IN THE MATTER OF THE SECURITIES ACT,

R.S.O. 1990, CHAPTER S.5, AS AMENDED

– and –

IN THE MATTER OF THE DECISION OF THE HEARING PANEL OF MARKET REGULATION SERVICES INC. DATED FEBRUARY 9, 2004

- and -

IN THE MATTER OF THE UNIVERSAL MARKET INTEGRITY RULES

- and –

IN THE MATTER OF
CREDIT SUISSE FIRST BOSTON CANADA INC.

HEADNOTE

Solicitors – Solicitor-Client Relationship – Conflict of Interest – Acting Against a Former Client

Stikeman Elliott, LLP (Stikeman Elliott) had been retained by the Toronto Stock Exchange (TSE) to provide legal and strategic advice leading to the demutualization of the TSE, the incorporation of Regulatory Services Inc. (RS), and the transfer of regulatory authority from the TSE to RS. In 2001, the Chief Executive Officer of the TSE consented orally to Stikeman Elliott's acting in matters which could be adversarial to the interests of the TSE. RS was incorporated after this consent had been given. No formal retainer was ever entered into by Stikeman Elliott and RS after RS was incorporated.

Credit Suisse First Boston Canada Inc. (CSFB) retained Stikeman Elliott in May 2003 to represent it in connection with an investigation by RS in respect of alleged contraventions of RS's Universal Market Integrity Rules. RS issued a Notice of Hearing and Statement of Allegations against CSFB in September 2003. Stikeman Elliott filed a reply on behalf of CSFB several weeks later, setting out defences to the allegations. Part V of the reply challenged the jurisdiction of RS to hold a hearing and impose penalties against CSFB, and alleged that RS was institutionally biased in favour of the TSE because of its structure and governance. RS alleged that Stikeman Elliott was in a conflict of interest position in representing CSFB because the allegations in Part V of the reply amounted to an attack on Stikeman Elliott's previous advice.

In November 2003, RS moved before a hearing panel of RS (the Hearing Panel) for an order removing Stikeman Elliott as counsel for CSFB. In that motion, CFSB argued that: (i) RS had never been a client of Stikeman Elliott; (ii) if RS had been a client, then the consent by the Chief Executive Officer of the TSE also bound RS; (iii) the only duty owed by a solicitor to a former client was non-disclosure of confidential information relevant to the new retainer, and in this case there was no relevant confidential information that had not already been made public; (iv) there is no additional duty of loyalty owed to a

former client apart from the duty not to disclose confidential information; and (v) there is no separate public interest in this case except in relation to the disclosure of confidential information.

The Hearing Panel granted the order removing Stikeman Elliott as counsel for CSFB. CSFB applied to the OSC for an order setting aside the decision of the Hearing Panel.

Held: the application was denied.

Was RS a former client? The Commission concluded that in the unique circumstances of this case the solicitor-client duties owed to a former client should apply regardless of whether or not RS was technically a former client. Accordingly, Stikeman Elliott owed to RS the duties owed by a solicitor to a former client. Furthermore, although not determinative in this case, the Commission believed that RS became a client of Stikeman Elliott. The LSUC Rules of Professional Conduct guided the Commission in determining that it would be inappropriate to take a rigid and mechanical approach in determining whether RS became a client and as to whether Stikeman Elliott owes duties to RS notwithstanding the absence of a formal retainer between them.

The TSE Consent: The adequacy of the oral consent must be assessed in the context of the specific facts of this case. The consent provided by the Chief Executive Officer of the TSE was neither informed nor adequate in these circumstances. There was no clear and unambiguous consent purporting to permit Stikeman Elliott to repudiate the very advice they had been retained to provide the TSE.

Confidential information: The Commission disagreed with the Hearing Panel that all relevant confidential information surrounding Stikeman Elliott's TSE retainer had been publicly disclosed. The Hearing Panel found that the only relevant confidential information had been publicly disclosed and that it related to shareholdings, the RS board, and implementation documents. The Commission found that relevant confidential information consisted of more than that, including such information as strategy discussions and outside legal opinions. The Commission found that there was a nexus between the issues raised by CSFB in the RS Proceeding and legal matters considered by Stikeman Elliott under the TSE retainer. Once the nexus is established, the onus is on the law firm to establish that no confidential information was, or would be, used. There was no evidence that Stikeman Elliott tried to set up Chinese walls within the firm. Furthermore, lawyers retained by CSFB were involved in the TSE retainer, and they had actual knowledge of the relevant confidential information. In this case, Stikeman Elliott did not – and could not -- discharge the heavy onus under the second half of the *MacDonald Estate* test that they did not and would not use relevant confidential information in the CSFB retainer.

Duty of loyalty: The end of the solicitor-client relationship as such does not end fiduciary duties prohibiting a lawyer from acting disloyally. The Commission agreed with the Hearing Panel that Stikeman Elliott was not prevented from acting against RS in general, but that Stikeman Elliott could not, in acting for CSFB, attack the very legal advice that it had previously provided to the TSE. The Commission found that Part V of the reply went to the very root of the matters that Stikeman Elliott was originally retained to advise upon.

The public interest: The Commission agreed with the Hearing Panel that removal was necessary to preserve public confidence in the administration of justice. The failure to so order would be viewed by the public as a failure to uphold the principle that "justice should not only be done but should be seen to be done."

IN THE MATTER OF THE SECURITIES ACT
R.S.O. 1990, C. S. 5, AS AMENDED

- and -

IN THE MATTER OF THE DECISION OF THE HEARING PANEL OF MARKET REGULATION SERVICES INC. DATED FEBRUARY 9, 2004

- and -

IN THE MATTER OF THE UNIVERSAL MARKET INTEGRITY RULES

- and -

IN THE MATTER OF
CREDIT SUISSE FIRST BOSTON CANADA INC.

Hearing:	**April 15, 2004**		
Panel:	**Paul M. Moore, Q.C.**	**-**	**Vice-Chair of the Commission (Chair of the Panel)**
	Susan Wolburgh Jenah	**-**	**Vice-Chair of the Commission**
	H. L. Morphy, Q.C.	**-**	**Commissioner**
Counsel:	**Brian Gover** **Brendan Van Niejenhuis**	**-**	**For Market Regulation Services Inc.**
	Benjamin Zarnett **David Lederman**		**For Credit Suisse First Boston Canada Inc.**
	Kathryn Daniels	**-**	**For the Staff of the Ontario Securities Commission**

DECISION AND REASONS

I. The Proceeding

[1] This matter comes before us an as an application for a hearing and review of a decision of the hearing panel of Market Regulation Services Inc. (RS) dated February 9, 2004 pursuant to section 21.7 of the Ontario *Securities Act* R.S.O. 1990, c.S.5 (the Act). The moving party in this matter is Credit Suisse First Boston Canada Inc. (CSFB) and the responding party is RS.

II. Factual Background to the Proceedings

[2] On May 6, 2003, RS commenced a formal investigation of CSFB. The investigation concerned certain off-market transactions conducted by CSFB in April 2003. In May 2003, CSFB retained the law firm of Stikeman Elliott LLP (Stikeman Elliott) to act for it in connection with the investigation by RS.

[3] A Notice of Hearing and Statement of Allegations were issued by RS on September 24, 2003 (the RS Proceeding). The RS Proceeding relates to alleged contraventions by CSFB of certain provisions of the RS Universal Market Integrity Rules (UMIR) arising out of the investigation.

[4] On October 14, 2003, CSFB served its reply (Reply) on RS. In responding to the allegations contained in the Notice of Hearing and Statement of Allegations of RS, CSFB raised several defences which form the basis of the alleged conflict of interest in this matter. In its Reply, filed by Stikeman Elliott, CSFB raised issues going to the jurisdiction of RS to proceed with the hearing against it and also raised issues as to the jurisdiction of RS to impose fines or other penalties against CSFB.

[5] After receiving the Reply, RS alleged that Stikeman Elliott was in a conflict of interest position in acting for CSFB in the RS Proceeding due to the nature of certain of the defences raised in Part V of the Reply. RS maintained that those defences should be withdrawn, failing which Stikeman Elliott could not continue to act. The cause of the alleged disqualifying conflict vis-à-vis Stikeman Elliott was a prior retainer with the Toronto Stock Exchange (TSE) which is described below (the Retainer). RS filed a Notice of Motion on November 14, 2003, requesting an order removing Stikeman Elliott as counsel for CSFB.

[6] A hearing on the motion was held before an RS hearing panel (the Hearing Panel) on January 16 and January 23, 2004. The Hearing Panel issued its decision on the motion on February 9, 2004, granting RS the order requested. CSFB now seeks an order setting aside the decision of the Hearing Panel on the motion with costs.

III. The Retainer

[7] Stikeman Elliott had a retainer which included providing legal and strategic advice to the TSE on how best to structure and deliver market regulation services in the wake of the rationalization of the Canadian stock exchanges, the subsequent demutualization of the TSE and the eventual incorporation of a new and separate corporate entity in the form of RS to deliver market regulation services. Stikeman Elliott was advised that, central to RS's creation, was the objective that it be, and be perceived to be, a neutral, independent and effective market regulator. Stikeman Elliott drafted numerous agreements and documents which were necessary to create RS and to transfer regulatory authority from the TSE to RS.

[8] Upon reviewing the defences advanced on behalf of CSFB as set out in Part V of the Reply, RS raised its objection to Stikeman Elliott continuing to act on behalf of CSFB in connection with the RS Proceeding. RS maintained that Stikeman Elliott was attacking the very advice it had provided in the Retainer. It did so, RS maintained, by taking the position in Part V of the Reply that, among other things, the relationship between the TSE and RS was so "impermissibly close and overlapping" that it evidenced a bias by RS in favour of the TSE's interests and thereby deprived RS of jurisdiction; and, further, that the TSE had not succeeded in effectively delegating its regulatory authority to RS despite having devised the manner in which that delegation was to be effected. RS therefore sought an order from the Hearing Panel disqualifying Stikeman Elliott from continuing to act on behalf of CSFB.

IV. The Issue

[9] The issue for determination in this hearing and review is whether Stikeman Elliott should cease to act as counsel for CSFB in connection with the RS Proceeding as a result of the Retainer and the nature and seriousness of the allegations raised in Part V of the Reply filed on behalf of CSFB.

V. The Hearing Panel's Decision

[10] The decision of the Hearing Panel contained findings on a number of issues that formed the basis of the submissions made before us. It is helpful to review those findings briefly in order to set the stage for the summary of the parties' submissions which follows and our analysis and rulings with respect to these issues.

A. Client

[11] The first finding on the part of the Hearing Panel dealt with a pivotal question: with whom did Stikeman Elliott have a solicitor-client relationship? The Hearing Panel ruled that it was impossible to divorce the relationship between the TSE and RS from the issues raised in the motion before it. It found that Stikeman Elliott owed all relevant solicitor-client duties to RS with respect to the work done during the Retainer.

B. Consent

[12] The second finding on the part of the Hearing Panel was that the oral consent provided by Ms. Barbara Stymiest, Chief Executive Officer of the TSE, to Stikeman Elliott to allow it to act in future proceedings against the TSE was not sufficient to include matters going to jurisdiction or bias of the type raised in the motion, was not binding on RS, and did not constitute a waiver of the solicitor-client privilege which RS had with Stikeman Elliott.

C. Risk of Use of Relevant Confidential Information to the Prejudice of RS

[13] The Hearing Panel found that most of the information acquired by Stikeman Elliott during the course of the Retainer was confidential. The Hearing Panel held that there were two different types of information which could be considered relevant to the issues raised in Part V of the Reply: first, factual information divulged in discussions about the share holdings and makeup of the board of directors of RS and, second, legal issues discussed by RS with Stikeman Elliott and opinions obtained from McCarthy Tétrault, and subsequently shared with Stikeman Elliott, about certain of the issues raised in Part V of the Reply.

[14] The Hearing Panel determined that when factual information about the share holdings and makeup of the board, which was relevant to the issues raised in Part V of the Reply, was made public as a result of publication by the TSE and the Investment Dealers Association (the IDA), that information could no longer be considered confidential. However, the discussions between RS and Stikeman Elliott and the McCarthy Tétrault opinion letters regarding the legal issues raised in Part V were different matters and were "undoubtedly relevant and confidential."

[15] The Hearing Panel noted that CSFB had no intention of withdrawing the arguments raised in Part V of the Reply. In addition, it was acknowledged that there was no "Chinese wall" erected within the Stikeman Elliott firm to try and ensure that other members of the firm were not presumed to have access to the relevant confidential information obtained by the members of the firm who acted for the TSE in the creation of RS.

[16] The question then became whether there was a risk of "relevant, confidential information" being used to the detriment of RS. The Hearing Panel held that the relevant, confidential information involved legal issues and McCarthy Tétrault opinions relating to the same issues as those raised in Part V, and that this information had nothing to do with the allegations of off-market trading by CSFB in the RS Proceeding and that these matters were purely legal and could be advanced by any lawyer. Therefore, the Hearing Panel held, there was no relevant confidential information available to Stikeman Elliott which could be used to the prejudice of RS.

D. Duty of Loyalty

[17] The Hearing Panel noted that the law is unclear with respect to the duty of loyalty, if any, owed by counsel to a former client and examined in detail the nature of the arguments made by Stikeman Elliott on behalf of CSFB in Part V of the Reply. The Hearing Panel found that certain of these arguments, relating to the nature of the relationship between the TSE and RS being so "impermissibly close and overlapping" that RS evidenced a bias in favour of the TSE, and relating to the TSE's lack of authority to delegate its regulatory powers to RS, were tantamount to attacking the

"basic makeup of RS." Stikeman Elliott having done the legal work to establish that makeup, the Hearing Panel found that it was a breach of Stikeman Elliott's duty of loyalty to its former client to attack the basic makeup of RS. In particular, the Hearing Panel concluded, these allegations in Part V were so fundamental to RS as to preclude Stikeman Elliott from acting for CSFB in the RS Proceeding.

E. Public Confidence

[18] The Hearing Panel found that most members of the public would be shocked if they were told that counsel could give them legal advice and later argue against that advice in a case against them. They would not see this as justice being done or being seen to be done. This finding reinforced the Hearing Panel's decision that Stikeman Elliott should be disqualified from acting for CSFB in the RS Proceeding.

VI. Position of the Parties

A. CSFB's Position

1. Standard of Review

[19] Counsel for CSFB refers to *In the Matter of Taylor Shambleau* (2002), 25 O.S.C.B. 1850 (*Shambleau*) as support for his position that the decision of the Hearing Panel may be set aside in the following circumstances:

- if the panel proceeded on an incorrect principle;
- if the panel erred in law;
- if the panel overlooked material evidence;
- if new and compelling evidence is to be presented to the reviewing panel that was not presented to the original panel;
- if the original panel's perception of the public interest conflicts with that of the reviewing tribunal.

[20] Counsel for CSFB submits that the decision of the Hearing Panel should be set aside on the grounds that it is based on incorrect principles, contains errors in law, overlooked material evidence and applied an incorrect perception of the public interest.

[21] Counsel for CSFB notes that the function of RS is to regulate the public markets and that deference should be accorded to the Hearing Panel only in its area of institutional expertise. He argues that the Hearing Panel has no particular expertise in the area of solicitor-client conflict of interest and that the appropriate degree of deference should be determined by reference to the institution as opposed to the background and experience of the particular individuals that comprise the Hearing Panel.

2. Who Was the Client?

[22] Counsel for CSFB refers to *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (*MacDonald Estate*) as authority for the principle that in determining whether a disqualifying conflict of interest exists, the main concern should be whether or not there will be a misuse of confidential information on the part of the solicitor as regards a former client. A determination must also be made as to whether or not the former client is objecting to the use of the confidential information. He cites the two-step test set out by Sopinka J. at p.1260 of the *MacDonald Estate* decision:

> 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?

[23] According to the factum of CSFB, there were two prior retainers between the TSE and Stikeman Elliott: the demutualization retainer and the incorporation retainer. The demutualization retainer commenced in or about August 1998 and concluded in or about July 2000. The factum states that the TSE was the only client under the demutualization retainer. The policy issues and decisions made during the course of this retainer were widely known and subject to public comment by means of the approval process mandated by the Commission and the statutory amendments that were introduced to facilitate the TSE's demutualization. Following demutualization, market regulation continued to be carried out by the TSE through a regulatory services unit, all as described in the Commission's recognition order.

[24] For the incorporation retainer, the TSE contacted Stikeman Elliott regarding the TSE's proposal to create a new, distinct corporate entity to provide market regulation services. The incorporation retainer commenced, at the earliest, in or about October 2000 and culminated in the incorporation of RS on September 21, 2001. Once again, CSFB submits that the only two parties to this retainer were the TSE and Stikeman Elliott.

[25] Counsel for CSFB notes that it was the TSE that shaped the original retainer. He argues that the Hearing Panel erred in considering whether RS had any relationship at all with regard to the retainer between the TSE and Stikeman Elliott. His position is that the TSE was the former client and the TSE is not objecting to Stikeman Elliott acting as counsel for CSFB. He adds that RS had nothing to do with the retainer and it did not become a party to the retainer retroactively upon its creation. He also argues that the transmittal of confidential information from Stikeman Elliott to the TSE occurred before RS existed. His position is that these facts combined with a reading of *MacDonald Estate* are determinative of the entire matter.

[26] In oral submissions before us, counsel for CSFB indicates that before RS could be said to be a party to the original retainer between the TSE and Stikeman Elliott, something would have had to have happened in a "legally recognizable way." Upon its creation, had RS formally retained Stikeman Elliott and obtained the consent of the TSE, then perhaps RS could argue that it was a party to the Retainer. Without this formal retainer and legal delegation of rights to RS, counsel for CSFB argues, RS has no standing to object to the use of the information that was conveyed through the original retainer between the TSE and Stikeman Elliott.

[27] Counsel cites *Hem Mines Ltd. N.P.L. v. Omax Resources Ltd.,* [2003] B.C.J. No. 2046 (B.C.S.C.) as authority for the proposition that the legal rights associated with a retainer will not be imputed to those who were not parties to the original retainer.

[28] Counsel for CSFB refers to the *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R.(3d) 566 (Ont. C.A.) (*Chapters*) case. In that case, Chapters objected to Davies, Ward & Beck (Davies) appearing as counsel to the company that was planning a hostile takeover of Chapters. Chapters was formed from an amalgamation of SmithBooks and Coles Ltd. Davies had performed services for both SmithBooks and Coles leading up to, and including, their amalgamation. The new corporate entity, Chapters, complained about the work Davies was now performing for Trilogy. The Court of Appeal granted Chapters' request to have Davies removed.

[29] Counsel for CSFB distinguishes *Chapters* on the grounds that the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44 (as amended) and the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 (as amended) s.179 both provide for the preservation of the rights of an amalgamated company from the original entities. He notes that there is no relevant legislative provision for RS to allow it to claim the rights inherent in the original retainer between the TSE and Stikeman Elliott.

[30] In his factum and in oral submissions before us, counsel for CSFB underscores the fact that the TSE and RS are not subsidiaries or affiliates of one another. He says this is relevant because, in determining to whom solicitor-client duties are owed, and therefore who has standing to complain of conflicts in this regard, legal distinctions, such as the existence of separate legal entities, are to be respected. Counsel for CSFB argues that the Hearing Panel ignored these valid legal distinctions between RS and the TSE as two separate corporations. It ought to have found that, upon incorporation, RS did not inherit the TSE's liabilities, assets or legal rights including rights against its former lawyers, nor the benefits of duties owing to the TSE by their former lawyers.

[31] Finally, on the issue of Stikeman Elliott's communications with RS after its incorporation, counsel for CSFB indicates that these communications were with regard to a tax matter related to corporate structure. He notes that these communications dealt with an issue that was unrelated to the Retainer. Finally, he notes that the mere fact that there were communications between Stikeman Elliot and RS does not make RS a client for the purposes of the retainer of Stikeman Elliott by the TSE.

3. Issue of Consent

[32] In the summer of 2001, Stikeman Elliott sought and obtained oral consent from the Chief Executive Officer of the TSE, Ms. Barbara Stymiest, to be able to accept future mandates that could be adverse to the interests of the TSE. Counsel for CSFB maintains that the scope of this consent was very broad and extends to the matter in issue.

[33] Counsel for CSFB indicates that the TSE has never taken issue with the scope or effect of the consent it rendered and he indicates further that the TSE has specifically not objected to Stikeman Elliott representing CSFB in the RS Proceeding.

[34] Counsel for CSFB argues that the consent on the part of the TSE was validly obtained as part of the retainer with Stikeman Elliott. He states that any analysis of what is fair or appropriate in the public interest must be analyzed in the context of the consent obtained.

[35] Counsel for CSFB further submits that, if RS is to benefit from the retainer between the TSE and Stikeman Elliott as if RS were itself a party to that retainer such that RS is owed a duty of loyalty by Stikeman Elliott, it follows that RS must also be bound by the TSE's consent.

[36] Counsel for CSFB distinguishes *Chiefs of Ontario v. Ontario* (2003), 63 O.R.(3d) 335 (Ont. S.C.) (*Chiefs*) on the facts. In *Chiefs*, consent was obtained but counsel was nevertheless removed on the basis of conflict. The court found that, at the time of giving consent, the Mnjikaning First Nation was not informed that the scope of the consent was to include adverse future representation by its law firm on behalf of other parties. CSFB distinguishes *Chiefs*, in part, on the basis of the court's finding, at paragraph 48 of its decision, that the consent " . . . does not use the word 'adversity' or 'conflict' or 'potential conflict' or any word that suggests adversity of any kind . . . ." In the facts before us, counsel indicates that at the time of providing consent, Ms. Stymiest fully understood that Stikeman Elliott could act in matters adverse to the interests of the TSE.

[37] Assuming the TSE consent was broad enough to cover the conflict alleged in connection with the CSFB retainer, counsel for CSFB argues that the Hearing Panel erred in finding that the consent obtained from Stikeman Elliott did not bind RS.

4. Duty of Loyalty

[38] Counsel for CSFB argues that in law there is a difference in the duties owed by lawyers to current clients as opposed to former clients. He maintains that the Supreme Court of Canada in *MacDonald Estate* laid down the test for when a solicitor may or may not act against a former client. If the solicitor possesses relevant confidential information and there is a risk that it will be misused to the prejudice of the former client, the solicitor may not act, in the absence of consent, against the former client.

[39] Counsel for CSFB maintains that the Hearing Panel was correct in finding that there was no relevant confidential information made available to Stikeman Elliott through the course of the Retainer which could be used to the prejudice of RS. He says that this should have resulted in a dismissal of the motion by RS for disqualification of Stikeman Elliott. If RS was a party to the Retainer, the retainer is now terminated and RS has the status of a former client. He argues that it is wrong in law to determine, as the Hearing Panel did, that there was a subsisting duty of loyalty owed to RS by Stikeman Elliott.

[40] Counsel for CSFB cites the decision of the House of Lords in *Prince Jefri Bolkiah v. KPMG (a firm)*, [1999] 1 All E.R. 517 (*Bolkiah*), as authority for the principle that the basis of the court's jurisdiction to intervene in a solicitor conflict involving a former client is founded not on the avoidance of any possible perception of impropriety but on the protection of confidential information.

[41] Counsel for CSFB directs us to the following passage at p. 527 of *Bolkiah*:

> Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

[42] Counsel for CSFB notes that *Bolkiah* has been cited with approval in numerous Canadian cases. See *Neto v. Medeiros*, [1999] O.J. No. 1249 (Ont. Ct. Gen. Div.) at para [33]; *Drabinski v. KPMG* (1999), 33 C.P.C. (4th) 318 (Ont. Ct. Gen Div.) at para [5]; and *R. v. Neil,* [2003] 3 S.C.R. 631 at para [27] (*Neil*). In summary, there is a distinction between the duties owed to former clients, where the only concern is with confidential information, and the duty owed to current clients, where there is an overarching duty of loyalty.

[43] That this is the proper interpretation of the relevant authorities is beyond doubt, contends counsel for CSFB, as a result of *Chapters*. In dealing with when a lawyer will be disqualified from acting against a former client, the court said as follows at p. 677:

> [21] The question is not so much whether a lawyer acting for a new client against an old client offends an obligation of loyalty to the old client. As unseemly as it may appear in some circumstances for a lawyer to do so, this alone does not trigger a legal prohibition.
>
> [22] Rather, the overriding policy focuses on the need for public confidence in the security of the cloak of confidence surrounding client-solicitor communications. The public represented by the reasonably informed person must be satisfied that no use of confidential information received in acting for the old client would occur in acting against that client for the new client. However, if this possibility exists, the lawyer has a disqualifying conflict of interest – his duty to advance the cause of the new client conflicts with his duty of confidentiality to the old client.

[44] Counsel for CSFB maintains that the Hearing Panel misinterpreted *Chiefs*. He says *Chiefs* is consistent with the authorities cited above in that the law firm was disqualified because it had relevant confidential information and there was a risk of its misuse to the prejudice of its client. Furthermore, while consent had been obtained, it did not extend to the claim in question. The references in *Chiefs* to a duty of loyalty are all in the context of the use of confidential information to the prejudice of the client. Accordingly the case does not stand for the proposition that there is a subsisting duty of loyalty to former clients.

[45] In conclusion, counsel for CSFB contends that the Hearing Panel erred in holding that there was a duty of loyalty to a former client, and in proceeding to disqualify Stikeman Elliott for a breach of that duty in circumstances where it held that where there was no risk of misuse of relevant confidential information to the prejudice of the former client.

5. Public Confidence

[46] Counsel for CSFB outlines in detail the work performed by Stikeman Elliott during the course of the incorporation retainer which involved the provision of preliminary and draft agreements and draft by-laws which would be considered for use in the formulation of a separate market regulator. He indicates that the draft agreements and by-laws provided by Stikeman Elliott were never implemented by the TSE and ultimately the TSE retained other counsel. The agreements and by-laws initially prepared by Stikeman Elliott were altered by in-house or other counsel and published for comment after the termination of the retainer with Stikeman Elliott in 2001. When RS was incorporated in September 2001, the only role played by Stikeman Elliott was to effect the incorporation, which involved the filing of the articles of association.

[47] Counsel for CSFB argues that it can hardly be said that the public interest would be offended by the nature of the pleadings in Part V of the Reply. He reasons that the work provided by Stikeman Elliott was in the nature of draft documents for the finalization efforts of other counsel. He notes that this work was not akin to the provision of "unequivocal advice".

[48] Counsel for CSFB notes that the Hearing Panel made observations at p.15 of its decision about what the public might expect about lawyers acting against persons they have previously advised. He argues that the law specifically permits this to occur as regards former clients where there is no risk of misuse of relevant confidential information. This is the test articulated in *Chapters*. Based on the Hearing Panel's finding that there was no risk of misuse of confidential information, the public interest was satisfied, and no disqualification of counsel was justified.

B. RS's Position

1. Standard of Review

[49] Counsel for RS agrees that the appropriate standard of review was accurately stated by counsel for CSFB to be the test set out in *Shambleau*. He maintains that, gauged against that standard of review, the Hearing Panel did not proceed on an incorrect principle nor did it err in law. He submits that the Hearing Panel did not overlook material evidence nor did it mistake the perception of the public interest.

2. Standing of RS to Complain and RS's Client Status

[50] Although counsel for CSFB separates Stikeman Elliott's legal advice to the TSE into two separate retainers, the demutualization and the incorporation retainers, RS submits that there was no evidence of a formal conclusion and resumption of the Stikeman Elliott retainer. He maintains that Stikeman Elliott initially acted for the TSE in advising on how the market regulation function should be structured as part of its broader mandate in advising on the TSE's demutualization and later advised more specifically on the design and creation of RS.

[51] Counsel for RS notes that in law other persons besides a client may raise the issue of solicitor conflict where there is a question of impropriety on the part of a solicitor. He cites *Shaughnessy Brothers Investments Ltd. v. Lakehead Trailer Park (1985)* (1987), 23 C.P.C. (2d) 194 (Ont. S.C.) and *Booth v. Huxter* (1994), 16 O.R. (3d) 528 (Ont. Div. Ct.).

[52] Counsel for RS refers to the Law Society of Upper Canada's *Rules of Professional Conduct* and its Commentary as further support for the proposition that the solicitor-client relationship can be established without legal formality:

> Rule 1.02 (Commentary): A solicitor and client relationship is often established without formality. For example, an express retainer or remuneration is not required for a solicitor and client relationship to arise. Also in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a solicitor and client relationship. For example, a lawyer may meet with a prospective client in circumstances that impart confidentiality, and, although no solicitor and client relationship is ever actually established, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer's own interest to carefully manage the establishment of a solicitor and client relationship.

[53] Counsel for RS also refers to the *Rules of Professional Conduct* Commentary to Rule 2.04, "Acting Against Client":

> Rule 2.04 (Commentary): It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

[54] In pointing out this Commentary to us, counsel emphasizes that the subsequent work assumed by counsel must be "wholly unrelated to any work the lawyer has previously done" which is not the allegation in the current fact situation.

[55] Counsel for RS maintains that RS has standing to complain of the conflict even if it was not a party to the original retainer between the TSE and Stikeman Elliott. Counsel for RS asserts that RS was functionally a client of Stikeman Elliot throughout.

[56] Counsel for RS maintains that the Hearing Panel dealt carefully with the difficult issue of RS's status as a client together with the issue of standing and did not err in finding that RS had both standing to complain and status as a client. In so doing, the Hearing Panel's finding was consistent with legal principles which are not rigid or mechanical but depend on the particular circumstances of the case.

[57] In responding to CSFB's emphasis on the TSE and RS as separate legal entities, counsel for RS maintains that a finding that Stikeman Elliott does not owe a duty to RS would have a far-reaching and unfortunate effect on the practice of law. By way of example, he cites the duty of a lawyer to an amalgamated corporation, illustrated by the facts of *Chapters*, as being directly on point. In that case, the Ontario Court of Appeal found that the law firm acting for two amalgamating book-sellers (Coles and SmithBooks) owed a duty to both companies and to the new amalgamated company (Chapters). He argues that duties can be owed to subsidiaries and related corporations, and that the interests of different corporate entities can converge for conflict purposes as recognized in *Chapters* as well as in the relevant literature.

[58] Finally, counsel for RS argues that Stikeman Elliott's behaviour was consistent with the Hearing Panel's finding that RS was a client. He cites the correspondence carried out between Stikeman Elliott and RS as late as November 2002 and the account that was delivered to "Regulatory Services Inc." c/o the TSE. These actions indicate that Stikeman Elliott understood that RS was a client in respect of its own creation and behaved accordingly.

3. Issue of Consent

[59] In his factum, counsel for RS argues that the consent obtained from the TSE did not bind RS. He states that the Hearing Panel correctly found that "no consent given by Ms. Stymiest regarding Stikemans acting against the TSE can constitute consent for them to act against RS" (at page 5 of the decision of the Hearing Panel).

[60] In oral argument before us, however, counsel for RS concedes that there is some force to CSFB's argument that, if RS inherits the client role, then it stands to reason that it also inherits any consent given by Ms. Stymiest.

[61] However, even if Ms. Stymiest could have consented on behalf of RS, counsel for RS maintains, the consent was deficient in that it was not a properly informed consent, nor was its scope broad enough to encompass Stikeman Elliot's ability to effectively repudiate the very structure it advised on.

[62] For the consent to be valid, counsel for RS argues, it was incumbent upon Mr. Waitzer to fully disclose the nature of the anticipated conflict at the time of obtaining consent from the TSE. The present fact situation was not conceived of by either Mr. Waitzer or Ms. Stymiest at the time consent was rendered. In other words, the TSE was not informed at the time of the consent that Stikeman Elliott would make the type of allegations set out in Part V of the Reply.

[63] Counsel for RS suggests that the conversation between Mr. Waitzer and Ms. Stymiest is consistent with the notion of a business conflict as opposed to a legal conflict. By way of example, he mentions that Stikeman Elliott anticipated acting for NASDAQ Canada, a competitor of the TSE.

[64] Counsel for RS argues that Ms. Stymiest could not have foreseen and was not put on notice that Stikeman Elliot, having participated in the design of RS, would later claim that the design was inherently flawed. He maintains that the consent given by Ms. Stymiest was therefore not a properly informed consent.

[65] Counsel for RS also argues that the scope of the TSE consent was inadequate to permit Stikeman Elliott to act in the proposed manner on behalf of CSFB. He refers us to *Chiefs* as authority for RS's position that the consent obtained was ambiguous and not specific enough to permit Stikeman Elliott to make the serious allegations it now seeks to make on behalf of CSFB with respect to matters directly related to its former retainer.

[66] In conclusion, counsel for RS indicates that Stikeman Elliott has not met the evidentiary onus of establishing that the consent obtained in an oral conversation between Mr. Waitzer and Ms. Stymiest was informed, adequate and unambiguous in the present circumstances.

4. Duty of Loyalty

[67] RS says that there was effectively only one retainer involving Stikeman Elliott and the TSE. RS notes that the retainer originally involved Stikeman Elliott providing advice to the TSE on the structure of the new market regulation organization as part of a broader mandate involving the demutualization of the TSE.

[68] RS argues that between 1998 and 2000, Stikeman Elliott advised on the issue of demutualization and the legal advice focused on:

- the potential separation of the TSE's regulatory function from its market operator function;
- the provision of legal advice in the form of legal memoranda. Specifically, various models of market regulation were considered and discussed along with the issue of possible conflicts between the market operator and regulatory roles of the TSE.

[69] Initially, the TSE created a unit called "TSE Regulatory Services" which was part of, but functioned as an independent unit within, the TSE with full responsibility for the TSE's regulatory mandate.

[70] RS maintains that in late 2000 Stikeman Elliott was consulted specifically on the possibility of spinning off the regulatory functions of TSE Regulatory Services into a new and separate corporation which ultimately occurred and became the corporate entity known as RS. During that time the advice provided by Stikeman Elliott included:

- strategic and legal advice on the part of Mr. Waitzer in fashioning an effective, impartial and independent regulator. Mr. Waitzer also provided advice in dealing with the impact of this new body upon other stakeholders including the Commission along with the other securities commissions in Canada, the IDA, the investment community and the public.
- advice as to the contractual agreements that would be necessary to effect an independent market regulator and legal advice as to the appropriate recognition orders that would be needed from the Commission and other securities commissions across Canada.
- advice on the corporate structure of RS, the ownership and governance structure of RS, the structure and composition of the board of directors of RS, and legal advice on the contracts and other matters essential to the successful transfer of regulatory authority from the TSE to RS.
- preparation of draft versions of the articles of incorporation of RS, by-laws for RS, the drafting of the regulatory services agreement and the unanimous shareholders agreement with the TSE, the IDA and RS and a draft version of the corporate services agreement outlining the provision of certain corporate services to RS by the TSE.
- the review of two lengthy and detailed opinion letters from McCarthy Tétrault obtained by the TSE addressing legal issues involved in the delegation of authority to RS including issues of potential bias.

[71] RS maintains that Stikeman Elliott provided to the TSE their final drafts of all documents in July 2001 but that the retainer continued well into 2002. RS concedes that, near the end of the

Retainer, Stikeman Elliott's involvement primarily concerned the translation into the French language of various RS constating documents including a translation of the UMIR.

[72] RS maintains that, as it was to be the TSE's successor in market regulation, the TSE's goal in the creation of RS was to ensure that RS would be independent, impartial and effective and would be perceived as such. There was no ambiguity in this situation. Stikeman Elliott clearly knew what its client's objectives were in forming RS and performed substantial work to achieve those goals.

[73] RS argues that certain of the allegations set out in Part V of the Reply amount to a breach of the subsisting duty of loyalty owed by Stikeman Elliott to its former client because they strike at the very heart of the matters that were advised upon in the Retainer. The impugned allegations are:

- that the TSE and RS have an impermissibly close and overlapping relationship because of the TSE's status as a 50% shareholder in RS, the substantial representation of the TSE on the RS board of directors, and the fact that many RS employees are former TSE employees;
- that RS does not represent "registrants" or regulate "members" within the meaning of the National Instruments or the Act, but instead represents the interests of the TSE, an objective that is not consistent with the public interest;
- that RS interpreted Rule 6.4 of the UMIR in the interests of maximizing order flow for (and therefore, the revenue of) the TSE, and not in the public interest;
- that a reasonable person informed of the circumstances of the relationship between RS and the TSE would conclude that CSFB has a reasonable apprehension of bias in RS's investigation and discipline of it;
- that, as a matter of law, the TSE does not have the authority to delegate its power to impose penalties and fines, and that therefore RS cannot exercise any such delegated authority;
- that, as a matter of contract law, RS cannot create an enforceable penalty against CSFB, or that if it could, such a penalty would be limited to actual damages sustained by the TSE.

[74] Counsel for RS also refers us to the Law Society's *Rules of Professional Conduct*. While the Rules are not dispositive, they help to inform a court's approach to these issues. When assuming a new retainer where the interests of a former client may be prejudiced in some way, there is an overriding public interest in ensuring that the lawyer acts professionally.

[75] Counsel for RS concedes that the duty of loyalty to a former client is less onerous than its duty to a current client. However, he says the law in Canada provides for the continuation of a duty of loyalty to a former client. As the Court of Appeal noted at p. 598 of *R. v. Speid* (1983), 43 O.R. (2d) 596 (Ont. C.A.) (*Speid*) (quoted with approval by the Supreme Court of Canada in *Neil*), "we would have thought it axiomatic that no client has a right to retain counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client and a former one."

[76] While counsel for CSFB argues that the only duty to a former client is the duty to preserve the confidentiality of information obtained in the course of a former retainer, counsel for RS says that this is not the only ground for removal. He interprets *Neil* as broadening the duty of loyalty to a

current client but not as foreclosing a duty of loyalty to a former client in appropriate circumstances. He maintains that in *Neil*, the Supreme Court of Canada expressly did not adopt the ironclad rule which exists in English law following *Bolkiah*, that, absent confidential information, no duties are owed to former clients. Likewise, counsel for RS says, *Chapters* does not foreclose the finding made by the Hearing Panel. Finally, he says *Chiefs* involves a case in which the duty of loyalty to a former client was held to be highly relevant to removal of the law firm. At p.123 of that decision, Justice Campbell held:

> The breach of loyalty and good faith is obvious from Blakes' attack on its former client. Blakes alleges that [its former client] is a "wolf in sheep's clothing", guilty of breach of fiduciary duty, deception and taking bribes . . .

[77] Stikeman Elliott provided advice on how to structure RS. In arguing that RS's relationship to the TSE creates a structural bias manifested in the investigation and discipline of its current client, CSFB, Stikeman Elliott seeks to argue that the arrangements it counselled were ineffective. In so doing, it seeks to repudiate its own legal advice.

[78] In conclusion, counsel for RS argues that the Hearing Panel had ample legal and factual bases to conclude that Stikeman Elliott was in an irreconcilable conflict of interest and could not act in this proceeding, and to hold at p.14 of its decision:

> [Stikemans], acting in a proceeding where it attacks the basic makeup of RS, having done the legal work to establish that very makeup, we consider to be in breach of its duty of loyalty to its former client.

5. Public Confidence

[79] Counsel for RS argues that the real question before the reviewing tribunal is whether there is a conflict of interest that prevents Stikeman Elliott from acting in this matter. He urges that, while the risk of misuse of relevant confidential information is the usual reason cited by the courts for the disqualification of lawyers in relation to former clients, there are other bases for the disqualification of counsel and that the Hearing Panel did not err in its decision to disqualify.

[80] In relation to the question of the public interest and public confidence in the legal system, counsel for RS submits that where there is a legitimate concern regarding the appearance of impropriety arising from a conflict, even a valid consent from a former client will not bar the solicitor's removal. He cites a passage by O'Connor J.A. in *R. v. McCallen* (1999), 43 O.R. (3d) 56 (Ont. C.A.) at pp. 75-76:

> It is also relevant to consider the consent of a client whose interest is potentially adversely affected by the alleged conflict recognizing however, that the consent of a client must give way to the public interest and the integrity of the system of justice when there is a legitimate concern about the appearance of impropriety arising from a conflict: see *Re Donaldson Inquest (sub no. Booth v. Huxter)* (1994), 16 O.R.(3d) 528, 111 D.L.R. (4th) 111 (Div. Ct.); *Goldberg v. Goldberg* (1982), 141 D.L.R. (3d) 133, 31 R.F.L. (2d) 453 (Ont. Div. Ct.).

[81] CSFB contends that the only relevant aspect of the public interest in a motion to remove a solicitor as a result of conflict due to a prior retainer is the public interest in the confidentiality of information. Counsel for RS submits that in *Chiefs*, the court relied on varied and ample authority to the contrary. In addition to the risk of misuse of confidential information, the court weighed the public interest in the administration of justice alongside the classic *MacDonald Estate* factors (as further explained in *Neil)* as well as other aspects of the public interest in reaching its decision.

[82] Accordingly, counsel for RS submits that the Hearing Panel was on solid ground in determining that public confidence in the administration of justice supported the disqualification of Stikeman Elliott in this case. He argues that the public interest in preserving the right to counsel is outweighed in a case where the lawyer, in a public forum, seeks to "defeat his own advice."

6. Relevant Confidential Information and Risk of Misuse

[83] Counsel for RS submits that the Hearing Panel correctly concluded that Stikeman Elliott was in possession of relevant confidential information acquired during the course of the Retainer. However, he says the Hearing Panel erred in finding that there was no risk of misuse of that confidential information to the prejudice of RS. Specifically, he says the Hearing Panel erred in its appreciation of the onus on Stikeman Elliott and in failing to appreciate the connection between the Part V allegations and the confidential information when applying the second stage of the *MacDonald Estate* test. Properly applied, the second stage of the test provides a further basis for the Hearing Panel's decision that Stikeman Elliott be removed.

[84] Counsel for RS argues that the Hearing Panel erred in finding that the jurisdictional concerns raised by Stikeman Elliott were purely legal and any law firm could have raised the same arguments based on the public availability of the relevant documentation. He argues that the onus is on Stikeman Elliott to prove both the absence of relevant confidential information or, failing that, to prove that there was no risk of transmission of that information among other lawyers from the same firm who sought to act. Given that there was no evidence that Stikeman Elliott took any measures to prevent the transmission of confidential information among the members of the firm, the disqualification of the law firm should be automatic according to the test in *MacDonald Estate*.

[85] In finding that there was no "nexus" between the substance of RS's allegations against CSFB, which related to off-market transactions, and the Retainer, counsel for RS submits that the Hearing Panel erred. The issue was not whether CSFB's alleged actions in completing off-market trades were related to the prior Stikeman Elliott retainer; the question was whether the issues raised in the RS Proceeding – namely the Part V allegations – were so related. In other words, the Hearing Panel misapprehended the "nexus" issue.

[86] According to RS, the Hearing Panel's determination that there was "no confidential information available to Stikemans in this matter . . . which could be used to the prejudice of RS" resulted from an incorrect application of the second half of the *MacDonald Estate* test. That test stands for the proposition that, once it is shown by the client that a previous relationship existed which is sufficiently related to the current retainer, a strong presumption in favour of removal arises. In addition, the fact that certain of the documents became public does not deprive the advice and communications between the parties of their confidential character or of the relevance to the defences advanced in Part V of the Reply. In other words, once the client shows "sufficient

relatedness," there is a risk of misuse of that information to the prejudice of RS by virtue of Stikeman Elliott's possessing that information and being aware of that advice.

C. Position of Staff of the Commission

1. Standard of Review

[87] Commission staff refers to the Commission decisions of *Shambleau* and *In the Matter of Dimitrios Boulieris* (2004), 27 O.S.C.B. 1597 (*Boulieris*) as authority for the position that, by reason of subsection 21.7(2) of the Act, the Commission exercises original jurisdiction when exercising its powers of review under subsection 21.7(1) of the Act. The Commission may confirm the decision under review or make such other decision as the Commission considers proper.

2. Relevant Confidential Information

[88] Commission staff refers to the words of Sopinka J. in *MacDonald Estate* that highlights the danger of allowing the same counsel to act on a matter where confidential information has been imparted by a former client. She refers us to this reference on page 1261:

> Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

[89] Commission staff notes that Justice Sopinka's admonition applies in the present case as well. One need only replace the reference to "personal matters" in the quote above with reference to "questions about the structure of RS or an impermissibly close relationship between the TSE and RS." She further notes that different individual lawyers were involved in the retainers in *MacDonald Estate*. In this case, she points out, Mr. Waitzer, Mr. Romano and Ms. Kay of Stikeman Elliott have, and are presumed to have, the same information that was conveyed in the first retainer – in particular the McCarthy Tétrault opinions.

[90] Commission staff maintains that, while any law firm could make out the jurisdictional arguments that Stikeman Elliott is making in defence of CSFB, lawyers in other law firms could not conduct examinations, discoveries or analyze documents with the same knowledge of the McCarthy Tétrault letters and other information previously conveyed. In other words, the caveat in *MacDonald Estate* that "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" is particularly problematic when some or all of the same counsel are involved in both retainers.

3. Costs

[91] Commission staff notes that costs have been requested in this matter by both parties. She submits that there is no authority under the Act to provide for costs to be awarded in relation to a hearing and review under section 21.7 or section 8 of the Act. She notes that this hearing is conducted under the rules set out in the *Statutory Powers and Procedures Act* R.S.O. 1990, c.S.22 (as amended), (SPPA). In the absence of the Commission having made rules under the SPPA concerning costs, she submits that such an order cannot be made.

VII. Our Analysis and Findings

A. Standard of Review

[92] Counsel for both parties contend, and we agree, that the appropriate standard of review is set out in *Shambleau*. In addition, Commission staff refers us to the decision of this Commission in *Boulieris* as authority for the scope of the Commission's jurisdiction on a hearing and review pursuant to section 21.7 of the Act.

B. Standing of RS to Complain and Who is the Client

[93] The first, and critical threshold issue which the Hearing Panel dealt with was whether Stikeman Elliott owed any duties to RS or whether its duties were only to the TSE as the "former client" that had retained it to provide legal and strategic advice.

[94] The determination of this issue involves a key threshold question. As the Hearing Panel put it at p.3 of its decision:

> If RS cannot establish that it was at any time, and in any way, a client of Stikemans, then Stikemans could hardly have a conflict of interest based on possible use of confidential information obtained when acting for a client . . . It comes down to a consideration of whether RS was ever a client of Stikemans, and whether Stikemans owes solicitor-client duties to RS.

[95] At page 4 of its decision, the Hearing Panel said as follows:

> It is impossible to divorce the relationship between the TSE and RS from the issues raised in this motion. At the time that the TSE was a client of Stikemans, there is a question as to whether Stikemans was also acting for the corporation that it was helping to create. Obviously, no counsel could have been retained by RS, since RS was not yet in existence. However, there surely could be no argument against there being a solicitor and client privilege between a lawyer giving legal advice on the setting up of a subsidiary corporation and that subsidiary itself regarding matters involved in its incorporation.

[96] The Hearing Panel understood, and expressly stated, that these circumstances are a step removed from those involved in the creation of a subsidiary. In the proceedings before us, much was made of the alleged inappropriateness of the analogy the Hearing Panel employed to describe the nature of the relationship between a parent corporation, its subsidiary and the lawyer who gives advice on the creation of the subsidiary. The appropriateness of the analogy is not germane to our finding in this regard.

[97] We conclude that the circumstances in this case are somewhat unique and that solicitor-client duties owed to a former client should apply regardless of whether or not RS was technically a former client. Therefore, we agree with the Hearing Panel that the nature and purpose of the Retainer, as well as the nature of the relationship between the three parties in this case, are such that RS is properly viewed as having standing to complain of the conflict, and as being a beneficiary of both

the legal advice provided by Stikeman Elliott as well as the solicitor-client duties owed by Stikeman Elliott. Furthermore, although it is not determinative in this case, we believe that, in the circumstances of this case, RS became a client of Stikeman Elliott.

[98] The Commentary to Rule 1.02 of the *Rules of Professional Conduct*, as set out previously, while lacking legally binding effect, provides helpful guidance on this issue. It also serves as a useful reminder that a solicitor-client relationship is often established without legal formality and in the absence of an express retainer or remuneration. This commentary is an important statement of public policy from the body which regulates the legal profession in Ontario. It reinforces our determination that it would be inappropriate, in the circumstances of this case, to take too rigid and mechanical an approach as to whether RS became a client and as to whether Stikeman Elliott owes duties to RS notwithstanding the absence of a formal retainer between them.

[99] In *MacDonald Estate*, Sopinka J. said at p.1245:

> 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. 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.

[100] At the time that Stikeman Elliott was retained by the TSE, RS did not exist. In fact, its creation was the very purpose of the later stages of the Retainer. The fact that it was impossible for the uncreated RS to be separately represented factored into the Hearing Panel's thinking as is evidenced by the following statement at p.4 of its decision:

> Since it was impossible for the uncreated RS to be separately represented, the panel is compelled to conclude that Stikemans owes the overall duty of a solicitor to RS.

[101] We believe that the Hearing Panel carefully considered the relationship between Stikeman Elliott, the TSE and the inchoate RS in coming to this conclusion.

[102] We are also influenced by the fact that initially, Stikeman Elliott was dealing with the division of the TSE – TSE Regulatory Services – that ultimately "became" RS when it was spun off into a separate corporate entity. The functions, role and personnel that had previously resided within the TSE Regulatory Services division were largely transferred to RS. The establishment of TSE Regulatory Services following advice from Stikeman Elliott was, in effect, the "half-way house" between the TSE carrying out those functions itself and the eventual creation of RS to assume those functions. When the legal advice provided by Stikeman Elliott is viewed from the perspective of

this "continuum," it would be an elevation of form over substance were we to conclude that duties were owed by Stikeman Elliott as long as regulatory services continued to be performed in-house by TSE Regulatory Services but did not extend to RS when it was created for the very purpose of assuming those regulatory responsibilities.

[103] One normally expects that a solicitor-client relationship, and the resulting duties that flow from it, are created through a formal retainer between the parties. Stikeman Elliott has maintained throughout that they were never retained by RS and owe no duties to RS. In fact, RS was not in existence at the time of the Retainer between the TSE and Stikeman Elliott. Nonetheless, the Hearing Panel concluded, in the circumstances of this case, that Stikeman Elliott owed "the overall duty of a solicitor to RS." Applying the appropriate standard of review to this finding, and for the reasons set out above, we agree.

[104] In conclusion, we find that the Hearing Panel did not err in deciding that, for the purposes of determining whether Stikeman Elliott should continue to act for CSFB in the RS Proceeding, they owe all relevant solicitor-client duties to RS with respect to the work completed during their retainer by the TSE.

C. Issue of Consent

[105] Having determined that RS should be viewed as if it were a former client of Stikeman Elliott, the next issue to be determined is the effect of the consent rendered by Ms. Stymiest. The parties addressed four issues in this regard: was Ms. Stymiest the proper agent to render that consent on behalf of the TSE, is the consent binding on RS, was it informed, and was its scope adequate to cover the alleged conflict?

[106] Counsel for RS concedes that Ms. Stymiest was the proper agent to render consent on behalf of the TSE. We agree.

[107] As noted in the previous description of RS's oral arguments before us on the issue of consent, he concedes the logic of the position of CSFB that, if RS "inherits the client role," it follows that it also inherits any consent that the TSE provided, assuming that consent is otherwise valid. We note that the Hearing Panel found that Ms. Stymiest could not give consent on behalf of RS. However, even if the TSE consent does bind RS, given our finding on the question of whether the consent was informed and adequate, the issue becomes moot.

[108] In analyzing the nature of the consent rendered in the summer of 2001, we note that the affidavit evidence on the part of Mr. Waitzer indicates that the consent was oral and that the mandate sought and obtained was: ". . . [that] Stikeman Elliott should be able to take on other mandates which could be adversarial to the TSE's interests."

[109] We find *Chiefs* to be directly relevant to a determination of the adequacy of the TSE's consent in this matter. While that case involved a fact situation where adversity was not specifically raised when consent was rendered, the court's holding in that case is still relevant to the current case and very instructive. In particular, we note the following passage from Campbell J. which indicates that, when consent is in issue, the evidentiary onus is on the law firm that seeks to act adversely

against a former client, to ensure the clarity of the consent. At pages 357-358 of *Chiefs* the court said as follows:

> *Consent: A Blank Cheque?*
>
> [89] Blakes takes the position that the consent was a blank cheque for Blakes to go "wherever the litigation took it."
>
> [90] The weakness in Blakes' position is that [it] looks at the events of June 9, 2000 in light of what has happened since then. The consent has to be interpreted in light of what was objectively known to the parties at the time and what was then within their reasonable contemplation.
>
> [91] Both sides, now that production has been forced of Tunley's originally privileged letter to MFN, parse Tunley's advice to MFN and search their recollection about what they said and thought at the time. Nothing in that evidence suggests that MFN consented to Blakes proceeding in the present circumstances against MFN.
>
> **[92]** ***The brevity, informality and vagueness of the consent rebut any suggestion that the parties at the time thought it removed from MFN the shield of solicitor client protection against attacks on its honour by its general counsel. They rebut also any suggestion that the parties at the time thought the consent was a sword in the hand of Blakes to attack its client for breach of fiduciary duty in transactions related to those in which Blakes acted for MFN, transactions in relation to which Blakes had access to confidential information when it was acting for MFN.*** (Emphasis added.)
>
> [93] The consent was not, expressly or by implication, a consent to act against the interest of MFN in the 20 per cent action. It was not, expressly or by implication, a consent to accuse MFN of breach of fiduciary duty or deception or of being a wolf in sheep's clothing.
>
> *Who Pays for Ambiguity?*
>
> **[95]** ***Were there any doubts about the scope of the consent, the issue would be decided adversely to Blakes on the basis of onus.*** (Emphasis added.)
>
> [96] The evidentiary onus is on the law firm, when it wants to attack a former client, to ensure clarity of consent. If the law firm fails to ensure clarity, the law firm pays the price.

[110] In construing the consent in light of what was objectively known to the parties at the time it was given and what was then within their reasonable contemplation, we do not believe that Ms. Stymiest could have rendered a fully informed consent that was broad enough in scope to speak to the present circumstances. There is nothing in the evidence to suggest that Ms. Stymiest understood that she was consenting to Stikeman Elliott attacking, at some point in the future, the regulatory structure which it was retained to provide advice on and to help create. As the court said in *Chiefs*, in the absence of clarity of consent, it is "the law firm that pays the price."

[111] We do not find that Stikeman Elliott has met its burden of proof. As was noted by counsel for CSFB in argument before us, no-one from the TSE who was involved in providing the consent came forward to say that it was intended to have a more restrictive meaning. However, we also note that the TSE did not come forward to say it was intended to be broad enough to cover a situation such as that which is in issue. We find the nature and scope of the consent rendered by Ms. Stymiest to be imprecise and ambiguous. As a result, we are unable to conclude that it was informed or that the scope of the consent was broad enough to extend to the present fact situation.

[112] Were we to construe the consent that was given as being broad enough in scope to cover the types of allegations that Stikeman Elliott seeks to advance on behalf of CSFB as set out in Part V of the Reply, this would be tantamount to permitting them to repudiate the very advice they were retained to provide. Only a clear and unambiguous consent would be sufficient to produce such a result.

D. Relevant Confidential Information and Risk of Misuse

[113] The Hearing Panel summarized the test in *MacDonald Estate* as raising three questions: was the information confidential, was it relevant to the RS Proceeding, and could it be used to the prejudice of RS?

[114] Counsel for RS maintains that, while the Hearing Panel correctly determined that Stikeman Elliott possessed relevant, confidential information, it erred in its appreciation of the onus on the lawyer and in failing to find the required nexus between that relevant confidential information acquired in the course of the Retainer and the Part V allegations advanced on behalf of CSFB. For the reasons set out below, we agree.

[115] The Hearing Panel, at p.8 of its decision, said as follows:

> The claim of RS against Credit Suisse involves allegations of improper off-market trading. These are not facts which Stikemans could have gleaned during its retainer by the TSE. They did not occur until well after the end of Stikemans retainer.

[116] With due respect to the Hearing Panel, we believe it misconstrued the question it was required to ask and the nature of the heavy burden that must be met by the law firm. In *MacDonald Estate,* the Supreme Court of Canada said, at p.1261, that:

> A lawyer who has relevant confidential information cannot act against his client or former client. In such a case disqualification is automatic.

[117] In addition, there was no evidence before us that Stikeman Elliott took any measures of the kind described by the Supreme Court of Canada in *MacDonald Estate* to prevent the transmission of confidential information among members of the law firm. Indeed, lawyers privy to the confidential information are involved in acting for CSFB. Accordingly, there is no basis to conclude that Stikeman Elliott has discharged the heavy onus resting on it to show there is no risk of transmission of the relevant confidential information to lawyers at the firm acting for CSFB.

[118] The Hearing Panel also found there was a lack of nexus between the alleged facts which bring CSFB into the RS Proceeding and the legal matters considered in the incorporation of RS. As a result, it concluded that there was no risk of misuse against RS of the relevant confidential information that Stikeman Elliott possessed as a result of the Retainer. We disagree. The issue is not whether CSFB's alleged off-market trade was related to the Retainer. The relevant question is whether the issues raised by Stikeman Elliott on behalf of CSFB in the RS Proceeding – namely, certain of the Part V allegations – are so related. It is clear from the evidence, according to the Hearing Panel's decision, that certain of the allegations in Part V of the Reply relating to lack of jurisdiction to impose penalties and RS's alleged institutional bias in favour of the TSE resulting from its structure and governance are matters that must have been the subject of advice form Stikeman Elliott. For these reasons, we find the required nexus has been established.

[119] In our view, the Hearing Panel also erred in assuming that, since the documents which Stikeman Elliot produced for RS are publicly available and since the arguments in this matter are purely legal, any lawyer could raise the same issues in defence of CSFB as those raised by Stikeman Elliott in Part V of the Reply. We reproduce this quote from pages 8 and 9 of the Hearing Panel's decision:

> Although during the time of Stikemans' retainer, the documents on which arguments of lack of jurisdiction can be based were confidential, the finished products are now publicly available. Information about the corporate makeup of RS, on which arguments of lack of independence of the TSE, or bias, can be based, is also available to the public. The only knowledge available to Sikemans that is not available to the public is knowledge of discussions between Stikemans and the TSE and the opinion of McCarthy Tétrault, neither of which could have referred to the actual events involved in this case.
>
> As stated earlier, all counsel have access to the sources of the law, and to the documents on which the Part V arguments could be based. Consequently, any counsel who might be retained by Credit Suisse would have all of the information necessary to argue the case that Stikemans would have, though perhaps in a slightly different form. Thus it cannot be said that any information available to Stikemans could be used to the prejudice of RS in any way other than the normal manner of argument in any adversarial proceeding.
>
> We conclude that there is not relevant confidential information available to Stikemans in this matter, of which we were made aware, which could be used to the prejudice of RS in this proceeding.

[120] In *Chapters*, Goudge J.A. specifically focused on the public nature of some of the documents previously received by the law firm. His comments on this issue are relevant to the facts in this case:

> [33] While a number of the documents received by Davies have since been made public by Chapters, many have not. Nor does it appear that the confidential discussions between Chapters and Davies in which information was passed have been publicly revealed.

[121] Similarly, in *Stewart v. Canadian Broadcasting Corp.*, [1997] O.J. No. 2271 (Ont. Ct. Gen. Div.) (*Stewart*), the court also found that the fact the broadcast content was public knowledge did not detract from a finding of a fiduciary duty of loyalty.

[122] Under the *MacDonald Estate* test, once the client is able to show a sufficient connection between a previous relationship and the new retainer, the court should then infer that confidential information was imparted unless the law firm can show that this was not the case. The onus on the law firm to establish that no confidential information was imparted that could be relevant is a "very heavy burden." This onus is described as follows at p. 1260 of *MacDonald Estate*:

> 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 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.
>
> 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.

[123] During the three years that formed the basis of the original retainer, there were confidential factual exchanges and documents that have not become public to date. The reality of the solicitor-client relationship made this inevitable.

[124] Nothing prevented Mr. Waitzer and Mr. Romano from using for CSFB information that was conveyed to them during the course of the Retainer.

[125] Stikeman Elliott has not discharged the heavy onus under the second half of the *MacDonald Estate* test that they did not receive, and would not use, the relevant, confidential information.

E. Duty of Loyalty

[126] *Stewart* is helpful because it contains a recent discussion of a lawyer's ongoing fiduciary duties to a former client. That case involved a lawyer participating in a public television broadcast regarding a case on which he had served as defence counsel some years before. The lawyer participated as host, narrator and consultant in the production of the television show in spite of the objections of his former client. The former client sued the lawyer for damages for breach of contract and breach of fiduciary duty. The former client was successful on his fiduciary duty argument but lost on the breach of contract issue.

[127] In the part of the decision relating to the question of fiduciary duty, MacDonald J. recognized the need to balance the concepts of freedom of speech and public benefit which were raised by the defendant lawyer, with the duty of loyalty inherent within the fiduciary duty owed by a solicitor to a former client as argued by the plaintiff.

[128] Citing *Tombill Gold Mines Ltd. v. Hamilton (City)*, [1954] O.R. 871 (Ont. H.C.), MacDonald J. refers to that decision as support for the principle that the fiduciary relationship survives the termination of the lawyer and client relationship and the end of the duties which are solely part of it. MacDonald J. says as follows at paragraphs 301 and 302:

> [301] It is trite but necessary, I think, to begin by noting that Mr. Greenspan was not bound to be Mr. Stewart's advocate forever. This is consistent with rule 5, commentary 13 of the rules of professional conduct which does not prohibit a lawyer from acting against a former client. It advises when a lawyer may not act, and when it is "not improper" for a lawyer to act. This standard of the profession demonstrates that a lawyer is not bound indefinitely to serve the former client's interests which were the subject of the earlier retainer. In my opinion, that obligation ends when the retainer ends. ***However, the end of the lawyer and client relationship as such does not end the fiduciary relationship. Duties arising from that fiduciary relationship may well restrain the lawyer from speaking about the former client's issues or business which were the subject of the concluded retainer, or from taking steps which affect them.*** (Emphasis added.)
>
> [302] In my opinion, the fundamental principles which Dubin J.A. re-stated in *R. v. Speid (supra)* included the nature of a lawyer's ongoing fiduciary duties to a former client. This was done through quoting part of Gale J.'s reasons in *Tombill Gold Mines Ltd. v. Hamilton (City) (supra)*. Gale, J. did not just speak of an existing principal and agent relationship such as an existing lawyer and client relationship, he spoke of an existing fiduciary relationship. That fiduciary relationship survives the termination of the lawyer and client relationship and the end of the duties which are solely part of it.

[129] Finally, MacDonald J., paraphrasing Gale J., states at paragraph 312 of *Stewart* that ". . . in a fiduciary relationship, the agent (read lawyer) is . . . prohibited from acting disloyally in matters which are related to the agency (read subject matter of the retainer)."

[130] MacDonald, J. was careful to note that each fact situation would require a special assessment of the fiduciary relationship owed by the lawyer to the former client. However, the underlying premise is that there is a duty of loyalty owed by a lawyer to a former client and this duty is separate from public interest concerns:

> [316] What then is to be said in support of attaching a fiduciary duty to Mr. Greenspan's broadcast involvement? In my opinion, it is not necessary to consider whether a fiduciary duty should be imposed here for the purpose of maintaining public confidence in the legal profession. Important as such public confidence is, a fiduciary duty of loyalty arises here without resort to public policy justifications, yet in a manner consistent with them. It was when he acted as Mr. Stewart's counsel that a fiduciary duty attached to Mr. Greenspan in respect of Mr. Stewart and his case. That duty was alive but inoperative through the years that Mr. Greenspan and Mr. Stewart were independent of each other. Mr. Greenspan brought himself within the sphere of that duty when, in 1991, he chose to involve himself again in the public aspects of Mr. Stewart's case. Involving himself again in the subject matter of his concluded retainer triggered the fiduciary obligation of loyalty. Mr. Greenspan's duty was to be loyal to Mr. Stewart to the extent of firstly, not taking advantage of him, and the information and issues which had been the subject of his professional services and secondly, to the extent of not undoing the benefits and protections provided by those professional services. In my opinion, the duty of loyalty itself is sufficient to ensure public confidence in the legal profession, in its relevant activities. Loyalty reciprocates the faith the client had in the lawyer respecting the information and issues which were the subject of the professional services.

[131] It is also worth noting that the court in *Stewart*, at paragraph 318, recognized that all of the broadcast content was public knowledge but held that this did not detract from a fiduciary duty of loyalty or prevent it from binding the lawyer in that case. In rejecting the argument of counsel for CSFB that there is no duty of loyalty owed by lawyers to former clients in Canada, we refer to the following dicta from Dubin J.A. in *Speid*:

> A client has a right to professional services. Miss Nugent had that right as well as Mr. Speid. It was fundamental to her rights that her solicitor respect her confidences and that he exhibit loyalty to her. A client has every right to be confident that the solicitor retained will not subsequently take an adversarial position against the client with respect to the same subject-matter that he was retained on. That fiduciary duty, as I have noted, is not terminated when the services rendered have been completed. Mr. Speid has a right to counsel. He has a right to professional advice, but he has no right to counsel who, by accepting the brief, cannot act professionally.

[132] Counsel for CSFB maintains that *Chiefs* is not relevant. We do not agree. While one of Campbell J.'s concerns in that case was the possible misuse of confidential information on the part of a solicitor against a former client, the case largely turned on the issues of consent and public interest as it related to the conflict on the part of the law firm. We found the following comments of Campbell J. both relevant and instructive in terms of the importance of the maintenance of public confidence in the justice system in Canada:

> [112] The public interest in the administration of justice requires the confidence of every litigant that their legal advisers will not later attack their honour in matters closely related to their confidential retainers.

[133] We respectfully disagree with the Hearing Panel on the issue of "misuse of relevant confidential information" for the reasons discussed above. It would therefore not affect the outcome of this hearing and review were we to agree with counsel for CSFB that the Hearing Panel erred in holding that Stikeman Elliott was disqualified from acting in the RS Proceeding based on duty of loyalty and public confidence in the administration of justice despite having found no risk of misuse of relevant confidential information in the facts before it. However, we have considered the arguments of the parties on this issue as well as the authorities cited. While *MacDonald Estate*, *Neil*, *Bolkiah* and *Chapters* are all relevant in deciding whether a disqualifying conflict with a former client exists, they are focused on the more typical case where confidential information is in issue. However, none of these decisions forecloses a duty of loyalty to a former client in appropriate circumstances.

[134] The Hearing Panel held, based on the particular and unique circumstances of this case, that Stikeman Elliott owed and was in breach of its duty of loyalty to RS. This was due to the nature of certain of the allegations in Part V of the Reply which were so fundamental to RS and to the legal advice previously provided in relation to those issues

[135] There is no doubt that a lawyer's duty of loyalty to a former client is less onerous than its duty to a current client. However, based on our review of the relevant authorities, we have concluded that *Speid*, *Stewart* and *Chiefs* all provide support for the view that the law in Canada provides for a subsisting duty of loyalty to a former client.

[136] A lawyer acting for a new client against a former client does not necessarily offend a duty of loyalty. In fact, in this case, RS did not object to Stikeman Elliott's retainer with CSFB for the five months prior to the time that the impugned Part V allegations were raised. The Hearing Panel did not find that Stikeman Elliott was prevented from acting against RS in general. Rather, it found that Stikeman Elliott could not, in acting for CSFB, attack the very legal advice it had provided to the TSE and, by extension, RS, in the Retainer. We agree with the conclusions of the Hearing Panel in this regard.

F. The Public Interest

[137] Having regard to the advice provided by Stikeman Elliott under the Retainer and having regard to the nature of the defence that Stikeman Elliott now wishes to plead for CSFB as set out in Part V of the Reply, we agree with counsel for RS that the nature of the impugned portions of the defence goes to the very root of the matters that Stikeman Elliott was originally retained to advise upon. While the Hearing Panel found that the allegations in this case are of a very different nature and do not come close to being as egregious as those in *Chiefs*, the Hearing Panel nonetheless felt removal was necessary to preserve public confidence in the administration of justice. The failure to so order would be viewed by the public as a failure to uphold the principle that "justice should not only be done but should be seen to be done."

[138] Upon reviewing the relevant authorities, we are unable to conclude, as counsel for CSFB urged us to, that the Hearing Panel erred in determining that this was a relevant consideration. In particular, we note the following quote at paragraph 139 of *Chiefs*:

> [139] This case engages very strongly the public interest in the administration of justice which requires the confidence of every litigant that their legal advisers will not later attack their honour in matters closely related to their confidential retainers.

[139] And, at paragraph 120 of *Chiefs*, the court said as follows:

> [120] The specific damage to the public interest in this case includes [the former client's] . . . added concern that the allegations would have more force and credibility because they are made by the law firm that acted for [the former client] in closely related matters.

[140] The concern expressed in *Chiefs* that the allegations of the allegedly conflicted law firm would have "more force and credibility" due to their prior retainer are particularly apt in the present fact situation.

G. Costs

[141] As previously noted, both parties sought an order as to costs. Commission staff submit that there is no statutory authority to order costs in connection with this matter. Counsel for the parties did not contest Commission staff's position. Accordingly, we make no order as to costs in this matter.

VIII. The Decision

[142] In conclusion, the Hearing Panel states at p.16 of its decision:

> We have at all times been cognizant of the importance of parties being able to retain counsel of their choice, and are reluctant to order the removal of competent counsel from a proceeding where such important issues are being raised. However, because of the seriousness of the allegations in Part V of the Reply and for the reasons set out above, we order that Stikemans cease to act as counsel for Credit Suisse in this proceeding.

[143] Based on the relevant legal principles, and the application of those principles to the facts of this case, we conclude, as did the Hearing Panel (although, in part, for different reasons), that Stikeman Elliott is precluded from acting for CSFB in the RS Proceeding. Accordingly, we deny the application of CSFB to set aside the order of the Hearing Panel on the motion.

[144] We wish to thank the parties' counsel for the high quality of their oral and written submissions and their extensive review of the relevant authorities.

Dated at Toronto this 24th day of June, 2004

"Paul M. Moore"

Paul M. Moore, Q.C.

"Susan Wolburgh Jenah"

Susan Wolburgh Jenah

"H. Lorne Morphy"

H. L. Morphy, Q.C.