict with respect to every matter handled by the old firm that has a substantial relationship with any matter handled by the new firm irrespective of whether the moving lawyer had any involvement with it. This is the "overkill" which has drawn so much criticism in the United States to which I have referred above.

[page1262]

49 Moreover, I am not convinced that a reasonable member of the public would necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it. There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence. These concepts are not familiar to Canadian courts and indeed do not seem to have been adopted by the governing bodies of the legal profession. It can be expected that the Canadian Bar Association, which took the lead in adopting a Code of Professional Conduct in 1974, will again take the lead to determine whether institutional devices are effective and develop standards for the use of institutional devices which will be uniform throughout Canada. Although I am not prepared to say that a court should never accept these devices as sufficient evidence of effective screening until the governing bodies have approved of them and adopted rules with respect to their operation, I would not foresee a court doing so except in exceptional circumstances. Thus, in the vast majority of cases, the courts are unlikely to accept the effectiveness of these devices until the profession, through its governing body, has studied the matter and determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession. In this regard, it must be borne in mind that the legal profession is a self-governing profession. The Legislature has entrusted to it and not to the court the responsibility of developing standards. The court's role is merely supervisory, and its jurisdiction extends to this aspect of ethics only in connection with legal proceedings. The governing bodies, however, are concerned with the application of conflict of interest standards not

only in respect of litigation but in other fields which constitute the greater part of the practice of law. It would be wrong, therefore, to shut out the [page1263] governing body of a self-regulating profession from the whole of the practice by the imposition of an inflexible and immutable standard in the exercise of a supervisory jurisdiction over part of it.

50 A fortiori undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement with the statement of Posner J. in Analytica, supra, to which I have referred above, that affidavits of lawyers difficult to verify objectively will fail to assure the public.

51 These standards will, in my opinion, strike the appropriate balance among the three interests to which I have referred. In giving precedence to the preservation of the confidentiality of information imparted to a solicitor, the confidence of the public in the integrity of the profession and in the administration of justice will be maintained and strengthened. On the other hand, reflecting the interest of a member of the public in retaining counsel of her choice and the interest of the profession in permitting lawyers to move from one firm to another, the standards are sufficiently flexible to permit a solicitor to act against a former client provided that a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur.

[page1264]

Application to this Case

52 The answer to the first question in this case presents no problem. It is acknowledged that Kristin Dangerfield actively worked on the very case in respect of which her new firm is acting against her former client. She is therefore in possession of relevant confidential information.

53 With respect to the second question, there is nothing beyond the sworn statements of Sweatman and Dangerfield that no discussions of the case have occurred and undertaking that none will occur. In my opinion, while, as stated by the courts below, there is no reason not to accept the affidavits of apparently reputable counsel, this is not sufficient to demonstrate that all reasonable measures have been taken to rebut the strong inference of disclosure. Indeed, there is nothing in the affidavits to indicate that any independently verifiable steps were taken by the firm to implement any kind of screening. There is nothing to indicate that when Ms. Dangerfield joined the firm, instructions were issued that there were to be no communications directly or indirectly between Ms. Dangerfield and the four members of the firm working on the case. While these measures would not

necessarily have been sufficient, I refer to them in order to illustrate the kinds of independently verifiable steps which, along with other measures, are indispensable if the firm intends to continue to act.

54 I would therefore allow the appeal with costs to the appellant both here and in the Court of Appeal, set aside the judgment of the Court of Appeal of Manitoba and restore the judgment of Hanssen J.

The reasons of Wilson, L'Heureux-Dubé and Cory JJ. were delivered by

55 CORY J.:-- I have read with interest the reasons of my colleague, Justice Sopinka. Although I agree with his disposition of the appeal, I would impose a stricter duty upon lawyers than that which he proposes. He puts his position in this way, at p. 1260:

> In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently [page1265] related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant.

He observes that it will be difficult for a solicitor to meet that onus. He states that the position, taken by some courts, that if one lawyer in the firm cannot act, then no member of the law firm can act, is unreasonable in this era of mega-firms and mergers. Thus, he reasons that it should be open for a solicitor to show "that no information was imparted which could be relevant".

56 With respect, I disagree. Neither the merger of law firms nor the mobility of lawyers can be permitted to affect adversely the public's confidence in the judicial system. At this time, when the work of the courts is having a very significant impact upon the lives and affairs of all Canadians, it is fundamentally important that justice not only be done, but appear to be done in the eyes of the public.

57 My colleague stated that this appeal called for the balancing of three competing values, namely: the maintenance and integrity of our system of justice; the right of litigants not to be lightly deprived of their chosen counsel; and the desirability of permitting reasonable mobility in the legal profession.

58 Of these factors, the most important and compelling is the preservation of the integrity of our system of justice. The necessity of selecting new counsel will certainly be inconvenient, unsettling and worrisome to clients. Reasonable mobility may well be important to lawyers. However, the integrity of the judicial system is of such fundamental importance to our country and, indeed, to all free and democratic societies that it must be the predominant consideration in any balancing of these three factors.

59 Lawyers are an integral and vitally important part of our system of justice. It is they who prepare and put their clients' cases before courts and tribunals. [page1266] In preparing for the hearing of a contentious matter, a client will often be required to reveal to the lawyer retained highly confidential information. The client's most secret devices and desires, the client's most frightening fears will often, of necessity, be revealed. The client must be secure in the knowledge that the lawyer will neither disclose nor take advantage of these revelations.

60 Our judicial system could not operate if this were not the case. It cannot function properly if doubt or suspicion exists in the mind of the public that the confidential information disclosed by a client to a lawyer might be revealed.

61 There can be no question that such a doubt would certainly be instilled if the public were to gather the perception that lawyers, by their actions, such as changing firms, create situations where the possibility of a conflict of interest exists.

62 Imagine a situation where a client involved in a contentious matter has divulged confidential information to a lawyer. If that lawyer practised with one partner, it would be perceived by the public as unfair and completely unacceptable if the partner were to act for the client's adversary. Similarly, if the lawyer moved to another firm which had been retained by those in opposition to the client, the most reasonable and fair-minded member of the public would find it intolerable for that firm to continue to act for those who opposed the client. In both situations the perception of unfairness would arise from the ease with which confidential information received from clients could be privately communicated between lawyers who are working together in the same firm.

63 Fortunately, partners rarely attempt to act for clients on both sides of a lawsuit. However, the problem more frequently arises when a lawyer, who has received confidential information, joins a firm that is acting for those opposing the interests of the former client. In such a situation there should be an irrebuttable presumption that lawyers who work together share each other's confidences with the result that a knowledge of confidential matters is imputed to other members of the firm. [page1267] This presumption must apply to the members of the new firm the lawyer joins if public confidence in the administration of justice is to be maintained.

64 Indeed, this seems to be the purport of the Canadian Bar Association Code of Professional Conduct quoted by my colleague. The chapter entitled "Impartiality and Conflict of Interest" contains the following significant commentaries:

> 11. A lawyer who has acted for a client in a matter should not thereafter act against him (or against persons who were involved in or associated with him in that matter) in the same or any related matter, or place himself in a position where he might be tempted or appear to be tempted to breach the Rule relating to Confidential Information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work he has previously done for that person.

> 12. For the sake of clarity the foregoing paragraphs are expressed in terms of the individual lawyer and his client. However it will be appreciated that the term "client" includes a client of the law firm of which the lawyer is a partner or associate whether or not he handles the client's work. [Emphasis added.]

65 It is contended that it is too demanding to hold that the knowledge of one member of a law firm constitutes knowledge of all members of the firm in situations where there has been a merger of large firms or a lawyer has joined a "mega-firm". I cannot agree. It is the appearance of fairness in the eyes of the public that is fundamentally important. No matter how large the mega-firm, there will be innumerable occasions when a lawyer with a possible conflict of interest will be meeting with those lawyers in the firm who are in opposition to that lawyer's former client. Whether at partners' meetings or committee meetings, at lunches or the office golf tournament, in the boardroom or the washroom, the lawyer of the former client will be meeting with and talking to those who are on the other side of the client's case. To those who are not members of the legal profession, it must appear that the opportunities for private discussion are so numerous that the disclosure of confidential information, even if completely inadvertent, would be inevitable. [page1268] Nor is it likely that disclosures of confidential information will ever be discovered. Further, if a lawyer even inadvertently discloses those weaknesses of the client that have been divulged to him or her, this may be sufficient to give the client's opponents an unfair advantage. This, I think, would be the inevitable conclusion of reasonable people.

66 That same conclusion would be drawn by the public no matter what form of restrictions were sought to be imposed on individual lawyers and law firms involved. No matter how carefully the Chinese Wall might be constructed, it could be breached without anyone but the lawyers involved knowing of that breach. Law has, after all, the historical precedent of Genghis Khan who, by subterfuge, breached the Great Wall of China, the greatest of Chinese walls. Nor would any system of cones of silence change the public's perception of unfairness. They do not change the reality that lawyers in the same firm meet frequently nor do they reduce the opportunities for the private exchange of confidential information. The public would, quite properly, remain skeptical of the efficacy of the most sophisticated protective scheme.

67 I am in complete agreement with the reasons of Posner J. expressed in Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983), at p. 1269, as quoted by my colleague, which I repeat here for ease of reference:

> The "substantial relationship" test has its problems, but conducting a factual inquiry in every case into whether confidences had actually been revealed would not be a satisfactory alternative, particularly in a case such as this where the issue is not just whether they have been revealed but also whether they will be revealed during a pending litigation. Apart from the difficulty of taking evidence on the question without compromising the confidences themselves, the only witnesses would be the very lawyers whose firm was sought to be

> disqualified (unlike a case where the issue is what confidences a lawyer received while at a former law firm), and their interest not only in retaining a client but in denying a serious breach of professional ethics might outweigh any felt obligation to "come clean." While "appearance or impropriety" as a principle of professional ethics invites and maybe has undergone uncritical expansion because of its vague and open-ended character, in this case it has [page1269] meaning and weight. For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public -- or for that matter the bench and bar -- by the filing of affidavits, difficult to verify objectively, denying that improper communication has taken place or will take place between the lawyers in the firm handling the two sides. [Emphasis added.]

68 Let us consider again the two factors which are said to be the competing values to be weighed against the maintenance of the integrity of our system of justice. One of these was the desirability of permitting reasonable mobility in the legal profession. Yet, no matter how strong may be the current rage for mergers or how desirous the mega-firms may be to acquire additional lawyers, neither the large firms nor the lawyers who wish to join them or amalgamate with them should dictate the course of legal ethics. The latest available statistics (as of May 1990) from the Law Society of Upper Canada for the province of Ontario, where the greatest concentration of large law firms might be expected, demonstrate that lawyers in large firms do not comprise the majority of lawyers in that province. These statistics show the following:

Size of Firm	No. of Lawyers in Firms of this Size	% of Lawyers in Firms of this Size
ALL OF ONTARIO		
1-10	9562	64.3%
11-75	2955	19.9%
75+	2348	15.8%

	14865	

ONTARIO EXCLUDING METROPOLITAN TORONTO

1-10	5871	82.7%
11-75	1135	16.0%
75+	95	1.3%

	7101	

This indicates that, although the large firms may be the movers and shakers on Bay Street, they do [page1270] not represent the majority of lawyers soldiering on in the cause of justice.

69 The judicial system and the confidence of the public in its operation are too important to be put at risk by any appearance of unfairness. Unfortunately, no matter how scrupulously ethical an individual lawyer or firm may be, the appearance of unfairness will always be present when, as in this case, one or more lawyers who had a substantial relationship with a client become members of a firm acting for an opposing party. The opportunities for disclosure, even of an inadvertent nature, are too frequent and the possibility of discovering such disclosures too minimal to permit anything less than the irrebuttable presumption that the knowledge of one member of a law firm constitutes the knowledge of all of the lawyers in that firm. Only such a test will ensure the public's confidence in the administration of justice.

70 This conclusion should not be taken as an impediment to the mobility of lawyers, the merger of law firms or the growth of very large firms; rather, it is a recognition of a professional responsibility owed by lawyers to the litigation process so that the process may retain the respect of the public. It is a small price to pay for mobility of lawyers, mergers of law firms and the increasing size of law firms. It is no more than the fulfilment of a duty owed by members of the legal profession to the public to preserve the integrity of, and public confidence in, the judicial system.

71 The other factor to be weighed against maintaining the integrity of the justice system was that litigants ought not to be lightly deprived of their chosen counsel. It seems to me that to give undue weight to this factor would unduly benefit the large corporate clients who are said by my colleague to be the raison d'être of the larger firms. It is they who would retain counsel of their choice and primarily benefit from a change in the irrebuttable presumption of shared knowledge. I can see no reason for extending any special benefit or privilege to such clients of large firms. They, like [page1271] any client who must seek new counsel, will suffer from inconvenience, loss of time and the inevitable worry and concern over such a change. However, the legal profession has many able counsel. The requirement of change imposed on a client is, on balance, a small price to pay for

maintaining the integrity of our system of justice.

Conclusion

72 Where a lawyer who has had a substantial involvement with a client in an ongoing contentious matter joins another law firm which is acting for an opposing party, there is an irrebuttable presumption that the knowledge of such lawyer, including confidential information disclosed to him or her by the former client, has become the knowledge of the new firm. Such an irrebuttable presumption is essential to preserve public confidence in the administration of justice.

73 Potential conflict of interest is undoubtedly a factor which has to be taken into account when firms consider bringing in new lawyers or merging with other firms. However, the conflict of interest situations can be easily ascertained (a task readily accomplished with the use of computers) and a price fixed for the value of the files that will have to be turned over to other firms in order to avoid any appearance of conflict of interest. Such a procedure certainly does not impose an impossibly difficult burden on firms considering a merger; rather, it imposes a review that will lead to the cost assessment of the advantages and disadvantages of the merger.

74 It must be left for another occasion, when argument has been directed to the issue, to determine whether a lawyer, who has not personally been involved in any way with the client on the matter in issue and who moves to a firm acting for the opponent to the client, should also be irrebuttably presumed to have received and imparted confidential information to his new firm.

75 In the result, I reach the same conclusion as my colleague. I would allow the appeal with costs to the appellant here and in the Court of Appeal, set [page1272] aside the judgment of the Court of Appeal of Manitoba and restore the judgment of Hanssen J.