Conflicting Interests, Conflicting Judgments and the Ethical Obligations of Lawyers and Judges
by Alice Woolley

Hughes Estate v. Hughes [2008] A.J. No. 739 (Q.B.) (Q.L)
Note: We will add a link when this judgment is posted on the Alberta Courts website.

Introduction

At what point do a lawyer's personal beliefs create a disqualifying conflict of interest? What are the obligations of a judge when a party is unrepresented by counsel? In addition to other issues (not discussed here), the Alberta Court of Queen's Bench judgment in *Hughes Estate v. Hughes* [2008] A.J. No. 739 (hereinafter "*Hughes Estate*") raises these problems, the first directly and the second indirectly.

This post reviews the judgment of Justice Macleod and makes four arguments. First, with respect to the question of when a lawyer's personal beliefs create a disqualifying conflict of interest, Macleod J. made findings of fact *prima facie* inconsistent with the broader judicial record. Second, Macleod J. failed to apprehend or properly apply the law respecting conflicts of interest. Third, in a case such as this, where the Respondent is unrepresented, the decision is dispositive of the Respondent's legal rights, and the relevance of the prior judicial record is evident, Macleod J. had an affirmative duty to familiarize himself with that prior judicial record, and to either apply it or distinguish it. Fourth, if the broader judicial record was not brought to Macleod J.'s attention, this may suggest an ethical violation by the Applicants, Mr. Gnam and Mr. Brady, acting as lawyers on their own behalf. Mr. Gnam and Mr. Brady may have had an ethical obligation to bring this judgment to the attention of the Court. The position on this final argument is, however, somewhat unclear.

Background

In September 2002, 16 year old Bethany Hughes died of acute myeloid leukemia. She was diagnosed with the illness in February 2002, and immediately became embroiled in a legal controversy over whether she could be compelled to receive the blood transfusions deemed medically advisable to treat her condition. Based on her religious convictions as a Jehovah's Witness, Ms. Hughes resisted proceedings brought by the Director of Child Welfare to compel her to receive blood transfusions. Ms. Hughes' was unsuccessful, and she received blood transfusions and chemotherapy between February and June 2002.

In the main reasons justifying the compulsion of treatment (*B.H. (Next friend of) v. Alberta (Director of Child Welfare)* 2002 ABQB 371, hereinafter "*B.H.*"), Madam Justice Adele Kent found that while Ms. Hughes was a "mature minor" such that she was capable of making decisions on her own behalf, the legislative scheme in Alberta allowed the imposition of necessary medical treatment on such a minor even without her consent. In addition, however, Kent J. considered evidence relative to Ms. Hughes' ability to make informed choices. Based on that evidence, Kent J. found that Ms. Hughes had been subject to undue influence by others, had been misled, and in particular had been led to believe that she would not die if she refused the blood transfusions:

> B.H. has not been allowed to look death in the face. Because of incorrect information and the behaviour of some around her, she now believes that she will not die if she does not have transfusions. Even if B.H. was in law entitled to refuse medical treatment, the undue influence put upon her in the last few weeks has taken away her ability to make an informed choice….
>
> I am told that B.H. wanted to testify before me. I read her affidavits and viewed the video. Can I now or could I, if she did testify, rely on the evidence coming from a free, informed will? I could not, not after the pressures and influences that have been brought to bear on her in the last few weeks to maintain her position on blood transfusions. In administering treatment to B.H. over the coming weeks, authorities will continue to be required to consider B.H.'s views. They, too, should be mindful of the pressures that are and may continue to be placed upon her. (*B.H.* at para. 76 and 78).

Kent J. also noted the role of Ms. Hughes' mother, Arliss Hughes, in influencing her daughter. Kent J. found Arliss Hughes had "no perspective on her child's current medical situation" (*B.H.* at para. 68), that she was making decisions which risked immediate physical injury to Ms. Hughes (tampering with Ms. Hughes' blood transfusion line) (*ibid.*), and that she provided Ms. Hughes with information which was "simply wrong" (*B.H.* at para. 70). Kent J. referred to hospital records which stated that Ms. Hughes had informed a social worker "that she had been instructed to "fight" by both the Mother and Mr. Gnam, counsel for the Child" (*B.H.* at para. 74).

At the end of June, 2002 it became apparent that Ms. Hughes' cancer was not responding to treatment. At that time the medical benefit of further transfusions was unclear and Ms. Hughes was successful in resisting imposition of further medical treatment.

In resisting the blood transfusions Ms. Hughes was, as Kent J.'s judgment indicates, supported by her mother, a committed Jehovah's Witness. At the outset her father Lawrence also supported her; however, shortly after her diagnosis her father changed his mind and advocated for Ms. Hughes to receive medical treatment. Ultimately the Hughes divorced, and Mr. Hughes left his former church.

During the course of the initial litigation to resist the blood transfusions, Ms. Hughes was represented by David Gnam, and her mother was represented by Mr. Gnam's colleague Shane Brady, both of whom were members of the Glen How and Associates firm. The Glen How firm also represented the Watch Tower Bible and Tract Society of Canada "which oversees the Jehovah's Witness community in Canada" (*Hughes Estate* para. 9).

At the time of the initial representation, Mr. Hughes brought an application to have Mr. Gnam removed as counsel for Ms. Hughes on the basis of a disqualifying conflict of interest given those lawyers' representation of Watch Tower and that they were

themselves Jehovah's Witnesses. That application was rejected by Kent J. on the basis that there needed to be clear grounds to remove counsel, such grounds had not been made out, and in any case she (Kent J.) was unprepared to lose focus on the main question at issue, which was Ms. Hughes' treatment, and whether Ms. Hughes was capable of making an informed decision to refuse it:

> I accept the proposition that to remove counsel from a case should only be done in the clearest of circumstances: *Alberta (Treasury Branches) v. Leahy* (1998), 223 A.R. 113 (C.A.). I also accept the proposition that there should be a presumption that a lawyer will carry out his or her duties in accordance with the Oath of Office and the Codes of Professional Conduct. There have been a great number of allegations made throughout this litigation. I am not prepared at this stage to lose track of the primary focus – the care and treatment of B.H. – to embark on a long investigation to determine if that presumption should be overturned. The application to remove counsel is denied (*B.H.*, para. 10)

After Ms. Hughes' death, Mr. Hughes commenced a variety of legal actions against those who had been advising her, both on his own behalf and as Administrator *ad litem* of Ms. Hughes' estate. In 2007 the Alberta Court of Appeal affirmed a Queen's Bench decision striking all of the personal claims brought by Mr. Hughes. The Court declined to strike the claims being brought by him as Administrator *ad litem*. It did not affirm the *prima facie* legitimacy of those claims, but simply declined to strike them based on the facts and pleadings before the Court at that time.

The defendants subsequently brought a further application for summary judgment relative to the claims brought by Mr. Hughes as Administrator *ad litem*. On June 20, 2008 Justice Macleod granted that application in part.

Judgment of Macleod J.

This comment focuses in particular on Macleod J.'s decision to grant summary judgment relative to the claim by the Administrator *ad litem* that Mr. Gnam and his law firm had a disqualifying conflict of interest which should have prohibited them from acting for Ms. Hughes relative to her future medical care. After setting out the test for granting summary judgment – "there is no genuine issue for trial… the Plaintiff's claim has no merit, or it is bound to fail" (*Hughes Estate* at para. 22) – Macleod J. dismissed this claim based on several points.

To begin, he held that the interests of Ms. Hughes and her mother Arliss "were aligned," so that there was no reason for the firm not to act for both of them (*Hughes Estate* at para. 26).

He also held that there would have been a conflict if Ms. Hughes had "been willing to accede to blood transfusions" but that she was not, with the result that, presumably, no conflict arose (*Hughes Estate* at para. 27).

Macleod J. emphasized that Ms. Hughes received advice from four independent lawyers. He relied significantly on the affidavit sworn by one of those lawyers, in which the lawyer stated that he had "satisfied himself, as a result of a number of meetings and conversations with Bethany that she was competent to give instructions and that she was basing her instructions on her understanding of her medical condition, the available treatments for her condition, and the possible outcomes of receiving or not receiving those treatments" (*Hughes Estate* at para. 28). That lawyer was advised by Ms. Hughes that her decision was based on "legal advice," and her "personal religious faith," and that she "was not being pressured by family or officials of her church" (*Hughes Estate* at para. 29). Macleod J. stated that he was "confident" that Ms. Hughes was aware that the blood transfusions were "essential to her survival" (*Hughes Estate* at para. 31).

Macleod J. noted that Ms. Hughes did receive the treatment in question: "she received the very treatment that Mr. Hughes states that Mr. Gnam and Mr. Brady were incapable of recommending" (*Hughes Estate* at para. 32).

Finally, Macleod J. rejected Mr. Hughes' assertion that Ms. Hughes' counsel shared confidential information with the church. He said that there was "no evidence" that such information was disclosed and that he was "entitled to assume that members of the Bar will honor their oath of office, in the absence of any evidence to the contrary, and in this case there is no such evidence" (*Hughes Estate* at para. 33).

Analysis - Conflicts

With great respect to Macleod J., and noting that Mr. Hughes was unrepresented in the action and so it is quite likely that little in the way of substantive argument was offered on his behalf, the analysis of the Court on the conflicts issue is unsustainable. The factual conclusions on which the analysis is based are facially irreconcilable with the earlier factual conclusions of Kent J., no explanation is given for how the two judgments can be reconciled, and the analysis of the law on conflicts is weak.

In the original litigation, as noted earlier, Kent J. concluded that Ms. Hughes was subject to undue influence, and was incapable of making an "informed decision" on whether to receive the transfusions. And as also noted earlier, according to a social worker on whose affidavit Kent J. placed "great weight" (*B.H.* at para. 74), Ms. Hughes voiced "disbelief that her death would result if she received no blood products" (*B.H.* at para. 73).

Yet, apparently based largely on the affidavit from a lawyer who interviewed her, Macleod J. concluded that Ms. Hughes was capable of making an informed choice, and that he could assert *with confidence* that Ms. Hughes understood that blood transfusions "were essential to her survival" (*Hughes Estate* at para. 31). This is deeply troubling. Surely such an affidavit cannot reasonably outweigh the judicial finding of the Court in 2002, particularly given that that finding was based on extensive evidence from those caring for Ms. Hughes at that time.

Further, as also set out previously, in the original litigation Kent J. was highly critical of Ms. Hughes' mother, and of her role in endangering Ms. Hughes, misleading her and placing considerable pressure upon her. Again, given this judicial interpretation of Arliss Hughes' conduct, it seems premature, without greater exploration of the factual background, to state that Arliss Hughes and Ms. Hughes were "aligned in interest" such that no conflict of interest arose from joint representation of them by a single law firm.

As a consequence, the factual basis on which Macleod J. primarily concludes that no conflict could be demonstrated to arise appears troubling. In his judgment Macleod J. nowhere refers to the reasons given by Kent J.; he does not note them, distinguish them or explain his reasons for deviating from them. As discussed below, this judgment may not have been brought to Macleod J.'s attention. However, as also discussed below, it is not clear that that fact is sufficient justification for it not to be incorporated in the judgment.

Even ignoring the issues with the underlying findings of fact, however, Macleod J.'s conclusion that provided Ms. Hughes did not want transfusions, and that she had received independent legal advice, there was no conflict, is highly problematic. While Macleod J. notes the provision of the Alberta Code of Professional Conduct (http://www.lawsocietyalberta.com/files/Code.pdf) prohibiting a lawyer from acting when his objectivity is impaired, he does not note the commentary to that provision. The commentary states that impairments of objectivity do not arise just when a lawyer opposes the client's position, but can also arise when the lawyer favors the client's position, because a lawyer who unduly agrees with the client may give "overly-optimistic advice or an unrealistic recommendation." (Alberta Code of Professional Conduct, Ch. 6, R.8, C.8). It is also important to note that this is not a conflict that can be waived by a client. The entitlement to objective legal advice is absolute.

In addition, the issue in this case was not simply that Mr. Gnam himself would oppose a blood transfusion, but that he had another client – Watch Tower - with a clear interest in ensuring that no member of its church accede to receiving a blood transfusion. As the Supreme Court of Canada recently noted in its decision in *Strother et al v. Monarch Entertainment Corporation* [2007] SCC 204, general conflicts between clients which do not involve legal rights – for example, a commercial conflict or, in this case, a religious belief – do not automatically give rise to a disqualifying conflict of interest. However, if the competing interests "impair a lawyer's ability to properly represent the legal interests of both clients" (*Strother* at para. 55) then there may be a disqualifying conflict. In this case, it is probable that Watch Tower would have been deeply opposed to Mr. Gnam taking any position in the litigation with respect to Ms. Hughes that could acknowledge the legitimacy of the state imposing medical treatment upon her, even if the imposition of such treatment was in her interests as she identified them after advice from counsel. This creates the real risk that in advising Ms. Hughes, Mr. Gnam would not have been independent, would not have considered her interests loyally, and in priority to other claims made upon him. Such a risk is, with respect, the hallmark of a disqualifying conflict of interest.

The Alberta Code of Professional Conduct does contemplate the possibility of consent as a cure to inter-client conflict. Chapter 6 Rule 2 provides that a lawyer may act where there is a conflict if the clients consent and it is in the clients' best interests. Chapter 6 Rule 3(a) provides that with consent a lawyer may act for a person whose interests are directly adverse to the immediate interests of a current client. There is authority to the effect that a law firm relying on the existence of consent has an evidentiary onus to establish that the consent was sufficiently clear (Gavin Mackenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, looseleaf at 5-45). Neither of the Alberta Rules applies straightforwardly here, given that this is not the type of matter contemplated by Rule 2, and Rule 3(a) is orientated more to obtaining the consent of Watch Tower (the existing client) than of Ms. Hughes (the new client). Having said that, however, assuming any inter-client conflict could have been cured by Ms. Hughes' informed consent, it is not clear that such consent was, or was capable of being, granted here. Ms. Hughes was not a sophisticated commercial entity. She was a young woman extremely ill with cancer, where the treatment for the cancer conflicted with her religious beliefs and where she was under considerable pressure to refuse that treatment. Her parents were divided. No matter how much independent advice Ms. Hughes received, no matter how well "informed" she was, I would argue that she was simply too young and in circumstances too troubling to consent to a conflict when one arose. Her need for independent legal advice should have been absolute and unwaivable.

Ultimately, the most significant problem with Macleod J.'s judgment with respect to whether there was a disqualifying conflict of interest may be that it does not reflect sufficiently on the nature of the problem. The problem is a tricky one. The issue – the potential impairment of objectivity and the conflict with the interests of another client – does not really arise with respect to legal advice. The legal issue is largely how, if Ms. Hughes does not wish to have a blood transfusion, she can resist the state's attempt to require that she receive one. The conflict arises with the underlying position taken by Ms. Hughes as a client: does she wish to have the blood transfusion or not?

Whether and how a lawyer should advise a client on such a question is a topic of debate within legal ethics, with some ethicists such as Thomas Shaffer arguing strenuously for the legitimacy of the lawyer as a moral counselor of his or her clients. The more common position, however, and certainly that reflected in the Alberta Code of Professional Conduct (Ch. 9) is that the lawyer as an advisor is primarily charged with the obligation to "follow the client's instructions" (Ch. 9 C.G.1). The Code does not limit the lawyer's role as an advisor to legal issues (Ch. 9 C.G.3), but does not envision a role for the lawyer as a moral guide to his or her clients.

So what then is the obligation of a lawyer faced with a client like Ms. Hughes? At minimum, the lawyer must be sure of the client's actual wishes. Particularly given her youth, her relationship with her family, and her relationship with her Church, any lawyer representing Ms. Hughes needed to be careful to ensure that her statement of her wishes coincided with her actual and independently determined wishes. This is, I would suggest, inherent in the lawyer's obligation to obtain instructions. In addition, and as clearly provided by the Code, the lawyer must retain independence. His or her objectivity must

not be impaired such that it is an open question whether he has properly identified what his client's instructions would be had that client received independent and objective advice.

In understanding this position it is useful to reflect on the lawyer's role in a pluralist society. As argued by Jeremy Waldron and others, a system of laws can be understood as the embodiment of the political solution to pluralism, allowing individuals to live together despite their deep, intractable differences over what constitutes the right way to live. Individuals in society do not just disagree, they disagree fundamentally, and yet they need some way to co-exist peacefully, to collectivity reach agreement as to the principles governing society and the interactions of individuals (Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999)). Bradley Wendel has taken this insight and used it to understand the lawyer's role, and her ethical obligations in acting in that role. Wendel argues that it is not the lawyer's ethical responsibility to substitute her moral judgment for that of her client. To the contrary, the lawyer's ethical responsibility is to assist a client to pursue his own moral decisions consistent with what the law permits. Not to help the client obtain more than his legal entitlements, not to pursue his interests unbounded, but to pursue his interests within the compromise of plurality reflected in the law. To do this, however, it is essential that a lawyer be independent, that she be able to act honestly and in good faith both when helping a client identify what his goals actually are, and when identifying whether those goals can be achieved consistent with what the law requires. A lawyer who does not carefully attempt to identify what the client wants, and how the law operates (or does not operate) to allow pursuit of that end, has fundamentally violated the obligations of her role in sustaining the system of laws enacted by a pluralist democracy (See, e.g. W. Bradley Wendel, "Lawyers, Citizens, and the Internal Point of View" (2006) 75 Fordham L. Rev. 1473 at 1475-76).

In this case, given the pressure Kent J. found Ms. Hughes to be under, and the fact that that pressure appears to have arisen in part from other clients of her lawyer's firm, it appears *prima facie* arguable that a conflict not only arose, but also impaired Mr. Gnam's representation of his client. Mr. Gnam's obligation was to ensure Ms. Hughes pursued her own ends within what the law permits, to help her make that choice perhaps, but most importantly not to make it for her, or to let others do so. If Ms. Hughes truly did not want a blood transfusion (a position that in a pluralist society she was entitled to take), it was the job of her lawyer to help her make that crucial life decision without undue influence from those who might not have her interests at heart, and without the constant pressure to which Kent J.'s judgment suggests she was subject.

Macleod J. seems to put significant weight on the fact that, in the end, Ms. Hughes did receive treatment, that "she received the very treatment that Mr. Hughes states that Mr. Gnam and Mr. Brady were incapable of recommending" (*Hughes Estate* at para. 32). That point may suggest that Ms. Hughes was not harmed by her lawyer's conflict, that she suffered no remediable harm (although at minimum one can question whether if she paid fees to Mr. Gnam she received the legal services and fiduciary loyalty to which

those fees entitled her). It does not, however, demonstrate that their conduct was right or ethical.

A further point needs to be noted. Macleod J. does not in his judgment address the fact that the issue of a conflict was raised in the original litigation and that Kent J. declined to remove Mr. Gnam and Mr. Brady. Given her reasons, which emphasized the need to focus on resolving Ms. Hughes' need for medical care, it is not certain that her refusal to do so indicates that there was no disqualifying conflict. It is, though, a reason to question the conflicts argument that merited more concern from the Court here. Does Justice Kent's decision create an argument of *res judicata* or abuse of process with respect to litigation of that issue here? Again, as discussed below, it is not clear whether Macleod J. was aware of Kent J.'s judgment on this point or not, but Kent J.'s refusal to remove counsel for Ms. Hughes, and the fact that the conflict was brought to her attention, is clearly relevant to the legal analysis of whether a subsequent lawsuit based on the conflict has merit.

Finally, on the question of confidentiality, Macleod J. notes the absence of evidence, but also, as did Kent J., places weight on the idea that lawyers are entitled to an assumption of ethical conduct absent evidence to the contrary. While it is quite reasonable to require evidence before the indictment of any individual's conduct in a court of law, it seems like magical thinking – 'if I act as if it is true, it will be true' – to believe that lawyers are entitled to be believed more than the next person. Lawyers are entitled to belief if they are credible, if their actions and testimony are believable. In this case, given the at best problematic nature of their representation of Ms. Hughes in the circumstances, it is not obvious that Mr. Gnam and Mr. Brady deserve the benefit of the doubt from the Court.

While the tragic outcome of this situation – Ms. Hughes' death despite receiving treatment – may warrant the Court declining to allow the Administrator *ad litem* to pursue the conflict of interest claim, it is very much to be hoped that Mr. Hughes appeals this judgment to the Court of Appeal. As an articulation of the facts, of the law on conflicts of interest, and as an application of the law to the facts, this judgment is highly suspect.

Analysis – Judicial and opposing counsel obligations to unrepresented litigants

Did Macleod J. know of the judgment issued by Kent J. in the earlier proceedings?

If he did, then, especially given the likely inability of Mr. Hughes' to launch sophisticated arguments on his own behalf, it was incumbent on Macleod J. to explain why he was reaching different conclusions than those reached by Kent J. with respect to Ms. Hughes' understanding of her circumstances and her capacity to assess those circumstances reasonably. It is unlikely that if this matter proceeded to trial Kent J.'s judgment would create issue estoppel relative to the facts surrounding Ms. Hughes decision, and the actions of those apparently influencing her. However, to make findings contrary to those prior findings of fact, based on limited affidavit evidence provided by only one party, and with no justifying explanation, is troubling. Kent J. was considering these facts at the time they arose, based on extensive evidence from those close to the

situation but with a degree of impartiality, such as the hospital social worker. This evidence appears far more credible and stable than that relied upon by Macleod J.. Given that, if Macleod J. was aware of this earlier judgment, he needed to justify not following it.

If Macleod J. did not have Kent J.'s judgment before him, then two questions arise. First, given that Mr. Hughes was unrepresented, did Macleod J. have an ethical obligation to find this judgment? Was he obligated to explore the judicial record of proceedings related to the matter before him? Second, did Mr. Gnam and Mr. Brady, as counsel acting on their own behalf, have an ethical obligation to bring the judgment to Macleod J.'s attention?

On the first question it may be that such an obligation does not arise in every case, that usually a judge is entitled to rely on the record before him in deciding an application. Nonetheless, I argue that simply relying on the record was not sufficient here. Macleod J. may not have been required to do independent research of the legal issues presented, but he was required to familiarize himself with the judicial record at least to this extent, whether or not a party brought it expressly to his attention.

The decision to strike this part of the Administrator *ad litem*'s Statement of Claim was dispositive of the Estate's legal rights. It ended further litigation of this question. In addition, the Administrator was unrepresented, and the Court essentially placed no weight on the evidence that he provided. As a result, it was largely relying on the evidence provided by the Applicants, lawyers with a significant advantage over the Respondent Administrator in terms of relative legal knowledge and sophistication. And even without doing any research into the question, it should have been obvious that the prior judgment was likely to speak to the question of Ms. Hughes' decision-making capacity. The issue in any imposition of medical treatment on a minor such as Ms. Hughes is almost certain to include consideration of her ability to make a decision about medical treatment for herself; the relevance of that issue should be common knowledge to any lawyer or Queen's Bench judge. Finally, and perhaps most significantly, the judgment of Kent J. was referred to in the Court of Appeal reasons striking Mr. Hughes' personal claims in this matter, and in the Court of Appeal's summary of that decision it states, "the Queen's Bench Justice concluded that *Bethany was not in a position to make independent decisions about her medical care*" ([emphasis added] *Hughes Estate v. Hughes* [2007] A.J. No. 948 at para. 4). That Court of Appeal decision is referenced in Macleod J.'s judgment. Reading that judgment should, therefore, have alerted him to the existence of Kent J.'s judgment, and to its relevance to the question before him.

Given all of those factors, it seems a constituent part of Macleod J.'s ethical obligations as a judge that he have independently identified, reviewed and considered Kent J.'s decision in reaching his own.

On the second question it is arguable, but not certain, that Mr. Gnam and Mr. Brady had an obligation to bring this judgment to the attention of the Court (and, of course, they may have done so). Under the Code of Professional Conduct counsel have an obligation

not to "mislead the court nor assist a client or witness to do so" (Ch. 10, R. 14). Counsel also have an obligation to bring to the attention of the court relevant adverse authority of which counsel is aware but which have not been brought forth by opposing counsel (Ch. 10, R 18). And in an *ex parte* proceeding, counsel has an obligation to disclose all material facts, whether adverse or not (Ch. 10, R 8). The commentary to Rule 8 relates *ex parte* proceedings to those where "factors will prevent the adversary system from functioning at its optimum level" and incorporates by reference rules governing lawyers' interactions with parties not represented by counsel.

As noted, it is not clear whether any of these rules expressly required disclosure of the decision. The proceeding was not *ex parte,* and none of the rules dealing with unrepresented parties expressly place an obligation on counsel to give greater factual disclosure. To the extent the authority in this case is adverse, it is largely adverse on the facts rather than on the law; if anything, on the law it is helpful to Mr. Gnam and Mr. Brady. And the rules on not misleading the court appear to deal more with active deceit than with a failure to make the entirety of the record clear. In addition, given that the Court of Appeal had expressly referred to the judgment and its key factual finding, and that that judgment was known by Macleod J., it is potentially the case that Mr. Gnam and Mr. Brady simply believed Macleod J. to be sufficiently aware of the reasons issued by Kent J. such that they did not need to avert to them expressly.

Having said that, however, *if* this decision was not brought to Macleod J.'s attention, that would appear to come very close to an attempt to mislead the court. Moreover, it would violate the principles underlying all of these Rules. The focus of the Rules is to protect and foster the fairness and integrity of the judicial process. The Rules are a check on the norms of the adversary system, and, in the case of *ex parte* proceedings, make some attempt to correct the procedural problems that arise absent proper representation of both parties. If counsel were to fail to advise the Court of a decision containing factual findings contrary to those of which they are trying to persuade the Court, and in particular were to fail to advise where the party for the other side is unrepresented, it would undermine rather than foster the fairness and integrity of the system.

Conclusion

The Supreme Court of Canada has struggled to articulate the principles governing conflicts of interest in the trilogy of cases (*Macdonald Estate v. Martin* [1990] 3 S.C.R. 1235; *R. v. Neil* [2002] 3 S.C.R. 631), culminating in its decision last year in *Strother*. Those cases ultimately indicate the governing principles of loyalty and protection of client confidentiality. But they do not solve the complexities and nuances of how to apply those principles in particular cases. The laws on conflicts of interest cannot be applied on a "one size fits all" basis. What constitutes an impairment of objectivity relative to a sophisticated commercial client is not the same as what constitutes an impairment of objectivity relative to a 16 year old girl with cancer. Independent legal advice may be sufficient to remove some conflicts of interest but not to remove others. One client may be able to consent to representation by a lawyer with a conflict, while others may not; determining what is required needs to be done in cases like this one. It is most unfortunate that this judgment does not accomplish that task satisfactorily.