



# **Advisory Committee on Conflicts of Interest**

## **Supplementary Report**

**February 14, 2011**

## Introduction

1. The Advisory Committee on Conflicts of Interest (the “Committee”) was originally mandated to make recommendations to the Council of the Federation on a rule governing conflicts of interest. After studying the relevant law, considering the report of the Canadian Bar Association Task Force on Conflicts of Interest (the “CBA Task Force”), meeting with members of the CBA Task Force, and reviewing the draft rule in the Model Code of Professional Conduct, the Committee issued its final report in June 2010 (the “Final Report”).
2. In August 2010, while voting on the Final Report by members of Council was underway, the Federation received a response to the Final Report from the Canadian Bar Association (the “CBA Response”). At the request of Council, the Committee was reconvened to consider the CBA Response, to conduct such consultations as the Committee saw fit and to report back to Council.
3. This is the report of the Committee’s further considerations, consultations and recommendations.

## Committee Activity

4. Members of the Committee met 12 times, 11 by conference call and once in person. The in-person meeting was held at the Federation office in Ottawa and included members of the CBA Task Force. Members of the CBA Task Force also participated in two of the conference calls and information was regularly exchanged with them as the Committee carried out its work.
5. The Committee decided that it would also be of assistance to its deliberations to consult an academic on the public interest aspect of the conflicts rule. In selecting the academic the Committee strove to identify someone with relevant expertise who had not yet taken a position on the different approaches to the current client rule evident in the reports of the CBA Task Force and the Committee. Professor Brent Cotter, Q.C., former Dean of the College of Law at the University of Saskatchewan, immediate past-Chair of the Council of Canadian Law Deans and a noted scholar on legal ethics, was ultimately asked to provide an opinion on the issue of how the public interest would best be protected in a rule on conflicts of interest, particularly as the rule relates to acting against current clients. A supplementary opinion was also obtained from Professor Cotter with regards to a possible amendment to the current client rule considered by the Committee (discussed below). Copies of Professor Cotter’s opinions are attached as Appendix “A” and Appendix “B” to this report.
6. Information on the deliberations that had previously occurred or were occurring on the conflicts rule in several law societies (including British Columbia, Alberta, Manitoba, Nova Scotia and Yukon) was also considered by the Committee.

7. In its consideration of a possible amendment to the current client rule, the Committee received drafting assistance from Jim Varro, Director Policy and Tribunals at the Law Society of Upper Canada, Ross McLeod and Nancy Carruthers, Practice Advisors at the Law Society of Alberta and Jeff Hoskins, Q.C., Tribunals and Legislative Counsel at the Law Society of British Columbia.

### **Scope of Deliberations**

8. At the outset of its review the Committee considered what the scope of its deliberations should be. The focus of the CBA Response is a critique of the proposed rule on acting against current clients (the “current client rule”). It is evident from the CBA Response and from the reports of discussions in a number of law societies, that it is this aspect of the rule that is of primary concern. Although the CBA did raise other issues<sup>1</sup> it is our view that none of these are of such a nature as to impact on Council’s consideration of the rule on conflicts of interest. Of the additional matters raised by the CBA, only one, the application of the conflicts provisions to pro bono work, had been considered in the Committee’s initial work. In all of the circumstances, including the need for the Committee to report promptly to Council, the Committee concluded that it would be prudent to concentrate specifically on the critique of the proposed current client rule. It is the view of the Committee that the other matters raised in the CBA Response might appropriately be considered by the Federation’s newly established Standing Committee on the Model Code of Professional Conduct (see paragraphs 41-46 below).

### **Consultation with CBA**

9. In the deliberations leading up to the Committee’s June 2010 Final Report, members of the Committee met with members of the CBA Task Force and also invited and received additional comments from Malcolm Mercer, a key member of the CBA Task Force. Given the extensive consultation with members of the profession that the CBA Task Force had undertaken and its focus on the issues the Committee was tackling, this engagement with members of the CBA Task Force brought an important perspective to the Committee’s initial deliberations.
10. Upon reviewing the CBA Response it was evident to the Committee that additional consultation and engagement with representatives of the CBA Task Force would be valuable. One of the first actions of the Committee was thus to invite members of the CBA Task Force to meet with members of the Committee.

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<sup>1</sup> In Part II, Section F of the CBA Response, the CBA commented on the following additional aspects of the proposed rule: Concurrent Representation (Rule 2.04(4)); Pro Bono Exception to Conflicts Rules; Extension to “likely” conflicting interests (Rule 2.04(2)); Extension of Disqualifying Personal Interest to Others (Commentary to Rule 2.04(2)); Extension of Former Client Rule to Non-Clients (Rule 2.04(5)); and Extension of Transferring Lawyer Rules to Non-clients (Rule 2.04(17)).

An initial meeting was held on November 12, 2010 in the offices of the Federation in Ottawa. Committee chair Mona Duckett, committee member Phil Star, and Frederica Wilson, Federation Director, Policy and Public Affairs, participated in person, Committee members Allan Fineblit and Anne Stewart joined the meeting by phone. Michel Décary and Bonnie Tough were not available to participate. Representing the CBA Task Force were Scott Joliffe, Malcolm Mercer, Simon Chester, Susan McGrath and Joan Bercovitch.

11. Members of the CBA Task Force were invited to elaborate on their concerns about and criticisms of the Committee's recommendations. Considerable time was spent discussing the CBA Task Force's analysis of the *Neil* and *Strother* decisions and the differences in the approaches of the CBA and the Committee. CBA Task Force members also expanded on their suggestion that adoption of the rule on current clients proposed by the Committee would stifle evolution of the common law. In essence their concern is that adoption of the rule that conforms to the bright line test articulated in *Neil* will signal to the courts that "the flag is in the right place," leading to a conclusion that no further refinement of the law is necessary.
12. Notwithstanding our different views on the state of the law, participants in the meeting agreed that it would be useful to explore whether a modified approach to the current client rule could be found that protects the public interest while addressing the concerns raised by the CBA.
13. One alternative identified during the meeting was a modification of the rule to permit a lawyer to represent a client in an unrelated matter where no conflicting interest exists but the client's legal interests are adverse to the legal interests of a current client, provided the lawyer makes disclosure to the clients. Although client consent would not be required, there would be an onus on the lawyer to demonstrate that acting against the current client would have no adverse impact on representation of that client. The meeting concluded with agreement to continue the search for alternative approaches.
14. As discussed below, following this in-person meeting, the Committee continued to engage with the members of the CBA Task Force throughout its deliberations both through additional teleconferences and ongoing email exchanges.

### **Consideration of "disclosure" approach**

15. While still considering whether a disclosure approach would fully accord with the duty of loyalty that lawyers owe their clients, members of the Committee decided to give serious consideration to modifying the current client rule to permit a lawyer to act for a client even where the interests of that client are adverse to those of a current client provided that the matters are unrelated, full disclosure is made to the clients and no conflicting interest is present. The Committee turned

to Jim Varro (LSUC), Ross McLeod and Nancy Carruthers (LSA) and Jeff Hoskins (LSBC) for assistance in drafting the modification. We also advised members of the CBA Task Force of our decision to look further at such a modification and invited them to share with us any thoughts, concerns or suggestions they might have about this approach.

16. In early December 2010, members of the Committee met by teleconference with members of the CBA Task Force to continue discussions about a possible modification to the current client rule. Although there was general agreement that an amendment based on disclosure without a requirement to obtain consent was worth considering, a number of issues were identified including whether a lawyer should be able to act against a current client if it was not possible (because prohibited by law or the rules, or because the client could not be located) to fulfill the disclosure requirement. Concerns also remained about the duty of loyalty on the one hand and client choice of counsel on the other.
17. As the Committee continued to consider a possible amendment we involved CBA Task Force members in the process, exchanging drafts and inviting their continued feedback. In early February 2011 we met again by teleconference with members of the CBA Task Force. During this meeting much of our discussion focused on whether a lawyer should be permitted to act when disclosure is not possible because it is prohibited by law or the rules, or because the client cannot be located. A draft rule prepared by the CBA Task Force would permit a lawyer to do so provided the matter is unrelated, there is no conflicting interest and “the lawyer reasonably concludes that acting for the client is in the interests of justice having regard to all relevant circumstances.” Members of the Committee expressed concern about the propriety of allowing a lawyer to act in such circumstances without either obtaining the consent of the clients or disclosing the situation to them. The CBA Task Force did make revisions to its proposed rule following the meeting, but the provision permitting a lawyer to act where disclosure cannot be made remains.

### **Professor Cotter’s Opinions**

18. As noted above, the Committee initially sought an opinion from Professor Cotter on the question of how the public interest is best protected by an ethical rule governing acting against a current client. Professor Cotter was asked to consider the issues raised in the Committee’s Final Report and the CBA Response, and the CBA Task Force Report of August 2008, with specific regard to the mandate of law societies to regulate the profession in the public interest, the challenges faced in some communities with limited access to lawyers, the limited pool of lawyers available in some highly specialized fields of practice and the practice of some clients retaining lawyers as a means to limit access to services by other clients.

19. In an opinion that considered the role of the Federation and law societies, existing conflict of interest rules, the trilogy of cases from the Supreme Court (*MacDonald Estate, Neil, and Strother*), and four lower court decisions cited in the CBA Response, Professor Cotter concluded that a rule based on the “bright-line” test set out in *Neil* best advances the public interest. As he states at page 21 of his initial opinion (see Appendix “A”), it is Professor Cotter’s view that such an approach is to be preferred because it
- a) establishes a high standard of loyalty to current clients with a view to protecting the integrity of the administration of justice;
  - b) entitles clients to be informed of a conflict of interest at the outset and enables them to make an informed decision whether they wish to provide consent and have the matter proceed;
  - c) establishes a framework where it will be legitimate for lawyers to proceed on a reasonable assumption that clients have impliedly consented to the adverse representation;
  - d) identifies circumstances where certain representations should not be seen as conflicts at all, such as the appropriate representation of business competitors; and
  - e) establishes a final check on the part of lawyers whereby, even if other factors are satisfied, the lawyers must be satisfied that the representation causes no real and substantial risk to the client’s interests.
20. It is clear from Professor Cotter’s opinion that he does not agree with the interpretation of *Neil* advanced by the CBA – that the bright line test is modified by the requirement that there be “a real and substantial risk that the lawyer’s representation of the client would be materially and adversely affected.” In Professor Cotter’s opinion, the Supreme Court decisions in *Neil* and *Strother* stand for the proposition that acting for a client whose interests are directly adverse to the interests of a current client is by definition a violation of the duty of loyalty and an inherent conflict of interest. As he puts it, “It is the violation of loyalty – the sense that the current client feels he or she has been betrayed – that constitutes the conflict” (Appendix “A”, page 22).
21. Professor Cotter also considered the CBA’s argument that adoption by the Federation and member law societies of a rule based on the bright line test in *Neil* would stifle evolution of the law. In his view, the fact that the Supreme Court – “the most authoritative source available” - has articulated a clear set of principles makes this argument less persuasive. Professor Cotter also questions the wisdom of inaction by law societies given their mandate to protect the public interest. In a subsequent discussion with the Committee members, Professor Cotter also questioned the likelihood of the Supreme Court changing its position

on the current client issue in the near future even if the Federation and the law societies were to refrain from enacting a rule that adheres to *Neil*.

22. Professor Cotter does acknowledge the possibility that a strict rule on acting against current clients can be used to attempt to gain a strategic advantage by creating conflicts and thus disqualifying a number of lawyers from acting in a given matter. In his opinion, however, the solution to such inappropriate use of the conflict of interest rules does not lie in “watering down” the conflicts rule. He suggests that it would be more appropriate to attempt to tackle the inappropriate behaviour itself, for example by including a general rule prohibiting lawyers from making conflicts challenges for tactical reasons only.
23. As the Committee explored the possibility of revising the current client rule by substituting disclosure for consent, members of the Committee sought a supplementary opinion from Professor Cotter. Specifically, Professor Cotter was provided with the various drafts and asked to provide an opinion on whether the modified approach provided sufficient protection for the public interest.
24. In an opinion provided on December 21, 2010 (see Appendix “B”), Professor Cotter concluded that the possible modification we were exploring would fail to provide sufficient protection for the public as it would take inadequate account of the duty of loyalty. As he states at page 3 of his supplementary opinion, Professor Cotter is of the view that “the substitution of client notification for client consent seems to moderate, and in some cases seriously undermine, the whole foundation upon which a lawyer’s representation of a client is based.”
25. Professor Cotter also questioned the real benefits of such an approach. He suggested, for example, that while permitting a client to retain a lawyer to act in a matter that is directly adverse to the interests of a current client might increase that client’s choice, there is a serious risk that the original (current) client would not be willing to have the lawyer continue to represent him or her. As Professor Cotter put it, “[o]ne client’s increased choice of counsel will lead to another’s loss of counsel of choice” (see page 5). Professor Cotter expressed concern about “the optics of a professional rule that empowers lawyers to make decisions to take on clients in opposition to existing clients” and made the following observation:

The law firm essentially becomes the sole arbiter of client representation. It can take on the new representation and see the existing client leave, or it can decline the new representation and continue to serve the existing client. The choice effectively becomes less a matter of a client’s choice of counsel and more a matter of counsel’s choice of client. [Emphasis added.]<sup>2</sup>
26. In his view, any increase in client choice of counsel would be modest and would be offset by a loss of confidence in lawyer integrity.

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<sup>2</sup> Supplementary opinion, page 5.



27. At our request, Professor Cotter participated in a conference call with members of the Committee in early January 2011 to discuss his supplementary opinion. This provided a valuable opportunity for us to discuss Professor Cotter's conclusions and to pose a number of questions about the opinions he expressed.
28. In early January 2011, copies of Professor Cotter's opinions were provided to the CBA Task Force with an invitation to provide any additional information or commentary the CBA Task Force wished the Committee to consider before we finalized our report. Upon learning that the CBA Task Force wished additional time to consider and respond to Professor Cotter's opinions, the Committee sought and received an extension to February 14, 2011 to submit our report to Council. We also invited members of the CBA Task Force to participate in another teleconference with members of the Committee.
29. A teleconference held February 2, 2011 provided an opportunity for members of the Committee and the CBA Task Force to discuss Professor Cotter's opinions and the CBA's critique of them at some length. Notwithstanding Professor Cotter's opinion on the merits of the alternative approach, we also continued our discussions on the possibility of substituting disclosure for consent in the current client rule (see paragraph 17 above).
30. On February 8, 2011 the CBA Task Force shared with us an opinion from Michel Bastarache, former Justice of the Supreme Court of Canada responding to Professor Cotter's opinions. A copy of the opinion of Justice Bastarache is attached as Appendix "C".
31. At the outset of his opinion Justice Bastarache discusses the different roles of the courts and the regulators in establishing rules governing conflicts of interest. He states that law societies "are not required to prepare rules implementing common law rules developed by the courts as such. . . . What is imperative is that the rules not be inconsistent with the common law." (See page 1 of Appendix "C".) Justice Bastarache goes on to say that the role of the courts in addressing the issue of conflicts of interest is "limited to establishing the fundamental obligations necessary to preserve the integrity of the legal system." In describing how this role differs from that of the regulators of the profession, Justice Bastarache writes "Law societies take into account a number of values and interests, but fundamentally they must reconcile the public interest and the realities of the practice of law, with special regard for sustaining public confidence in the justice system." (See page 2 of Appendix "C".)
32. Justice Bastarache expresses the view that the jurisprudence is as yet unsettled. Pointing to the minority decision in *Strother* (with which he sided as a member of the Court that decided the case) he says that there are indications that the Court is divided on the meaning of *Neil* and the application of the bright line test articulated in that case. He also disagrees with Professor Cotter's opinion that "It



is the violation of loyalty – the sense that the current client feels he or she has been betrayed – that constitutes the conflict.” Justice Bastarache agrees with the CBA position that “there is no conflicting interest unless there is a “substantial risk” that a material adverse effect will occur.” (See page 6 of Appendix “C”).

33. In Justice Bastarache’s opinion, the rule on current clients contained in the revised CBA Code of Professional Conduct conforms to the common law.

### **Recommendation on “current client” rule**

34. The Committee gave serious consideration to an amendment to the current client rule that would permit a lawyer to act for a client whose legal interests are adverse to the legal interests of a current client in an unrelated matter where no conflicting interest exists and the lawyer makes full disclosure to the clients. In the end, however, the majority of the Committee has concluded that we prefer the rule as originally proposed to Council with one small change. The Committee unanimously recommends inserting the word “legal” before “interests” in the first line of Rule 2.04(3) so that the rule would read

2.04(3) A lawyer must not represent a client whose legal interests are directly adverse to the immediate legal interests of a current client – even if the matters are unrelated - unless both clients consent.

35. While agreeing with this amendment, two members of the Committee would support the disclosure approach subject in one case to further work being done on the provision relating to a lawyer acting when disclosure cannot be made, and in the other to clarification (by way of commentary) of some of the language proposed by the CBA Task Force relating to this same element of the rule (“the lawyer reasonably concludes that acting for the client is in the interests of justice having regard to all relevant circumstances”).
36. The possibility of finding an alternative approach to regulation of conflicts of interest in the case of acting against current clients was attractive for a number of reasons. Members of the Committee agreed that while protection of the public must be the foremost consideration, any regulation should interfere as little as possible with the business interests of lawyers and to the extent possible ought not to prohibit conduct where there is no risk of harm. We were also mindful of the desirability of ensuring client choice of counsel wherever possible, and of crafting a rule that would eliminate or minimize attempts to create conflicts of interest for purely strategic reasons. We engaged with representatives of the CBA Task Force with an open mind and the sincere hope that we would find an alternative approach in this area that would lessen our differences while ensuring that the public interest was protected and the duty of loyalty was not undermined.
37. The majority of the Committee finds compelling Professor Cotter’s opinion that “the public interest is best maintained and protected where lawyers may only act

against current clients where both clients give their consent, and the lawyer believes that he or she can represent both clients in the respective [unrelated] matters without adversely affecting the interests of either,” (see page 2 Supplementary opinion). Requiring consent puts the clients first. We do, however, continue to find elements of the compromise approach explored with members of the CBA Task Force attractive as it would ensure that a lawyer would not be prohibited from acting in circumstances in which there is no risk of harm. While the ultimate decision on whether to act would be up to the lawyer, the requirement for disclosure would ensure that the client has an opportunity to raise any concerns they might have that representation would be impaired. In addition, the lawyer’s discretion would be circumscribed by the requirement that the matters be unrelated and that there be no conflicting interest. But without resolving the issue of whether a lawyer may act when unable to make disclosure, it is an approach that in the view of the majority of the Committee does not sufficiently protect the public interest. Disclosure is an essential element. Without disclosure concerns about loyalty to clients and potential feelings of betrayal are simply not addressed. From our discussions both with members of the CBA Task Force and within the Committee itself, it was not evident to the majority that a resolution of this issue could easily be achieved.

38. While we recognize that a “one size fits all” current client rule that doesn’t distinguish between different types of clients (corporations and governments v. individuals), or legal matters (litigation v. other matters) may create challenges for lawyers, the majority of the Committee is of the view that the current proposed rule strikes the right balance between the competing interests at play. We do recommend that the Standing Committee be asked to consider an addition to the rule to address strategic conflicting out. The current proposed rule addresses this issue in the Commentary to Rule 2.04(3), but we believe that it may be preferable to add a rule specifically prohibiting attempts to create conflicts of interest for strategic reasons.
39. Although there are some questions of interpretation of the language in the bright line test from *Neil*, particularly the phrase “directly adverse to the immediate interests,” the Committee is not proposing to add clarification to the commentary at this time. In the original proposed current client rule, the Committee included the word “legal” before “interests” in the second line of the rule (and is now recommending the same change in the first line) to clarify, in accordance with the Court’s decision in *Strother*, that conflicting business interests will not themselves constitute a conflict of interest for the lawyer. Additional guidance from case law and law society ethics committees can be expected over time.
40. It is therefore the recommendation of the majority of the Committee that subject to the amendment set out in paragraph 34 above, the rule on acting against current clients contained in our June 2010 Final Report be adopted.

### Additional Issues Raised by the CBA

41. As noted above, the Committee members concluded that we were not best placed to consider the other matters raised in the CBA Response.
42. Although the current client rule was the focus of the CBA Response, comments and criticisms were also voiced on the following matters:
  - Concurrent Representation (Rule 2.04(4))
  - Pro Bono Exception to Conflicts Rules
  - Extension to “likely” conflicting interests (Rule 2.04(2))
  - Extension of Disqualifying Personal Interest to Others (Commentary to Rule 2.04(2))
  - Extension of Former Client Rule to Non-Clients (Rule 2.04(5))
  - Extension of Transferring Lawyer Rules to Non-clients (Rule 2.04(17))
43. Other than the *pro bono* exception, none of these aspects of the recommended conflicts rule were specifically considered by the Committee during its initial deliberations. As stated in the Committee’s Final Report, the Committee did not study or amend any portion of the original draft conflicts rule that did not relate to the following four areas of significant difference between the draft Model Code conflicts rule and the recommendations of the CBA Task Force:
  - i) definition of client;
  - ii) definition of conflicting interest;
  - iii) current client rule; and
  - iv) former client rule.
44. Although the Committee did consider the rule on acting against former clients (2.04(5)) it made no changes to the original draft rule other than a clarifying addition to the accompanying commentary.
45. In its original work on the conflicts rule, the Committee considered the possibility of amending the draft conflicts rule to provide a more relaxed standard for dealing with conflicts that might arise in the context of or as a result of the provision of *pro bono* legal services by a member of a firm. In our Final Report we noted that only three Canadian jurisdictions have included such a provision in their rules of professional conduct. Given the jurisdictional variances in addressing this issue, the Committee recommended that no such provision be included in the Model Code conflicts rule at this time.
46. In our view, none of these issues is of such significance as to have a material bearing on consideration of the conflicts rule by Council. In considering how the additional issues raised by the CBA should be addressed, the Committee was aware of the establishment of the Standing Committee, the mandate of which includes tackling a number of issues left unresolved in the drafting of the Model

Code and reviewing matters that may arise over time. The Committee was of the view that the Standing Committee would be well placed to consider the additional issues raised by the CBA. In all of the circumstances, the Committee recommends that the Standing Committee be asked to review and consider the additional issues found in Part II, Section F of the CBA Response. We have advised the CBA Task Force of this recommendation and have invited them to provide any additional comments they may have on these issues directly to the Standing Committee.

## Appendix “A”

## Appendix “A”

### OPINION

#### I INTRODUCTION

I have been asked by the Federation of Law Societies’ [FLSC] Advisory Committee on Conflicts of Interest to provide an opinion on the following question:

How is the public interest best protected by an ethical rule for lawyers governing conflicts of interest, specifically as it relates to acting against a current client?

In its request, the Advisory Committee asked me to:

consider this issue in the context of the issues raised in the two reports including the mandate of law societies to regulate the profession in the public interest, the challenges faced in some communities with limited access to lawyers, the limited pool of lawyers available in some highly specialized fields of practice and the practice of some clients retaining lawyers as a means to limit access to services by other clients.

The two reports to which the Advisory Committee referred are the Canadian Bar Association’s [CBA] Task Force Report on Conflicts of Interest [August 2008] and The Advisory Committee’s Report on Conflicts of Interest [June, 2010].

As will become apparent in this opinion, I have given consideration to other documents, including codes of professional conduct and the recent Canadian jurisprudence on the question. As well, I have given specific consideration to the Canadian Bar Association’s Response to the Federation of Law Societies of Canada Advisory Report on Conflicts of Interest Final Report [August 2010]. This document is the Canadian Bar Association’s official response to the Advisory Committee’s June 2010 Report.

#### II BACKGROUND

The opinion sought arises in a complicated professional context, and it will be helpful at the outset to describe, at least in summary form, the highlights of this context. In three seminal decisions of the Supreme Court of Canada in the period 1990 to 2007, the Court addressed questions of lawyer conflict of interest and introduced new rules and principles to guide lawyers in their relationships with clients. These cases are *MacDonald Estate v. Martin*<sup>1</sup> [*MacDonald Estate*]; *R. v. Neil*<sup>2</sup> [*Neil*]; and *Strother v. 3464920 Canada Inc.* (Monarch Entertainment Ltd.)<sup>3</sup> [*Strother*]. These decisions, and in particular the two more recent decisions, *Neil* and *Strother*, have created some controversy within the legal profession regarding the scope of a lawyer’s legal and ethical responsibility to avoid conflicts of interest.

In a related development beginning in 2004, the Federation of Law Societies of Canada commenced work to develop a national “Model Code of Professional Conduct” for Canadian lawyers and law

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<sup>1</sup> *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 [*MacDonald Estate*].

<sup>2</sup> *R. v. Neil*, [2002] 2 S.C.R. 631 [*Neil*].

<sup>3</sup> *Strother v. 3464920 Canada Inc.* [Monarch Developments Ltd.], [2007] 1 S.C.R. 177 [*Strother*].

## **Appendix “A”**

societies. This initiative was endorsed by the law societies of Canada’s provinces and territories. The law societies possess the regulatory authority to govern the conduct of lawyers in their respective jurisdictions, an authority and responsibility that includes the development and application of codes of professional conduct in relation to lawyers’ actions. With the acceleration of lawyer mobility in Canada and the growth of national and international law firms, the FLSC wisely recognized the value of a code of professional conduct for lawyers in Canada that was as consistent as possible from one province or territory to another. This work included a consideration of various professional conduct issues, including conflicts of interest.

The FLSC Committee produced a draft national Model Code of Professional Conduct [the “Model Code”], in 2007 for consideration by provincial and territorial law societies. This draft code contained provisions related to conflicts of interest that, in the Committee’s understanding, accorded with the recent Supreme Court of Canada jurisprudence. When the draft Model Code was circulated for consideration, the CBA became concerned about the provisions related to conflicts of interest and established a Task Force on Conflicts of Interest to examine the question. This Task Force submitted its Report to the Canadian Bar Association in August of 2008. The Report was made public at about the same time and the Report and Recommendations were communicated to the FLSC.

The CBA’s Task Force Report analyzed the area of conflicts of interest in detail. It produced a framework and a set of proposed rules that differed significantly from the FLSC approach. Meanwhile, the FLSC Committee moved forward with its work in 2008 and 2009, and the FLSC Council approved essentially a final draft Model Code in October of 2009. However, in light of the different approach being recommended by the CBA, the FLSC Code was released without a final version of the provisions dealing with conflicts of interest. The FLSC had struck an Advisory Committee on Conflicts of Interest in February of 2009 to examine the FLSC’s draft rule on conflicts of interest, the CBA’s report and recommendations, engage in consultations and provide a report with recommendations to the FLSC Council. The Advisory Committee submitted its Report in June of 2010. This Report was provided to the CBA and comments invited. The CBA provided its Response in August of 2010. While the CBA was supportive of many of the recommendations in the Advisory Committee’s June 2010 Final Report, it was strongly opposed to what is referred to as the ‘current client’ rule, and dedicated much of its August 2010 Response to this issue.

It is in this context that this opinion was sought.

### **III THE ROLES AND RESPONSIBILITIES OF LAW SOCIETIES AND THE FEDERATION OF LAW SOCIETIES**

One of the most significant features of the legal profession in each of the provinces and territories of Canada is that it exercises ‘self-regulation’ or ‘self-government’ with respect to its members. Self-regulation is an authority provided to the legal profession itself, through its governing body, to design rules and procedures to govern the legal profession, ranging from the establishment of requirements for admission into the legal profession; to rules and regulations governing how lawyers must conduct their law practices; to the establishment of codes of ethical conduct; to standards of legal practice; to



## Appendix “A”

procedures and consequences for lawyers whose conduct falls below the required standards of the legal profession. This is a significant responsibility, and one that the legal profession, to its credit, does not take lightly. It is a cornerstone of the independence of the legal profession, and in meaningful ways contributes to public confidence in lawyers as independent of the influence of government, or other interests, when serving clients. This privilege and responsibility of self-regulation is expected to be exercised in the public interest, as opposed to being exercised in the interest of lawyers or the legal profession itself.

These privileges and obligations, and their orientation, are reflected in the ‘vision’ of the FLSC and in the mandates of Canada’s law societies. As noted in the FLSC’s June 2010 Advisory Committee Report, its ‘vision’ is

acting in the public interest by strengthening Canada’s system of governance of an independent legal profession, reinforcing public confidence in it and making it a leading example for justice systems around the world.

While the FLSC is not itself a regulatory body assigned direct responsibility for the oversight of lawyers, it serves as a federative entity to offer advice to, and in some cases fulfill responsibilities that are delegated to it by law societies in Canada. Its ‘vision’ articulates, in a general way, the “public interest” responsibilities of Canada’s law societies in relation to the governance of lawyers in their respective jurisdictions.

In some jurisdictions this responsibility is articulated in the very legislation establishing or continuing the self-regulation of the legal profession. For example, Nova Scotia’s Legal Profession Act<sup>4</sup> specifically provides in Section 4 (1):

The purpose of the Society is to uphold and protect the public interest in the practice of law.

Specifically relevant to the issues under consideration in this opinion, Section 4 (2)(b) of the Act<sup>5</sup> provides:

In pursuing its purpose, the Society shall  
...  
(b) establish standards for the professional responsibility and competence of members in the Society ...

This arrangement - the purpose or mandate of law societies to exercise their responsibilities in the public interest and the specific responsibility to establish standards for professional responsibility with this public interest orientation – is typical of modern legislation in Canada,. This is an important consideration, since it locates the central role and responsibility of law societies, in Nova Scotia’s language, ‘to uphold and protect the public interest in the practice of law’. Given that the responsibility of the law societies includes the establishment of standards for professional responsibility, the ‘public interest’ implications in relation to these standards is clear. Therefore, it is not only reasonable, but is critical to law societies’ mandates, that its standards for professional responsibility of lawyers be crafted in ways that give paramount consideration to the public interest. And it is consequently an important

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<sup>4</sup> S.N.S. 2004, c. 28

<sup>5</sup> Ibid.

## Appendix “A”

question to determine, in relation to any rule or standard to be applied to lawyers, which formulation of a rule or standard best serves and protects the public interest.

### IV CONFLICTS OF INTEREST AND THE ‘CURRENT CLIENT’ ISSUE

#### A. THE NATURE OF THE ‘CURRENT CLIENT’ ISSUE

The essence of the question to be considered in this opinion is what ought to be the professional conduct rule or standard related to the ability of lawyers to represent clients whose interests are adverse to those of one of the lawyer’s existing clients. This question implicates many issues, including the existing client’s expectations of loyalty from his/her/its lawyer (not only as a feature of the lawyer-client relationship but as a foundational principle of our system of justice); access to justice issues, (where the ability of clients to access legal services could be limited or curtailed, particularly where the issues are complex and only a limited number of lawyers or law firms are equipped to provide the required legal services or where there is only a limited number of lawyers available in a particular geographic area); and concerns for administration of justice where strategies are employed to disqualify lawyers from legal representation for ‘tactical’ reasons.

The question has wide-ranging implications because both the jurisprudence<sup>6</sup> and Codes of Professional Conduct<sup>7</sup> interpret conflicts of interest to implicate not only individual lawyers but, absent special considerations, to all lawyers in a law firm or in some circumstances, to a group of lawyers practicing law independently but in association with one another. Consequently, the inability of one lawyer in a law firm to take on any particular representation because of a conflict of interest will usually mean that no one else in that law firm can undertake the representation.

Speaking generally, the choices under consideration are: a) whether a rule should be incorporated into the FLSC’s Model Code that prohibits lawyers from being able to act on behalf of a client whose interests are directly adverse to the immediate interests of an existing client without the informed consent of the clients; or b) whether conflicts of interest should be defined on the basis of circumstances that give rise

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<sup>6</sup> See for example, Neil. *Supra*, note 2, at para. 11, where Binnie J. stated: “The conflict of interest largely concerns the activities of one of the Venkatraman firm’s associates, Gregory Lazin. Lazin shared office space and some facilities with the law firm in the fall of 1994. The trial judge found that as of January 1, 1995 he should be considered a member of the Venkatraman firm for the purpose of conflict of interest and confidentiality by virtue of the extended definition of “firm” adopted by the Law Society of Alberta in its *Code of Professional Conduct* (loose-leaf), effective January 1, 1995, at p. ix. I say “extended meaning” because the evidence established that Lazin was essentially carrying on an independent practice despite the shared facilities.”

<sup>7</sup> See, for example, the former provisions of the Law Society of Manitoba’s Code of Professional Conduct, Chapter V, Commentary 12, (quoted with approval in *MacDonald Estate*, *Supra*, note 1): “12. For the sake of clarity the foregoing paragraphs are expressed in terms of the individual lawyer and his client. However it will be appreciated that the term “client” includes a client of the law firm of which the lawyer is a partner or associate whether or not he handles the client’s work.”

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to a ‘substantial risk of material and adverse effect on representation’, with the consequence that a lawyer’s acting against an current client in circumstances that do not generate a ‘substantial risk of material and adverse effect on representation’, does not constitute a conflict of interest. The former choice is the one recommended by the FLSC’s Advisory Committee<sup>8</sup>. The latter choice (or no specific rule at all) is the recommendation of the Canadian Bar Association<sup>9</sup>.

### B. CONFLICTS OF INTEREST: CODES OF PROFESSIONAL CONDUCT AND THE CASE LAW

There is a significant interplay between the responsibilities of courts, on the one hand, to oversee the activities and the standards of conduct of lawyers in court processes, and the responsibilities of law societies, on the other, to oversee the conduct of lawyers more generally. As noted by Sopinka J. in *Macdonald Estate*:

... the legal profession is a self-governing profession. The Legislature has entrusted to it and not to the court the responsibility of developing standards. The court’s role is merely supervisory, and its jurisdiction extends to this aspect of ethics only in connection with legal proceedings. The governing bodies, however, are concerned with the application of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater part of the practice of law.<sup>10</sup>

In many respects, the FLSC and law societies are attempting to take guidance from the courts to design general ethical frameworks for lawyers in all contexts in an effort to ensure their alignment with those aspects of lawyers’ activities that fall within court superintendence. This is particularly the case with conflicts of interest. Accordingly, it is critical to understand the jurisprudence and its implications for the question of ‘current client’ conflicts.

What has made this question a timely and controversial one is the development of a body of jurisprudence in Canada over the last 18 years by the Supreme Court of Canada that specifically addresses lawyer conflicts of interest. In three seminal cases beginning with *MacDonald Estate* in the early 1990s and culminating in *Strother* in 2007, the Supreme Court of Canada has articulated a legal framework for the consideration of conflicts of interest related to court proceedings.

What follows is a summary of that jurisprudence, setting out principles applied or developed in the trilogy. I then set out for reference applicable provisions of Codes of Professional Conduct in relevant jurisdictions, with some observations. After this analysis, I offer my opinion on the implications of the Supreme Court decisions, and the application of the principles to the ‘current client’ situation. One part of this assessment includes consideration of the ‘public interest’ values articulated by the Supreme Court in its decision-making, including the application of these values to the lawyer’s role more generally. This assessment is important. It would be difficult, perhaps impossible, for law societies to

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<sup>8</sup> FLSC Advisory Committee Report [June 2010], Appendix A, Rule 2.04 (3), “Acting Against Current Clients”

<sup>9</sup> CBA Response [August 2010], at pp 2, 14-15.

<sup>10</sup> *Supra*, note 1, at para. 49.

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develop conflict of interest standards that apply criteria in the determination of the public interest that are noticeably different from those of the courts, or that are balanced in noticeably different ways.

### C. THE CONFLICT OF INTEREST TRILOGY IN THE SUPREME COURT OF CANADA

#### i) *MACDONALD ESTATE*

Beginning with *MacDonald Estate*, the Supreme Court began to shape the legal framework for conflicts on interest in ways that had not previously occurred in Canada. *MacDonald Estate* was a case of a lawyer transferring from one law firm to another in circumstances where she had been fully involved in litigation on behalf of a client at her former firm. The adversary in this litigation, still continuing when she joined the firm, was a client at her new firm. The law firm provided assurances that the new lawyer would not be involved in the litigation in any way at the firm, and the law firm and the new lawyer swore affidavits that she had not passed along, and would not pass along, any confidential information obtained in the course of the earlier representation. Nevertheless, in a decision that was unanimous in result, the Supreme Court disqualified the law firm from continuing to represent its client in the litigation. The majority formulated the following test to determine whether a lawyer could continue to act in the matter:

that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest?<sup>11</sup>

The Court found that there was a reasonable possibility that client confidences could come to be disclosed, and ruled that in the absence of systems in place (so-called ‘institutional mechanisms’) at the outset of the new lawyer’s arrival at the firm that could provide greater assurances that such disclosures would not occur, the lawyers’ own assurances were insufficient to justify their continued engagement in the case. Since no ‘institutional mechanisms’ had even been contemplated by the firm (or by the legal profession) to that point in time, it was impossible for the firm to avoid disqualification. Sopinka J., writing for the majority, invited law societies to develop ‘mechanisms’ that could be adopted in a timely way to avoid lawyer disqualifications of this type in the future. Law societies did take up this challenge and it is now the case that law firms across the country make use of ‘screens’ and related mechanisms for this purpose.

For our purposes, the critical aspects of the *MacDonald Estate* decision relate to the factors or criteria given consideration by the Court in addressing the public policy interests at stake in the case, and the prioritization of these interests in the process of reaching a decision. At the outset of his majority decision, Sopinka J. laid out these public policy considerations. He stated:

In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice.

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<sup>11</sup> Ibid, at para. 44.

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Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession.<sup>12</sup>

It is clear from the decision that, absent being satisfied that the first value is met– the preservation of the integrity of our system of justice through ensuring that fair and uncompromised representation of clients takes place – a court cannot allow a lawyer to continue on a case despite the negative consequences within the context of the other two public policy values, client choice of counsel and lawyer mobility. Just how profound a commitment to public confidence in the administration of justice that this decision represents may be seen in this observation. The Supreme Court was not prepared to accept the sworn testimony of otherwise highly respected lawyers that the integrity of the system was not being compromised.

In a concurring opinion in which he would have placed an even higher standard upon lawyers, Cory J. made reference to the three public policy values articulated by Sopinka J. and stated:

Of these factors, the most important and compelling is the preservation of the integrity of our system of justice. The necessity of selecting new counsel will certainly be inconvenient, unsettling and worrisome to clients. Reasonable mobility may well be important to lawyers. However, the integrity of the judicial system is of such fundamental importance to our country and, indeed, to all free and democratic societies that it must be the predominant consideration in any balancing of these three factors.<sup>13</sup>

This case is factually irrelevant to the issue of ‘current client’ conflicts. But it makes clear in the Supreme Court’s weighing of public interest values that the preservation of the integrity of our system of justice is the predominant consideration. In *MacDonald Estate* this public interest value was that the administration of justice required that a client be assured that his/her/its legal representatives had not conducted themselves in ways that generated even the possibility that their responsibilities to the client would be compromised.

### ii) *NEIL*

In *Neil*, the Supreme Court of Canada considered the question of whether Neil, who had been convicted of criminal offences, should be granted a remedy on the basis that his lawyer conducted himself inappropriately by advancing the interests of another client to the disadvantage of Neil in his criminal law matters, all while that he [or at least his law firm] was representing Neil. Neil, a paralegal, was under investigation for having committed fraud in relation to certain real estate transactions [the “Canada Trust” matter], as was Ms. Lambert, his assistant. One of his lawyers sought to obtain confidential information from him for the specific purpose of assisting Lambert in her defence, to Neil’s disadvantage. As well, the lawyer obtained non-confidential information in an unrelated matter about additional criminal misconduct by Neil in the handling of a divorce matter [the “Doblanco” matter]. He arranged for this information to be shared with the police in a way that, ostensibly, assisted Lambert in her criminal proceedings.

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<sup>12</sup> Id., at para. 13.

<sup>13</sup> Id., at para. 58.

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In a unanimous judgment, the Court found the lawyer’s conduct in the matter to be a significant breach of his obligations to Neil, but declined to give a remedy. In the judgment, Binnie J., writing for the Court, reformulated the duty of a lawyer to avoid conflicts of interest, grounding it on the fiduciary obligations owed by a lawyer to his or her client, and in particular the duty of loyalty. After quoting the famous speech of Lord Brougham in *Queen Caroline’s Case*, he stated:

... [t]he defining principle – the duty of loyalty – is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance in that public confidence in that integrity be maintained. [citations omitted] Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies. [citations omitted] As O’Connor J.A. (now A.C.J.O.) observed in *R. v. McCallen* (1999), 43 O.R. (3d) 56 (C.A.), at p. 67:

...the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about the counsel’s loyalty and dedication to the client’s cause.

The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of the adversarial system rests.<sup>14</sup>

After reviewing recent English jurisprudence, Binnie J. concluded that the breach of a lawyer’s obligation to a current client is not limited to situations where client confidences are misused, but “the duty of loyalty prevails irrespective of whether or not there is a risk of disclosure of confidential information”. Binnie J. recognized the inconvenience of a loyalty-based principle but continued:

Nevertheless, it is the firm not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – *even if the two mandates are unrelated* - unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.<sup>15</sup> (emphasis in original)

Later in the judgment Binnie J. adopted the following ‘notion’ of a conflict:

A substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person”.<sup>16</sup>

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<sup>14</sup> Supra, note x, at para. 12.

<sup>15</sup> Ibid, at para. 29

<sup>16</sup> Id., at para. 31.

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Binnie J. recognized the potential for what he called “exceptional cases” – governments or chartered banks and other entities that he described as ‘professional litigants’. These situations, he said, “are explained by the notion of informed consent, express or implied”<sup>17</sup>.

It will be noted that the actual situations that were the subject of consideration by the Court in *Neil* were situations where one of the lawyer’s disloyal actions involved information that was covered by confidentiality. Binnie J. did not regard this as the critical element since “[T]his, as stated, is not the test of loyalty to an existing client”<sup>18</sup>. As well, the Court acknowledged that this was a ‘current client’ matter but not, strictly speaking, an ‘unrelated matter’ case. Even though the two matters [Canada Trust and Doblanko] in which the lawyer violated his fiduciary duties to Neil were “wholly independent of one another in terms of their facts” they were not ‘wholly unrelated matters’, since the lawyer’s actions sought to pull them together in aid of Lambert: “The linkage was thus strategic.”<sup>19</sup>

What can be said about Neil is that it grounded the law of conflicts of interest upon the broader principles of fiduciary obligation and loyalty to client. And in doing so, Binnie J., for the Supreme Court established a wide-reaching loyalty-based principle prohibiting lawyer from acting in an adverse capacity against the immediate interests of current clients absent client consent, express or implied, with the added requirement that the lawyer also be satisfied that the clients’ interests would not be adversely affected by the representation.

### iii) STROTHER

*Strother* is a different case altogether dealing, ultimately, with a conflict of interest between a lawyer’s personal interests and those of his client. Strother, a senior partner at Davis and Company, was retained by Monarch under an exclusive arrangement to provide sophisticated tax advice in relation to tax assisted production services funding investments for the financing of movies. At about the time that this exclusive agreement wound down due to changes in Canada’s income tax laws, Strother entered into discussions with another person, Darc [Sentinel], regarding potential new approaches to use the tax system, and an advance tax ruling, to help finance similar ventures. If this arrangement proved to be successful, significant benefits would accrue to Strother personally through a stake in the venture. Strother’s personal stake in the new opportunity was unknown to Davis. At the same time, Strother and the law firm continued to represent Monarch, but did not provide Monarch with information about the alternative approach, either when it was initiated or when it was approved. The new approach was successful, but Monarch did not learn about it until months later. During the period that the new approach was operational Strother earned significant income. Monarch sued Strother and his law firm on the basis that they were in a conflict of interest, a violation of fiduciary obligations owed by them to Monarch.

By a 5-4 majority, the Supreme Court of Canada concluded that the lawyer’s actions favoured his own interests over those of his client. This constituted a breach of his fiduciary obligation to the client. The

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<sup>17</sup> Id, at para 28.

<sup>18</sup> Id, at para. 33.

<sup>19</sup> Id.



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central question was whether the lawyer’s obligations were framed by the retainer agreement or whether additional duties are imposed upon lawyers by virtue of their roles as fiduciaries. Binnie J., writing for the majority, concluded:

When a lawyer is retained by a client, the scope of the retainer is governed by contract. It is for the parties to determine how many, or how few, services the lawyer is to perform, and other contractual terms of the engagement. The solicitor-client relationship thus created is however overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. The Davis factum puts it well:

The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating the relationship of trust and confidence from which flow obligations of loyalty and transparency.

Not every breach of the contract of retainer is a breach of a fiduciary duty. On the other hand, fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for. The foundation of this branch of the law is the need to protect the integrity of the administration of justice. [citing *Macdonald Estate*] “It is of high public importance that public confidence in the integrity be maintained”. [citing *Neil*]

Fiduciary responsibilities include the duty of loyalty, of which an element is the avoidance of conflicts of interest, as set out in the jurisprudence and reflected in the Rules of Practice of the Law Society of British Columbia. As the late Hon. Michel Proulx and David Layton state, “[t]he leitmotif of conflict of interest is the broader duty of loyalty”: Ethics and Canadian Criminal Law (2001), at p. 287.<sup>20</sup>

McLachlin C.J., writing for the minority, regarded the lawyer’s obligations as predominantly identified and bounded by the retainer agreement between lawyer and client, and would have found in this case, based on the trial judge’s findings, that there had been no breach of Strother’s or Davis’s fiduciary obligations to Monarch. She stated:

In my view, whether a conflict between two clients exists is dependent on the scope of the retainer between the lawyer and the client in question. The fiduciary duties owed by the lawyer are molded by this retainer, as they must be in a world where lawyers represent more than one client.<sup>21</sup>

On the basis of the scope of the lawyer’s obligations to the client, as set out by the majority, the finding in relation to Strother is straightforward. Binnie J. stated:

In these circumstances, taking a direct and significant interest in the potential profits of Monarch’s “commercial competitio[r]” ... created a substantial risk that his representation of Monarch would be materially and adversely affected by his own interests [citing *Neil*] ... It gave Strother a reason to keep the

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<sup>20</sup> Supra, note 3, at para. 34-35.

<sup>21</sup> Ibid, at para. 118.

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principals of Monarch in the dark ... in breach of his duty to provide candid advice on his changing views of the potential for film production services tax shelters.<sup>22</sup>

More specifically, on the question of the duties owed to ‘current clients’, the Supreme Court gave consideration to whether the law firm as a whole was in breach of its fiduciary obligation to Monarch by taking on Darc [Sentinel] as a client while continuing to provide legal services to Monarch. The Court found

- a) that Monarch was a ‘current client’ when it took on Darc [Sentinel];
- b) Darc [Sentinel] was anxious to secure the counsel of its choice – something that “does not trump the requirement to avoid conflicts of interest but it is nevertheless an important consideration”<sup>23</sup>; and
- c) the impact on a breach of the duty owed to Monarch (by Strother) was “material and adverse”.

Nevertheless, the Court found that, in appropriate circumstances, it is legitimate for a law firm or lawyer to act “concurrently for different clients who are in the same line of business or who compete with each other for business” without being in a conflict of interest, provided that:

- a) the interests of the respective clients are not adverse;

Here Binnie J. stated:

As recognized by the trial judge and Newbury J.A., the conflict of interest principles do not generally preclude a lawyer from acting concurrently for different clients who are in the same line of business, or who compete with each other for business.

...

There was no *legal* dispute between Monarch and Sentinel [Darc].<sup>24</sup>

- b) as the Court found in this case with respect to Davis, but not Strother, the lawyers’ actual duty of loyalty in the representation of the two clients is not impaired; and
- c) “the information confidential to a particular client is kept confidential”<sup>25</sup>.

The case restates the principle that lawyers and law firms may in appropriate circumstances concurrently represent client competitors and sets out the requirements for such representation to meet the requirements of the lawyer’s fiduciary obligations to the clients, including the duty of loyalty, without there being a conflict of interest.

### D. CODES OF PROFESSIONAL CONDUCT DEALING WITH CONFLICT OF INTEREST – CURRENT CLIENTS AND THE PUBLIC INTEREST

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<sup>22</sup> Id., at para. 69.

<sup>23</sup> Id., at para. 62.

<sup>24</sup> Id., at para. 54

<sup>25</sup> Id., at para. 55.

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Law Society Codes of Professional Conduct are highly relevant to the question of ‘current client’ conflicts. This is because, as stated above, law societies have the responsibility to articulate a standard of ethical conduct for lawyers across the spectrum of legal service. While some guidance can be drawn from the present state of Codes or Rules of Professional Conduct in various jurisdictions, these are of limited assistance. This is because law societies are, for the most part, awaiting the recommendations of the FLSC on the very issues in contention. It is nevertheless helpful to examine some Codes and the provisions that have been adopted to date.

Essentially, the law societies of Canada can be divided into two groups on this question – those that have modified the ‘current client’ rule in their codes of conduct in light of *Neil* (and possibly *Strother*), and those that have not done so. In the first group of jurisdictions are Alberta and British Columbia. Chapter 6 of the Alberta Code of Professional Conduct was amended in June of 2004 to read:

### STATEMENT OF PRINCIPLE

**In each matter, a lawyer's judgment and fidelity to the client's interests must be free from compromising influences.**

### RULES

1. A lawyer must not represent opposing parties to a dispute.
2. A lawyer must not act for more than one party in a conflict or potential conflict situation unless all such parties consent and it is in the best interests of the parties that the lawyer so act.
3. (a) Except with the consent of the client, a lawyer must not represent a person whose interests are directly adverse to the immediate interests of a current client.
  - (b) Except with the consent of the client or approval of a court pursuant to (c), a lawyer must not act against a former client if the lawyer has confidential information that could be used to the former client's disadvantage in the new representation.
  - (c) With the approval of a court, a lawyer may act personally against a former client where another lawyer in the firm has confidential information that could be used to the former client's disadvantage in the new representation.

Commentary C.2.1 now provides:

Conflict” means the situation existing when the parties in question are *prima facie* differing in interest but there is no dispute among the parties in fact.

The language of Rule 3(a) corresponds with the principles articulated in *Neil*. It appears that the Law Society of Alberta’s interpretation of the Supreme Court jurisprudence requires a ‘bright line’ conflicts rule for lawyers and current clients in all contexts of legal work. The Commentary appears to articulate an even stricter conception of ‘conflict’ than is articulated in the jurisprudence.

In British Columbia the provisions of the Professional Conduct Handbook dealing with ‘current client’ conflicts were amended in 2001. They currently provide:

### **Acting against a current client**

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**6.3** A lawyer must not represent a client for the purpose of acting against the interests of another client of the lawyer unless:

- (a) both clients are informed that the lawyer proposes to act for both clients and both consent, and
- (b) the matters are substantially unrelated and the lawyer does not possess confidential information arising from the representation of one client that might reasonably affect the other representation.

**6.4** For the purposes of Rule 6.3, the consent of a client to the lawyer acting for another client adverse in interest may be inferred in the absence of contrary instructions if, in the reasonable belief of the lawyer, the client would consent in the matter in question because the client has

- (a) previously consented to the lawyer, or another lawyer, acting for another client adverse in interest,
- (b) commonly permitted a lawyer to act against the client while retaining the same lawyer in other matters to act on the client's behalf, or
- (c) consented, generally, to the lawyer acting for another client adverse in interest.

These rules, as the CBA noted in its Task Force Report on Conflicts of Interest [2008], appear to establish at least as strict a set of requirements as are set out in the jurisprudence.

Other provinces have largely left their pre-*Neil* provisions intact. Most do not address the ‘current client’ situation. Ontario’s Rules are typical. They provide the following definition of a ‘conflict’:

2.04 (1) In this rule A “conflict of interest” or a “conflicting interest” means an interest

- (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
- (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

With respect to acting against clients, the Rule provides:

### Acting Against Client

2.04(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter (a) in the same matter, (b) in any related matter, or (c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information unless the client and those involved in or associated with the client consent.

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.

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2.04(5) Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if (a) the former client consents to the lawyer's partner or associate acting, or (b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including (i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur, (ii) the extent of prejudice to any party, (iii) the good faith of the parties, (iv) the availability of suitable alternative counsel, and (v) issues affecting the public interest.

Commentary The term “client” is defined in rule 1.02 to include a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. Therefore, if a member of a law firm has obtained from a former client confidential information that is relevant to a new matter, no member of the law firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied. In its effect, subrule (5) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a former client.

Because the rule relates to the statement of a prohibition against acting in ‘related matters’, some have interpreted this provision as not prohibiting lawyers from acting against a current client in unrelated matters. This appears to misread the Rule and Commentaries. It seems clear that the Rule applies to circumstances where a lawyer’s services in relation to the client have been concluded. The language of the rule is that the lawyer ‘has acted for’ rather than ‘acts for’, as one would expect in a ‘current client’ rule. This is also the language throughout the latter part of the Commentary, as well as the linkage to the proviso of Rule 2.04(5), which dealing exclusively with the situation where a lawyer acts against former clients. As with the case of most other provinces, it appears that Ontario’s Rules deal explicitly with ‘former client’ conflicts, and does not deal explicitly with ‘current client’ conflicts at all. It will also be noted that the definition of a conflict in Rule 2.04 in Ontario includes explicit reference to the loyalty obligations of lawyers, consistent with the recent jurisprudence.

To date, it appears that where provinces have acted on the question of ‘current client’ conflicts, they have adopted the principles set out in *Neil*. Other provinces have awaited the views of the FLSC on this question, in the form of the FLSC’s Model Code.

It is noteworthy to observe the approach to this question in the United States, as captured in the American Bar Association’s Model Rules of Professional Conduct. The ABA Rules have been adopted with varying degrees of amendment in most US states. Rule 1.7 deals with ‘current client’ conflicts. It will also be recalled that in *Neil*, Binnie J. referenced a US definition of conflict, and appears to have taken guidance from the structure of ‘current client’ rules there. The ABA Rule and Comments state:

### **Rule 1.7 Conflict Of Interest: Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

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(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

### Rule 1.7 Conflict Of Interest: Current Clients - Comment

#### General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

#### Identifying Conflicts of Interest: Directly Adverse

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous

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representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Three things may be noted in an examination of this rule and comments. First, a ‘current client’ conflict exists either where there is a representation that is directly adverse, OR is a representation that presents a real and substantial risk to the client. Second, the basis of this rule, as articulated in the Comment, is to ensure that loyalty to client, real or genuinely perceived, will not be jeopardized. Third, the Rule and Comment articulate an appreciation that certain representations (where ‘interests are only economically adverse’) may not constitute a conflict at all. It appears that the first two observations are consistent with *Neil*. The third - the representation of business competitors – appears to be consistent with *Strother* in relation to *Davis*’s ability to represent both *Monarch* and *Sentinel/Darc* without being in a conflict of interest, provided that client confidences were protected. Though hardly determinative, the ABA Rule and Comment provide an articulated framework which is remarkably consistent with the structure of the Supreme Court of Canada’s decisions.

## V THE JURISPRUDENCE AND ITS INTERPRETATION[S]

I begin with a summary of the key points to be drawn from the trilogy, and examine their application to ‘acting against current clients’ in the context of protection of the public interest. One will note the consistency of this analysis with those amendments to codes of professional conduct that have been recently undertaken in Canada - to the Alberta Code of Professional Conduct, the British Columbia Professional Conduct Handbook and the approach taken in the American Bar Association’s Model Rules. I review some recent judicial and academic consideration of the cases, particularly *Neil*. I then offer a conclusion in relation to the key features of ‘current client’ conflict of interest provisions that in my view are the most consistent with the jurisprudence and best protect the public interest. I conclude by briefly addressing some of the arguments that have been advanced in opposition to the features of conflict of interest provisions that, in my view, align these provisions with the principles articulated by the Supreme Court.

It is clear that the Supreme Court has over the last 20 years developed a more sophisticated interpretation of conflicts of interest as applied to lawyers. *MacDonald Estate* considered the question of conflicts within the framework of three articulated public policy values – the integrity of the administration of justice, the importance of client choice of counsel and the public interest value of reasonable lawyer mobility. The Court found that each of these public interest values deserves consideration, but that the integrity of the administration of justice was a paramount consideration. [Indeed, in *Neil*, Binnie J. observed that the latter two public policy interests are part of the larger interest preserving the integrity of the legal system as a whole.] The integrity of administration of



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justice was the paramount public interest consideration for Supreme Court. Accordingly, it must be the paramount public interest consideration for legal regulators and the drafters of professional conduct for lawyers.

In *Neil*, the Supreme Court built upon these considerations, but grounded a principle-based interpretation on the lawyer’s fiduciary obligations to the client, and in particular the duty of loyalty. In *Neil*, Binnie J. tied this principle to the administration of justice, articulating it in terms of the client’s entitlement to be represented by a lawyer with undivided loyalty. Equally, he emphasized that for our justice system to operate with integrity and public confidence, lawyers must function with undivided loyalty to their clients. As well, he articulated a framework grounded in client loyalty as an admittedly rich and far-reaching set of obligations for lawyers in ensuring that client loyalty is not compromised. In particular, the framework establishes that a lawyer [and by extension his or her law firm]:

may not represent one client whose interests are directly adverse to the immediate interests of another current client, even if the two mandates are unrelated, unless both clients consent after receiving full disclosure ... and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.”

The case also begins to construct realistic solutions to situations where as a general rule certain clients – so-called ‘professional litigants’ – are willing to tolerate circumstances where their current law firm may represent a client with interests directly adverse to their own. Nevertheless, this accommodation is grounded in the underlying principle that the clients are aware and consent to the otherwise conflicting representation.

One of the overlooked aspects of *Neil* is the degree to which the decision has the effect of placing in the hands of clients the authority to assess their circumstances and, at least in part, acquire a greater say in their legal destiny through the entitlement to be informed and if they choose to do so, give consent and effectively ‘waive’ the conflict. This principle is consistent with provisions throughout codes of professional conduct that place this authority in clients’ hands. The natural conclusion to be drawn from this is that in these situations the Court saw the client’s entitlement to be entitled to be informed, and able to grant or withhold consent, as being in the public interest.

*Strother* builds upon this foundation by recognizing the way in which fiduciary obligations help to frame the lawyer’s obligation to client, including the obligation of undivided loyalty. *Strother* also articulates another category of client – business competitors – whose interests are not ‘directly adverse’, and whose interests may be advanced by the same law firm provided that confidentiality obligations are honoured.

*Strother* contributes modestly to the ‘current client’ conflict situation. Essentially, in a majority judgment the Supreme Court recognized circumstances where a law firm could represent multiple clients who are in competition but, in the language of the Court, are not ‘directly adverse’ in interest, and are not in a ‘legal dispute’ with one another. The decision is complicated by *Strother*’s own personal engagement in conduct that a majority found to be a conflict of interest. But as far as the obligations owed to current clients in concerned, the foundational principles of *Neil* are applied.

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Namely, a law firm can represent clients who are competitors as long as the rule about the avoidance of directly adverse representation is honoured, confidences are maintained and the lawyers are confident that the lawyer’s representation will not result in a substantial risk to the client that its interests would be materially and adversely affected.

The dissenting opinion relies upon the lawyer’s retainer to define the lawyer’s obligations in a more limited way and takes issue with the degree to which a lawyer’s fiduciary obligations generate a penumbra of responsibility beyond the retainer. This view, in conjunction with the trial judge’s findings would have resulted in a more limited articulation of Strother’s and Davis’s obligations and would have led to a finding that they were not in breach of their fiduciary obligations to Monarch. But even the dissenting judgment does not call into question the central principle of *Neil*. Rather, McLachlin C.J.’s dissent rests upon the view that the retainer agreement entered into between Strother and the respective clients defined his commitment, and that there was no direct adversity as between the interests of the two clients, as determined with reference to the duties imposed on the lawyer by the relevant contracts of retainer. Read as a whole, the minority judgment suggests that retainers are the guide to whether a lawyer has taken on a representation that is directly adverse to the immediate interests of a current client. The minority does not appear to take issue with the consequences that would follow in a case where such a situation constitutes a representation that is directly adverse to the immediate interest of an existing client, as the majority found in relation to the conflict between Strother’s personal interests and those of Monarch. This is an important point, since it suggests that even though the minority judgment urges reference to a more limited, bounded source – the retainer – to assess whether a conflict exists, the consequences of such a conflict are not called into question.

In its August 2010 Response to the FLSC’s Advisory Committee Report, the Canadian Bar Association submitted for consideration the observations of judges in four court decisions<sup>26</sup> that gave consideration to *Neil* and the ‘bright line’ rule. The CBA’s position is that these cases show that the interpretation of *Neil* is unclear, that the law on the question of ‘current client’ conflicts is still evolving and that the FLSC should await this evolution before stating a final position on the question. In two of the four cases, the trial judges make passing reference to the meaning of the ‘bright line’ rule in relation to the question of ‘substantial risk of harm’, though in a context where the issue before them was irrelevant, since the question in each case was an alleged conflict related to a lawyer’s relationship with what was or appeared to be a *former* client. The depth of the analysis is understandably limited<sup>27</sup>.

In the third case, *Doucet v. Cousineau*, which was resolved on a basis unrelated to the ‘current client’ rules, the trial quoted the ‘bright line’ and the ‘substantial risk’ passages from *Neil*, and offered the view that loyalty is only compromised where the two conditions are met: ‘substantial risk that the new client’s representation will be adversely affected and that it will be affected in a material way’<sup>28</sup>. While

<sup>26</sup> *Phillips v. Goldson* (2007), 68 O.R. (3d) 737; *Belair v. McAllister*, 2008 CanLII 43577; *Doucet v. Cousineau*, 2009 CanLII 1801; and *Wallace v. Canadian Pacific Railway*, [2009] 12 W.W. R. 157 (on appeal).

<sup>27</sup> In *Phillips v. Goldson*, supra, note 26, at para. 15, the trial judge refers in passing to the Supreme Court having ‘smudged’ the bright line’ rule, but found it unnecessary to consider the rule, since the matter dealt with a ‘former client’.

<sup>28</sup> Supra, note 26, at para. 26.

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this offers a useful comment on the components of the definition of ‘conflict’ identified by the Supreme Court in *Neil*, but does not reflect on the ‘bright line’ rule itself. Indeed, if this were the totality of the role of current client loyalty’ in conflict of interest cases, it would eliminate the bright line rule altogether, something which the Supreme Court presumably never intended.

In a 2005 article published in the Canadian Bar Review, “Beyond Conflicts of Interest to the Duty of Loyalty”<sup>29</sup>, Richard Devlin and Victoria Rees analyzed over 50 cases that made reference to *Neil* subsequent to its release in 2001. Their analysis suggests that there have been two different streams of interpretation: the ‘conventionalist’ - which generally conforms to the cautious, qualified approach advocated by the CBA; and the ‘revisionist’ approach, a more expansive application of the ‘bright line’ rule in *Neil* grounded in a richer interpretation of loyalty, and which more closely corresponds with the FLSC Advisory Committee’s approach. Contrary to the summarizing description of the Devlin-Rees article as referred to in *Belair v. McAllister*<sup>30</sup>, quoted in the CBA Response, Devlin and Rees acknowledge that there is a significant lack of consensus in the judiciary on the requirements of a principle of loyalty, but then conclude:

However, the dominant trend in both *Neil* itself and the subsequent case law seems to be that what is required is a more comprehensive understanding of the duty of loyalty.

...

Given the conflicting responses to *Neil*, law societies across the country have been slow, if not laggard, in responding to *Neil*. Greater emphasis needs to be put on the importance of the duty of loyalty. A recent initiative by the Federation of Law Societies to draft a more comprehensive Model Rule on Conflicts is to be applauded [footnote omitted], although perhaps it could do more to emphasize the more positive message of loyalty.<sup>31</sup>

In my view this is a good general description of the direction of the law of conflicts of interest as it relates to ‘current client’ situations.

In the fourth case referred to in the CBA’s Response, *Wallace v. Canadian Pacific Railway*, (decided after the Devlin-Rees study), Popescul J. gave greater consideration to the interplay of the ‘bright line’ rule and the ‘substantial risk of harm’ question, though in a context that is not central to his final determination. The case was ultimately decided on the basis that the disqualified counsel possessed confidential information harmful to the current client against whom it had commenced litigation. In examining the question, Popescul J. concludes that the CBA interpretation of the ‘bright line’ rule – that it is only operative if there is also a ‘substantial risk of harm’ to the client – is preferable. In effect, the ‘bright line’ rule is qualified by the way in which Binnie J. defined a conflict of interest. Popescul J. stated:

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<sup>29</sup> (2005) 85 C.B.R. 433.

<sup>30</sup> *Supra*, note 26, at para. 32, in which the judge inaccurately characterizes the authors as suggesting ‘that the *Neil* test is not sufficiently clear to impose a duty of loyalty without finding a material and adverse risk to one of the clients’.

<sup>31</sup> *Supra*, note 29, at pp. 451, 455.

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Although a quick and superficial reading of the Bright Line Rule could lead to an interpretation that there is virtually an absolute prohibition that prevents law firms from acting for two clients adverse in interest, even in unrelated matters, absent informed (or implied) consent by both clients - a more in-depth and contextual examination of the rule leads to a somewhat different conclusion.

In my view, the appropriate interpretation of *Neil* is that, absent proper consent, a lawyer may not act directly adverse to the immediate interest of a current client unless the lawyer is able to demonstrate that there is no substantial risk that the lawyer's representation of the current client would be materially and adversely affected by the new unrelated matter. This interpretation of *Neil* is the same as that adopted by the CBA Task Force on Conflicts of Interest, "*Conflict of Interests: Final Report, Recommendations & Toolkit*", August 2008, Canadian Bar Association, (the "CBA Task Force"). My reasons for arriving at this conclusion follow.

Although *Neil* does not expressly limit the Bright Line Rule by wording such as, "... unless there is no substantial risk that the lawyer's representation of the current client would not be materially and adversely affected by the new unrelated matter", such a qualification serves to enhance the rule, rather than detract from it. Furthermore, in my view, it is the proper interpretation of the rule, given the other considerations and principles expounded in *Neil*.

In *Neil* the Supreme Court chose to frame the rule as a "general rule" and not as an absolute prohibition. A plain reading of the unrelated matter rule results in the inescapable conclusion that it was intended that there be exceptions to the rule which might bring into play a discretionary call on the part of the court hearing a disqualification application. For example, if the disqualification application is brought for tactical, rather than principled reasons, the Supreme Court directs that this be factored into the analysis. Binnie J. at para. 14 in *Neil* observed that:

... If a litigant could achieve an *undeserved tactical advantage* over the opposing party by bringing a disqualification motion or seeking other "ethical" relief using "the integrity of the administration of justice" merely as a flag of convenience, fairness of the process would be undermined.<sup>32</sup>

This interpretation was not necessary to the finding in the case since the basis upon which the plaintiffs claimed not to be in a conflict of interest was that Canadian Pacific Railway was a 'professional litigant', and has essentially given its implied consent to be sued by lawyers representing clients in direct adverse interest to it, despite being a current client. Nevertheless, it is important to give consideration to Popescul J.'s interpretation of *Neil*.

In my view the learned judge missed the central message of *Neil*, Binnie J.'s articulation of the bright line rule and its foundation on a lawyer's obligation of loyalty to the client. . Essentially, Popescul J.'s interpretation suggests, as does the CBA interpretation, that Binnie J. overlooked to include 'substantial risk' as an additional component of the bright line rule. Popescul J. suggests that a more sophisticated reading of the decision leads to the need to incorporate 'substantial risk' as a supplementary aspect of the rule, the purpose for Binnie J.'s later reference to the definition of 'conflict' in his judgment. This is justified on the basis that there needs to be a qualification to the 'bright line' rule to provide courts with a mechanism to moderate the rule and be able to deal with 'tactical advantage' disqualification motions.

I do not think this is at all what Binnie J. had in mind with his reference to the issue of 'undeserved tactical advantage'. First, the very articulation of the 'bright line' rule includes a *conjunctive* reference to the requirement: "and the lawyer reasonably believes that he or she is able to represent each client

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<sup>32</sup> Supra, note 26, at para. 30-33.

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without adversely affecting the other”.<sup>33</sup> Second, in my view the reference to ‘tactical advantage’ was not an invitation to have the rule qualified. Rather it was a cautionary message to lawyers that judges will be and should be on the alert for unfairness, and bad faith applications will not be countenanced. Courts have ample tools to deal with such unfairness and bad faith when it is detected. They do not need, and Binnie J. did not intend that, the ‘current client’ conflict rule be watered down to accommodate such circumstances. The reason that there is no reference to ‘substantial risk’ in the ‘bright line’ rule is that it is not necessary. The very fact that a lawyer falls within the bright line rule means, by definition, that the lawyer has compromised his or her commitment to the loyalty owed to the client against whom he or she acts. The foundational principle of loyalty is basis of the bright line rule and Binnie J. made it clear in the whole design of the judgment that such violations of loyalty cannot be countenanced unless the client agrees, either expressly or impliedly.

Finally, it is unusual for the Supreme Court, as it did in *Neil*, to not only establish a rule but to call it a ‘bright line’, in a unanimous judgment. The alternative and differing interpretations appear to ‘unbrighten’ the bright line and do not, as Popescul J. suggests, ‘enhance the rule’, but serve to diminish it. It will be recalled that the construction of the bright line rule is closely aligned with the American approach to conflicts of interest in ‘current client’ circumstances. As the ABA Rule, referred to earlier in this opinion, makes clear, the ‘substantial risk’ provision is an alternative disqualifying feature, not a qualification to the ‘bright line’ rule.

## VI CONCLUSION

In my opinion, then, the cases themselves support a powerful argument that the ‘bright line’ rule articulated by Binnie J. in *Neil*, and supplemented by *Strother*, expresses an approach to current client interests that best advances the public interest by virtue of the ways in which it:

- a) establishes a high standard of loyalty to current clients with a view to protecting the integrity of the administration of justice;
- b) entitles clients to be informed of a conflict of interest at the outset and enables them to make an informed decision whether they wish to provide consent and have the matter proceed;
- c) establishes a framework where it will be legitimate for lawyers to proceed on a reasonable assumption that clients have impliedly consented to the adverse representation;
- d) identifies circumstances where certain representations should not be seen as conflicts at all, such as the appropriate representation of business competitors; and
- e) establishes a final check on the part of lawyers whereby, even if other factors are satisfied, the lawyers must be satisfied that the representation causes no real and substantial risk to the client’s interests.

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<sup>33</sup> Supra, note 2, at para. 29

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This combination of values, articulated in a rule of professional conduct relating to ‘current client’ representation, better capture a commitment to the public interest than a narrower conception that relies exclusively on the lawyer’s assessment of ‘real and substantial risk’ to the client. Confidence in the administration of justice, real and reasonably perceived, requires a high standard in relation to the legitimate expectations of current clients, and, as the Supreme Court has articulated, this requires a commitment to undivided loyalty at its foundation. In my opinion, the drafting of a ‘current client’ rule along the lines of the present FLSC draft rule or the Alberta provision dealing with ‘current client’ situations best achieves this objective.

Beyond a detailed consideration of the interplay of the language of the cases and the language of Codes of Conduct, it is important to keep in mind the over-riding public policy purpose that these conflict rules is intended to address. That is, the public interest in the integrity of the administration of justice is the paramount and over-riding consideration for the Court, as it must be for law societies. In this respect, the principle of undivided loyalty to client is the foundational principle when it comes to current client representation, and the one that best protects the public interest.

## VII COMPETING VALUES AND PERSPECTIVES

### a) An alternative interpretation of *Neil*

Given Binnie J.’s reference to a definition of conflict that contemplates ‘a real and substantial risk that the lawyer’s representation of the client would be materially and adversely affected’, it has been argued that the better interpretation of the case is that ‘bright line rule’ was intended to be modified by the requirement of ‘real and substantial risk ...’ To some extent this argument is supported by the observation that the ‘bright line rule’ and its application to ‘unrelated matters’ was not, strictly speaking, necessary to a resolution of the case since, as the Court itself notes, the matters – even the ‘Doblancko’ matter – were not ‘unrelated’ in light of the lawyer’s dishonourable way in which the lawyer in question made use of the information gathered in relation to the Doblancko divorce to further disadvantage Neil. Additionally, it has been suggested that the majority in *Strother* rejected the applicability of the bright line rule in *Neil* to the conduct of Strother. In my view, this interpretation misses two foundational principles upon which the Court based its analysis in these cases. In its essence the Supreme Court identified these circumstances – acting on behalf of a client whose interests are directly adverse to the immediate interests of another client, even in an unrelated matter – as, *by definition*, a violation of the loyalty principle. It is the violation of loyalty – the sense that the current client feels he or she has been betrayed – that constitutes the conflict. That is, the failure to adhere to the ‘bright line’ in itself constitutes a situation of ‘real and substantial risk’ for the client. Otherwise there is simply no need for the ‘bright line’ rule.

In this view, which I believe to be the proper interpretation of *Neil*, the definition of ‘conflict’ adopted by the Supreme Court is a generic one. Its application to a ‘current client’ representation is that the Supreme Court regarded a representation directly adverse to the immediate interests of a ‘current client’ as an inherent conflict within the meaning of ‘conflict’ that it adopted. It has further application, even where, within the context of the ‘bright line’ rule, clients have provided informed consent. That is,

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*even in those circumstances*, if the lawyer is of the view that there is a substantial risk that the representation would materially and adversely affect the client he or she should not act. This seems to be the precise formulation of the Alberta Code provisions, as well as the ABA approach, and in my view is a preferred understanding of *Neil* and the foundational principles upon which it rests.

With respect to *Strother*, the majority did not apply the ‘bright line’ rule, but was not a rejection of the rule. Rather, *Strother*’s and *Davis*’s representation of both Monarch and Sentinel/Darc did not implicate the rule itself. This is because the clients’ interests, as competitors, were not ‘directly adverse’. This is simply a finding that, in the circumstances, the ‘bright line’ rule did not apply and, handled properly, both clients could have been represented without there being a conflict.

All of this is more than a question of the technical analysis of the text of the *Neil* judgment. When one considers the principle of loyalty upon which the conflict of interest analysis is based, it becomes clear that, absent absolute confidence in a lawyer’s loyalty to the client’s cause, the integrity of the justice system is jeopardized. In other words, it is in the public interest that this confidence is preserved. *Neil* builds upon and makes more precise the ‘public policy’ value of the integrity of the administration of justice and its requirements. Admittedly, this asks a great deal of both lawyers and in some cases clients, but a value of great public interest is under consideration, and that public interest deserves no less.

### b) The Law is in a State of Evolution

It is true that the law is evolving, and this has become true with respect to the law and ethics of lawyer conflicts of interest. Some have argued that the legal profession should await a clearer resolution of the legal principles under consideration before establishing standards, particularly when the project involves an effort to establish a model national standard for ‘current client’ conflicts of interest. This would be a more compelling argument if a) there was a serious lack of resolution at a level of court that was not authoritative; or b) there was a serious lack of clarity with respect to the legal principles involved. In my opinion neither of these situations exists. We have an articulated set of principles from the most authoritative source available - the Supreme Court of Canada. While some may disagree, these principles are in my view clearer and more coherent than have previously been articulated on this subject in Canada and are perfectly capable of being set out by law societies for application across the range of work that lawyers do on behalf of clients.

One of the troubling aspects of this argument is that it is unlikely that the law will ever be clear enough for everyone. One consequence of inaction is that those who have the mandate and obligation to ensure that lawyers’ obligations adhere to and protect the public interest would be disabled from ever fulfilling their mandates. In any event, if the law evolves in ways that call for further and better articulation of the standard for lawyers in relation ‘current client’ conflicts, law societies possess both the ability and the obligation to respond in a timely way.

### c) The “Tactical” Use of Disqualification of Withheld Consent



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It is becoming recognized that tactics are coming to be developed that make unwarranted use of disqualification to disadvantage opponents in litigation and to complicate client representation in a range of legal matters. It is argued, rightly, that this behavior, fueled by motives that are contrary to the interests of justice – the use of fair, timely and affordable processes by which client problems are resolved – is contrary to the public interest in preserving respect for the administration of justice. The argument is that too high a standard for conflicting interests will expand the availability of such tools, and create greater opportunities for conflicts ‘tactics’ to be used, not where a legitimate concern exists but to advance some clients’ interests in unprincipled ways. This is a legitimate concern.

However, in my opinion, if the contemplated standard for current client conflicts is correct in principle, as I believe it is, it seems equally inappropriate to modify that principled approach on the basis that some will attempt to make use of it in unprincipled ways. The alternative – which I believe is a better approach – is to address the inappropriate behavior itself. I note that some Codes of Conduct have developed a general rule that lawyers should not make use of conflicts challenges on behalf of their clients for tactical purposes. ‘Motive’ is always hard to determine, and one person’s view of what is a ‘tactical’ challenge may be another’s view of what is a ‘principled’ one. Nevertheless, we constantly rely on lawyers to conduct themselves ethically, even in the face of client pressures and in the face of temptation to cut corners or engage in sharp practice. In my view, this is another example of a legitimate expectation of lawyers that they not accede to these behaviours. Since it is nearly always the case that a challenge to an alleged conflictual representation will be made by a lawyer on behalf of a client, lawyers are the natural gatekeepers of good and honourable practice with respect to ‘tactical’ conflicts challenges. There is no reason why we would not repose confidence in lawyers to do the right thing in these situations, as we do in so many others. Code of Professional Conduct provisions to confirm this obligation seem to be a better solution to the problem than a watering down the conflict of interest principles.

### d) the Challenge of Limited Access to Lawyers

In my opinion, this is the only legitimate ‘public interest’ question that presents challenges for the application of the ‘bright line’ rule and its application to the ‘current client’ situation. In some cases the bright line rule will enable clients to learn at the outset of an adverse representation, and in some of these cases clients will withhold their consent. This will prevent some clients from being conveniently represented, or from being represented by the counsel of their choice.

I do not believe that there is a complete answer to this question of access. It is inherent in a system where a person wishes to rely on a professional agent to advance his or her interests, and the system within which these interests are advanced requires, as an important element of that system, that the agent have an undivided and untarnished commitment to the principal’s cause. This occurs all the time. In *MacDonald Estate*, lawyers who had previously managed conflicts of interest in ways that they thought were adequate and honourable found that the jurisprudence required more of them, to the significant disadvantage of their client. *Neil* imposes the same requirement. Both have admittedly had wide-ranging implications for client access to counsel, or access to counsel of their choice.

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We have, however, come to accept that certain actions and situations can create circumstances where a lawyer simply cannot act for a client. For example, a lawyer’s possession of one client’s confidential information relevant to a representation, even in the case of a former client, can prevent a lawyer from representing a client in opposition to that current or former client. In some circumstances, a lawyer may have too close a relationship to another person, or to another lawyer, to be able to act for or against a client. We accept the consequences of these situations because it would be unseemly in the extreme, and consequently unacceptable, for a client to be, or be reasonably perceived to be, at an unfair advantage. Similarly, the involvement of two clients in a ‘dispute’ is a complete bar to a lawyer or law firm representing both clients in the dispute, even where one might argue that the law firm could organize itself to ensure undivided loyalty to the clients and protect client confidences. The system of justice is, and would seem to be, compromised by such an approach, and we accept the limits on access to lawyers, or the lawyer of choice, by virtue of this deference to the public interest value of ensuring confidence in the administration of justice.

To the extent that *Neil* raises the bar for ‘current client’ conflicts, it does so with the lofty goal of preserving the integrity of the administration of justice in mind. As with other circumstances where standards are raised in this area, it can be expected that they will have consequences. One will be limitations on access to counsel. It is a price we will have to pay for our commitment to a very fine justice system based as it is on the rule of law.

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W. Brent Cotter, Q.C.

December 1, 2010

## Appendix “B”

**Appendix “B”****OPINION****I BACKGROUND**

In a November of 2010 I was asked by the Federation of Law Societies’ [FLSC] Advisory Committee on Conflicts of Interest to provide an opinion on a question related to what are known as ‘current client, unrelated matters’ conflicts of interest and the public interest. I have since been asked to supplement that opinion and give consideration to a possible amendment to the ‘current client’ rule as presently drafted by the Advisory Committee for the FLSC’s Model Code of Professional Conduct. The request is to examine the concept under consideration, again in the context of the articulation of a rule that best addresses the public interest.

The concept to be considered is described as follows:

In summary, the concept is an amendment to the current client rule in the context of an unrelated matter. If in such a case, the lawyer is satisfied, and can demonstrate that there is no conflicting interest with the current client, the lawyer may act with disclosure, but without the requirement of obtaining consent.

To assist me, I was provided with copies of two documents in draft, one from the Canadian Bar Association [CBA] and one prepared by the Law Society of Upper Canada [LSUC]. It was, however, a request to consider the concept, not the specific language under discussion.

**II PREVIOUS OPINION**

I had previously been asked by the Federation of Law Societies’ [FLSC] Advisory Committee to provide an opinion on the following question:

How is the public interest best protected by an ethical rule for lawyers governing conflicts of interest, specifically as it relates to acting against a current client?

This opinion required me to examine the values to be considered in assessing the ‘public interest’, which law societies are mandated to protect, and to give consideration to two reports – one prepared by the Advisory Committee and released in June of 2010, and a Response prepared by the CBA and released in August of 2010 [in combination with its 2008 Report on Conflicts of Interest]. I also considered recent Canadian jurisprudence on the question as well as the language of Codes of Professional Conduct

In essence I concluded that:

the ‘bright line’ rule articulated by Binnie J. in *Neil*, and supplemented by *Strother*, expresses an approach to current client interests that best advances the public interest by virtue of the ways in which it:

a) establishes a high standard of loyalty to current clients with a view to protecting the integrity of the administration of justice;

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- b) entitles clients to be informed of a conflict of interest at the outset and enables them to make an informed decision whether they wish to provide consent and have the matter proceed;
- c) establishes a framework where it will be legitimate for lawyers to proceed on a reasonable assumption that clients have impliedly consented to the adverse representation;
- d) identifies circumstances where certain representations should not be seen as conflicts at all, such as the appropriate representation of business competitors; and
- e) establishes a final check on the part of lawyers whereby, even if other factors are satisfied, the lawyers must be satisfied that the representation causes no real and substantial risk to the client’s interests.

The central aspect of this conclusion is that lawyers have fiduciary obligations in relation to existing clients, central to which is the duty of loyalty, an essential part of the framework for their ethical and legal obligations to clients. In ‘current client, unrelated matter’ situations, it was my view that the public interest is best maintained and protected where lawyers may only act against current clients where both clients give their consent, and the lawyer believes that he or she can represent both clients in the respective [unrelated] matters without adversely affecting the interests of either.

### **III THE SUPPLEMENTARY QUESTION – CLIENT NOTIFICATION, BUT NOT CONSENT, AND THE PUBLIC INTEREST**

#### **A The nature of ‘client notification’ versus ‘client consent’**

Essentially the contemplated amendments to the FLSC’s draft Rule on ‘current client, unrelated matter’ situations would substitute notification for consent. That is, the lawyer would be required to disclose to the existing client that the lawyer acts for another client in a matter [the ‘new’ client<sup>1</sup> representation] where the existing client’s immediate interests are directly adverse to those of that other client. The existing client would be entitled to learn of the new adverse representation by his/her/its law firm but would not be able to prevent this representation by withholding consent. Similarly, the ‘new’ client would similarly be required to be informed that its law firm currently represents the party adverse in interest in unrelated matters, but, at least theoretically, need not consent. Understandably, however, the critical nature of contemplated amendment is its application to the situation of the existing client rather than the new client, since the ‘new’ client can withhold consent in its own way by electing not to have the lawyer or law firm continue to represent it in the new matter.

There appear to be two ways of looking at the situation that is captured by the FLSC Rule as presently drafted, and which calls for client consents. One is to see it as enabling or allowing an obstreperous existing client to assert its lawyer’s obligation of loyalty to deny a ‘new’ client the right of access to the lawyer or law firm of choice in a new, contentious matter, even where the existing client’s interests are not at risk of being compromised by this new representation. Alternatively, one may see this as a

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<sup>1</sup> I use the phrase ‘new’ client to distinguish from ‘existing’ client, though in many cases the ‘new’ client may be an existing client of a law firm that was not previously in a position directly adverse to the ‘existing’ client.

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matter of an existing client being entitled , if not actually to be represented in a ‘new’ contentious matter, at least to be able to count on its lawyer’s obligation of loyalty preventing its lawyer or law firm from proceeding ‘disloyally’ against it in such matters, unless the client consents.

In formulations of an amendment to the presently existing draft rule, the objective appears to be to provide to the existing client a degree of information regarding its lawyer’s intended adverse representation in the unrelated matter, but without providing the existing client with the right to withhold the consent which would effectively prevent the lawyer or law firm from representing the ‘new’ client in the matter. This appears to effectively address the concerns articulated in the first way of looking at the rule, and essentially rejecting the second.

In a supplement to my earlier opinion I examine three perspectives related to the concept of the contemplated amendment. First, does it effectively preserve and protect the public interest, as that concept is presently understood in the jurisprudence and in the existing approaches to the regulation of conflicts of interest? Secondly, if it does not do so, does it nevertheless address certain difficulties associated with the currently formulated rule in ways that adequately accommodate the public interest? Third, would it generate any additional problems for lawyers or clients or the protection of the public interest?

### i) **Effective Protection of the Public Interest**

In my opinion, the concept associated with the amendments under consideration inadequately addresses the central aspect of the question. The jurisprudence and the language and commentaries in recently developed codes of professional conduct adopt the view that client loyalty is at the heart of a lawyer’s obligations to clients. In essence, they take the view that a lawyer’s acting in direct adversity to the immediate interests of existing clients is, absent consent, an affront to this obligation of loyalty. Furthermore, the requirement that a lawyer believe that acting in such a matter will not create a substantial risk to the clients’ interests is a *supplementary* obligation to this commitment to loyalty, not a substitute for client consent. Consequently, the substitution of client notification for client consent seems to moderate, and in some cases seriously undermine, the whole foundation upon which a lawyer’s representation of clients is based.

Additionally, if my earlier views expressed in my earlier opinion are accepted, the introduction of the concept of client notification would generate an inconsistency between circumstances where a matter is within judicial oversight and where a matter is outside judicial purview. That is, absent client consent, a lawyer would be unable to represent a ‘new’ client in litigation in a ‘current client, unrelated matter’ situation but would be able to do so in any matter, however contentious, if the lawyer notifies the existing client that the lawyer represents the ‘new’ client in a matter adverse to its immediate interests and believes that the representation will not adversely affect the interests of the respective clients. It is difficult to envision a justification for such a difference in ways that do not lead to a conclusion that, if the ‘court oversight’ principles are justified and appropriate to protect the public interest, the different and standard to address ‘non-court oversight’ situations would constitute at the very least a moderation of such principles and public interest considerations.

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In my opinion, the ‘client notification’ approach is inconsistent with the existing jurisprudence and the construction of conflicts rules in modern codes of professional conduct that seek to address the public interest dimensions of the issue. In addition, the ‘client notification’ approach appears to introduce a new approach to the resolution of ‘current client, unrelated matter’ conflicts that is not presently contemplated in the case law or the codes of professional conduct. This approach does not seem to be part of any of the existing codes of professional conduct in Canada, and is not part of the Supreme Court of Canada’s thinking, either in the decisions of the Court in *Neil* or in *Strother*, or in the alternative interpretation of these cases proffered by the CBA in its analysis. This is not to say that new ideas should not be developed and given consideration. This one, however, seems inadequate to the public interest objectives that have been authoritatively articulated.

I would add two supplementary observations. First, the ‘client notification’ approach returns the issue of determining the existence of a conflict of interest to the lawyer’s own judgment and integrity. This is not in itself a problem. Lawyers are rightly called upon to exercise ethical judgment, and to act with integrity, on a daily basis. However, in some circumstances even lawyers’ assurances in relation to conflicts of interest are insufficient to ensure that the public perception of confidence in the administration of justice is met.<sup>2</sup> Second, it seems likely that the introduction of a new concept, apparently at odds with the existing jurisprudence, will lead to another rounds of ‘conflicts’ litigation as lawyers and clients seek new guidance on these contentious issues. Many argue that too many of these matters find their way into court already in the form of disqualification applications.

### ii) Does a ‘client notification’ approach offer improvements at a modest diminution of the public interest?

There appear to be at least two potential benefits to a rule that moves away from a ‘client consent’ model and adopts a ‘client notification’ approach to ‘current client, unrelated matters’ conflicts. First, the ability of an ‘existing client’ to object to his/her/its lawyer representing a client in direct adversity to its immediate interests would presumably be significantly reduced. This would likely narrow the range of issues that can form the basis of disqualification applications in litigated matters. Assuming that it is in the public interest to limit client autonomy in this way, this would represent an improvement in the sense that it would remove from the system at least some disqualification proceedings that are brought for ‘tactical’ reasons. However, it was always within the authority of the Supreme Court to establish a more flexible rule on ‘current client’ conflicts, and it appears that the stricter provisions grounded in client loyalty and the requirement of ‘client consent’ were the balance that was struck to reflect the public interest. Additionally, a reduced range of ‘conflict of interest’ disqualifications will only occur if the courts adopt an approach to conflicts of interest in such situations that aligns with a ‘client notification’ rule. It is by no means clear that the courts would do so, and at present it appears unlikely in light of *Neil*.

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<sup>2</sup> In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 [*MacDonald Estate*], the Supreme Court declined to accept lawyers’ sworn statements that they had not compromised a litigant’s situation and would avoid any actions that would compromise the representation of a particular litigant in the future.

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Furthermore, moderating these public interest values to address ‘tactical’ disqualification’ cases seems to be an effort to use the wrong tools for the job, as I set out in my earlier opinion. Simply put, if it is wrong for a client to bring a disqualification application for simply tactical advantages, it is wrong for a lawyer to assist in such a proceeding. Judges and law societies have within their respective jurisdictions the authority to address this behavior.

A second benefit of the ‘client notification’ approach would be that it addresses the issue of client choice of counsel in circumstances where a client wishes to retain a lawyer with a law firm which already represents the ‘current client’, though in an unrelated matter. The refusal of the current client to provide consent would not be an impediment to the ‘new’ client being able to retain the lawyer of its choice to represent it on unrelated matters directly adverse to the immediate interests of the current client provided the other requirements are met. Access to choice of counsel is a relevant consideration and, as I indicated in the earlier opinion, the most troubling public interest concern associated with the stricter ‘client consent’ rule. In my opinion, however, the benefits of a ‘client notification’ rule are more limited than have been claimed, and would accrue at a cost to the concept of client loyalty. In cases where a current client is notified that its law firm is proceeding against it in a matter where its immediate interests are at stake, and would not have consented, the client is highly likely to be sufficiently affronted by a sense of disloyalty that it will take its [unrelated] business elsewhere, with this consequence. One client’s increased choice of counsel will lead to another’s loss of counsel of choice. Furthermore, where because of geography or specialist expertise, there is a shortage of suitable lawyers available to serve this client, one client gain’s is another client’s loss in terms of access to counsel of choice. While the question of access to counsel of choice is an important one, I anticipate that any net gain will be modest, and at some loss of confidence in the integrity of lawyers, whose obligation of loyalty to clients will be perceived to be shallower and more short-lived than has previously been the case.

### **iii) Potential problems generated by the ‘client notification’ approach**

I address four concerns that would be specific to the adoption of the ‘client notification’ approach, and that in my opinion would have an adverse impact on the public interest, and more precisely on public perception of the legal profession’s commitment to the public interest. The first is that the express articulation of a ‘client notification’ requirement in any new rule is more window-dressing than substance, as critics are sure to point out. This is because in any matter in which a law firm commences the representation of a ‘new’ client in matters directly adverse to the immediate interests of an existing client, the existing client is going to discover this adverse representation in short order, whether notified or not. Notification to the existing client does not seem to add much if anything to the fulfillment of the lawyer’s ethical responsibilities in such situations. The essential assessment of whether a conflicting interest exists will reside within the lawyer’s frame of reference, and the client will be required in most cases to accept that judgment, or essentially challenge its own lawyer’s integrity in the assessment of that judgment. While most lawyers will exercise this judgment with great care, the concept, and transfer of authority on such questions - from client consent to lawyer judgment alone - seems problematic. It seems to be an approach better suited to a time when greater deference was accorded lawyers’ judgments generally, and to a time when oversight of these questions was limited. Whether



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we like it or not, greater client autonomy is a feature of a modern, public interest-oriented system. This aspect of client autonomy associated with ‘current client, unrelated matters’ conflicts is endorsed by the Supreme Court. Client notification takes us in a different direction, is likely to be criticized and quite possibly will be rejected by the courts when it comes within their authority to address.

Second, the concept of client notification appears to introduce a new approach into the resolution of conflicts of interest in ways that are liable to be inconsistent with a number of provisions of codes of conduct that presently require client consent for a lawyer to act on behalf of another client. While I have not examined these provisions in detail, I would urge caution in the event that serious consideration is given to wider implications of a ‘client notification’ approach. Such an approach may signal a general evolution toward a less disciplined commitment to conflicts of interest than is presently articulated in codes of professional conduct generally, and one that reposes greater authority in the hands of lawyers to adjudge conflicts. In my opinion, this has the potential to reflect adversely upon the legal profession.

Third, as was recognized in one of the draft ‘client notification’ rules provided to me, the client notification requirement would be in conflict with some of the basic ethical and legal obligations of lawyers to keep client information confidential. For example, provisions of codes of professional conduct are so uncompromising on this point that they require lawyers not to disclose the fact that they represent a certain client, in the absence of client consent, express or implied. Some of these provisions would be impossible to honour and still fulfill the client notification requirements being contemplated. I am troubled that we would be willing to moderate the confidentiality provisions of our profession to accommodate greater flexibility in ‘current client, unrelated matter’ conflicts.

Finally, and perhaps uncharitably, the optics of a professional rule that empowers lawyers to make decisions to take on clients in opposition to existing clients has a generally unsavoury dimension to it in the following respects. It is associated with the earlier observation to the effect that such a rule is likely to achieve only a limited gain in client access to counsel. In many, perhaps most, cases such a rule would merely result in a law firm exchanging one client for another. The ‘new client comes to be represented, the ‘existing client, with no say in the matter and experiencing ‘disloyalty’, will elect to take its legal business elsewhere. The law firm essentially becomes the sole arbiter of client representation. It can take on the new representation and see the existing client leave, or it can decline the new representation and continue to serve the existing client. The choice effectively becomes less a matter of a client’s choice of counsel and more a matter of counsel’s choice of client. In many occupations this is a perfectly legitimate thing. In law, the fiduciary obligations owed by lawyer to clients – one of the critical indicia of a profession – invite a higher order of consideration. Even where such high level, principled consideration is undertaken, wherever a law firm chooses to take on a new and potentially lucrative representation at the expense of an existing client, there will exist the perception that the law firm favoured its own interests over that of those of an existing client, a client that it effectively drove away.

## IV CONCLUSION

**Appendix “B”**

In this opinion I have sought to reflect on the strengths and weaknesses of the ‘client notification’ approach to ‘current client, unrelated matter’ conflicts, and to assess whether such an approach would be able to address certain limitations in the ‘client consent’ approach, while meaningfully preserving and protecting the public interest. As will be evident, I do not think the ‘client notification’ approach addresses the limitations of the ‘client consent’ model to any great extent. Furthermore, however, it carries with it a significant amount of baggage, both in terms of its inconsistency with the present jurisprudence and with more modern approaches to lawyers’ codes of professional conduct. It would also invite the perception that the legal profession wishes to moderate its commitment to the public interest in conflict of interest through a) a diminution in lawyers’ loyalty to clients and b) a diminution in client autonomy.

It is my opinion that the adoption of a ‘client notification’ model for ‘current client, unrelated matter’ conflicts would make a small contribution to client access to lawyers of their choice, but at a potentially significant cost to the public interest, both in public confidence in the administration of justice and in terms of a potentially adverse effect on reputation of the legal profession.

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W. Brent Cotter, Q.C.

December 21, 2010

## Appendix “C”

PRIVATE AND CONFIDENTIAL  
ORIGINAL BY MAIL

February 7, 2011

**Of Counsel**

The Right Honourable Pierre Elliott Trudeau, P.C., C.C., C.H., Q.C., FRSC (1984 - 2000)  
The Right Honourable Jean Chrétien, P.C., Q.C.  
The Honourable Donald J. Johnston, P.C., Q.C.  
Pierre Marc Johnson, FRSC  
The Honourable Michel Bastarache  
The Honourable John W. Morden  
Peter M. Blaikie, Q.C.  
André Bureau, O.C.  
Ivan G. Whitehall, Q.C.

CBA Task Force on Conflicts of Interest  
Attention: Scott Jolliffe, Chair  
The Canadian Bar Association,  
500 - 865 Carling Avenue  
Ottawa,  
Ontario K1S 5S8

**Re: Conflicts Law Reform in Canada**

Dear Mr Jolliffe:

You have asked me to review a number of cases and documents pertaining to the ongoing discussions between the Canadian Bar Association Task Force on Conflicts of Interest and the Advisory Committee on Conflicts of Interest of the Federation of Law Societies of Canada, with regard to the development of new rules addressing the issues raised concerning conflicts in the case of representation of existing clients by lawyers. My mandate is not to produce another comprehensive analysis of the issues, as I understand it, but to give you my opinion on the two reports produced for the FLSC by Professor Cotter of the College of Law of the University of Saskatchewan. It is obvious that a lot of time has already been devoted to this issue: the CBA report is testimony to the careful consideration given to the production of recommendations.

First, I think it is important to note that the law societies are responsible for preparing rules and guidelines regarding all aspects of conflicts; they are not required to prepare rules implementing common law rules developed by the courts as such. Their mandate is different. What is imperative is that the rules not be inconsistent with the common law. In the present case, what is required is to lift lawyers' uncertainty in this area by providing clear guidelines. It is obviously important in the development of the new rules to have a good understanding of the common law rules that are being developed, but I think it is an error to conclude at this point in time that the jurisprudence is clear and settled and that no nuances are possible or permissible. In fact, nuances are required when rules are still unstable; furthermore, the duty of the law societies is to take into account all of the repercussions of new rules and guidelines for lawyers and law firms, large and small, throughout the nation. In *Neil*, even Justice Binnie recognizes this in saying:

Michel Bastarache  
T 613 236.3488  
F 1 866 411.2699  
mbastarache@heenan.ca  
55 Metcalfe Street  
Suite 300  
Ottawa, Ontario  
Canada K1P 6L5  
www.heenanblaikie.com

“An unnecessary expansion of the duty (of loyalty) may be as inimical to the proper functioning of the legal system as would its attenuation. The issue is always to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests”. ( I am underlining)

The Chief Justice added in *Strother*:

“This does not, of course, preclude law societies from imposing additional ethical duties on lawyers. They are better attuned than the courts to the modern realities of legal practice and to the needs of clients. If the obligations of lawyers are to be extended beyond their established bounds, it is for these bodies, not the courts, to do so”. (I am underlining)

There is no dialogue between the courts and law societies. The courts have a limited mandate in addressing the conflicts issue within the context of court proceedings, and they see their role as limited to establishing the fundamental obligations necessary to preserve the integrity of the legal system. They do not purport to act for the law societies and balance all of the interests that societies are concerned with in order to establish in their stead global guidelines. There is no reason to believe that the Supreme Court wanted, in *Neil*, to establish a rule so precise that there would be no possibility of discretion or assessment of the particular circumstances of each case, nor is there reason to believe that the Court considered that the matter had been dealt with definitively and that no further developments would be considered in the future. The Court is always concerned with the way in which its decisions are being implemented and willing to make adjustments when needed. In recent years, the Court has in effect been particularly sensitive to the practical results of developments in the law.

Although the decision in *Neil* was unanimous, there are signs that the Court is divided on its meaning and application. The best example of this is the apparent division in the Supreme Court of Canada in *Strother* regarding the application of the bright line test to current clients in unrelated matters; though *Neil* itself was an unrelated matter case, the majority reasons in *Strother* restated the Rule while the minority reasons rejected any extension of the law regarding unrelated matters. The jurisprudence is not so clear even in the Supreme Court.

Law societies take into account a number of values and interests, but fundamentally they must reconcile the public interest and the realities of the practice of law, with special regard for sustaining public confidence in the justice system. I would therefore question the appropriateness of this declaration of Professor Cotter:

“It would be difficult, perhaps impossible, for law societies to develop conflict of interest standards that apply criteria in the determination of

the public interest that are noticeably different from those of the courts, or that are balanced in noticeably different ways.”

I think this reflects a misunderstanding of the mandates of law societies and courts. The common law and law society guidelines are not synonymous. It must be remembered that law society guidelines are interpreted by the courts as sources of public policy, not legally binding rules. This leads me to believe that Professor Cotter asked himself the wrong question at the outset of his opinion. The question is not whether the CBA recommendations go far enough, it is whether its recommendations would constitute acceptable rules with regard to public policy and its three dimensions, whether they are practical and useful, and whether they are consistent with the common law. The CBA analysed the jurisprudence, consulted, saw that the “bright line rule” was not an absolute ideologically driven rule, and developed a proposition that was practical and met the objects of the common law, i.e. to protect against conflicts and ensure respect for the administration of justice. Professor Cotter has not explained in what way the CBA guidelines are inconsistent with the common law other than to argue that they make the “bright line rule” subject to conditions, while it is in his opinion meant to be unconditional and absolute. But what are these conditions, and where do we find in the jurisprudence the requirement that the “bright line rule” be absolute?

In my respectful opinion, Professor Cotter has adopted the wrong premise when stating that the jurisprudence is so clear that the “bright line rule” applies indiscriminately in all situations. If the jurisprudence was clear we would not be having these discussions and it would be quite simple to draft new rules that would seem practical. Very responsible and qualified people obviously disagree on the scope of the reasons in *Neil*. In my opinion, what is clear is the direction the Supreme Court is taking and the principles it wants to apply when considering situations of conflict. It is obvious, in my opinion, that even the majority and the minority of the Supreme Court in the *Strother* case did not have the same view of the precedent in *Neil* and its “bright line rule”; in itself, that should be sufficient to say the precedent will evolve. The speech given by justice Binnie, that was quoted by Professor Cotter, seems to indicate that there may even be some movement in the position taken by him, or is it that the position he takes in *Neil*, in the first place, is not as absolute as Professor Cotter thinks?

I think it is worth mentioning that in the Supreme Court case of *Côté v. Rancourt*, which is subsequent to *Neil*, there was no strict application of the “bright line rule”. As I will explain later, I am also convinced that there is inconsistency between the decision in *Neil* and the majority position in *Strother*; this may cause the Supreme Court to reconsider these matters as soon as the occasion comes up.

To add to this discussion of certainty in the law, I think it is useful to consider that many of the terms used in *Neil* are general and abstract, and need to be applied carefully in each case: “directly adverse”, “immediate interests”, “full disclosure”, “reasonably believes” ... I do not think this is accidental. Also, it is not always easy to

determine what will in fact “adversely affect representation” or what “public perception of the integrity of the justice system” encompasses. Even the exception to the loyalty rule is vague and somewhat slippery because “inferred consent” is not always obvious, nor are the factors to be applied in determining inferences or when deciding that there is a tactical abuse of the system. Even when addressing the fiduciary duty itself, one has to look closely at phrases like “duty of commitment to the client’s cause” and “zealous representation”, as well as the description of the duty itself, i.e. “ensuring that a divided loyalty does not cause the lawyer to ‘soft pedal’ his or her defense of a client out of concern for another client”. It is not obvious that these phrases are articulating a duty that is materially different than the general duty to avoid conflicting interests in fiduciary law. More importantly, these phrases indicate without a doubt that the rule has some necessary flexibility. There is much discretion required here.

Another point I would like to make in these remarks is that the three main decisions of the Supreme Court of Canada have to be seen as complementary. *MacDonald* was not overturned (*Côté v. Rancourt* affirms this) and there is still room for ethical screens. Indeed these measures are meant to preserve the confidentiality of information, but the fact is that if they are accepted, there can be no overriding rule that suggests that no commitment to confidentiality can be accepted because there may be a sense of betrayal in the case of some clients. All of these considerations are relative. I think it is an exaggeration to suggest that a unanimous court in *Neil* wanted to apply a notion of duty of loyalty that went beyond the normal understanding of the term in fiduciary law. One must not be too mesmerized by the use of the phrase “bright line rule”; all that means is that one rule should apply in the proper circumstances and that the rule should be certain, not subject to various conditions. It does not mean that there is a dogmatic approach to its definition and mode of application.

In my view, it is quite clear from the very terms used in *Neil* that the principal notion to be adopted was a new definition of conflict and that the choice of the Supreme Court was to generally adopt the definition in the *American Restatement*. The words used by Justice Binnie are to the very same effect. The “bright line rule” is meant to apply to conflicts as defined in the decision of the Court. I cannot understand how one can argue that there is in fact conflict when there is no serious risk of harm, or even to suggest that the risk is not a major factor in determining if there is conflict. In that sense, I would be of the opinion that the judge in the *Wallace* case was not extending the rule in his interpretation of the *Neil* case, but showing how the rule was related to the definition of the conflict to be avoided. The “bright line” is there for a reason and that reason is the avoidance of conflict; it is not a general affirmation of public confidence in the administration of justice, which would advance no one in the determination of what needs to be done.

The *MacDonald* case shows how the court proceeded to develop the common law in this area; it considered foreign jurisprudence but determined its own course according to its own evaluation of the Canadian context; it took into consideration the

practicalities of the profession and refused to adopt a dogmatic definition of the public interest in the confidence of the public in the administration of justice. There is no reason to suggest that the court would have decided to move away from that approach in *Neil*. In that case, the issue was different than that in *MacDonald* and there was need to go beyond the requirements of confidentiality to ensure that lawyers not take a position adverse to a former client or a present client. In *Strother*, the duty of loyalty was superimposed on the retainer, and imposed with regard to services owed to an implicit present client in the reasons of the majority, because the rule regarding actions in unrelated matters was insufficient. The “bright line” described in the judgment is simply the obligation not to act where interests are adverse; the adversity has to be interpreted broadly to cover the circumstances that were encountered in the instant case. This does not mean that there are no factors to be considered in determining when interests are truly adverse; the “bright line” is not meant to set aside consideration of the true nature of the rule, its purpose, the reason why it should in most circumstances outweigh other important values of the system of justice, like the freedom to choose one’s lawyer or the possibility of ensuring mobility within the profession. To say, as Professor Cotter does, that the “bright line rule”, without nuance or reference to the definition of conflict, is essential to the preservation of confidence in the system of justice is not acceptable, in my opinion. Judges understand that their decisions must be realistic and contextual.

The *Strother* decision is difficult for many reasons. As you are aware, I sat in that case and sided with the Chief Justice. The differences of opinion between the majority and the minority are more important than noted by Professor Cotter. First, we, of the minority, were of the opinion that the majority wrongly refused to accept some findings of fact that were determinative of the extent and duration of the mandate of the law firm and of Mr Strother in particular. Second, we were not satisfied that the majority applied *Neil* correctly; in particular, we could not see how the majority could conclude in *Neil* that the duty of loyalty is that “of the firm” and find in *Strother* that the firm had not breached that duty because it had no knowledge of the personal interest of one of its partners. The main point of disagreement was of course the application of the fiduciary duties. We were of the view that those duties are not meant as an expansion of the mandate set out in the retainer; we thought that they cannot be used to impose a new implied retainer, but that they are there to define the obligations (explicit and implicit) in carrying out the terms of the retainer. If the retainer was truly finished, there was no duty to act for the former client and give advice on new tax provisions. There was nothing to correct regarding past advice based on different legal provisions. The majority itself accepted that Sentinel was not acting in any way adverse to the interests of Monarch. The personal interest of Strother in Sentinel was a business interest acquired after leaving his law firm and the business was new, in the sense that it responded by way of a new scheme to new tax regulations and was built upon an operational model developed by Paul Darc, not Strother.



In our opinion, the fiduciary relationship was not meant to be different from what normally applies and I still believe that the interpretation to be given to the case should take that into account. There is nothing in the majority judgment that says the fiduciary duty of loyalty is different to that in other settings, not involving the practice of law. The quotations regarding fiduciary relations and the duty of loyalty are testament to this. This said, I think ethical rules should take into account the fact that a fiduciary duty exists, like in other situations, and that they must not permit a lawyer to act in situations of conflict. As stated in the CBA report, “there is no conflicting interest unless there is a “substantial risk” that a material adverse effect will occur. The *Restatement* suggests that the risk must be “significant and plausible” although “not certain or even probable”, requiring more than the “mere possibility” of adverse effect.” To deal with the ultimate issue raised in *Strother*, the revised CBA Code of Professional Conduct would allow a lawyer to act against a current client in an unrelated matter, but only where there is no substantial risk of material and adverse affect on client representation. This seems sensible and sufficient to satisfy conformity with the common law.

In its response to the Advisory Committee document, the CBA argued that the common law was still under development and pointed to a number of decisions decided after *Neil* and *Strother* that followed different paths with regard to the interpretation of the *Neil* decision in particular. Professor Cotter examined some of these cases where judges refused to accept that *Neil* had set a standard of conduct that should be imposed regardless of immediate circumstances. His comments serve as a good indicator of the reasons he advances in support of the position of the Advisory Committee recommendations. I want to briefly discuss his treatment of two decisions.

Professor Cotter says:

“In the third case, *Doucet v. Cousineau*, which was resolved on a basis unrelated to the ‘current client’ rules, the trial judge quoted the ‘bright line’ and the ‘substantial risk’ passages from *Neil*, and offered the view that loyalty is only compromised where the two conditions are met: ‘substantial risk that the new client’s representation will be adversely affected and that it will be affected in a material way’. While this offers a useful comment on the components of the definition of ‘conflict’ identified by the Supreme Court in *Neil*, but does not reflect on the ‘bright line’ rule itself. Indeed, if this were the totality of the role of current client loyalty’ in conflict of interest of interest cases, it would eliminate the bright line rule altogether, something which the Supreme Court presumably never intended.”

I must say that I find this rather difficult to understand because the “bright line rule” does not exist independently of the duty to avoid conflicts. The “bright line rule” itself has everything to do with the definition of conflicts because its application is

meaningless where there is no possibility of conflict. Is the rule meant to do more, according to Professor Cotter? He does not explain why he makes this distinction. In my view, the totality of the role of client loyalty is indeed to avoid conflicts; it is the definition of conflicts that is therefore essential to determining the scope of the duty of loyalty. We have seen that it applies not only to the preservation of confidential information, to refusing to act in related matters without consent, but also to representations that are adverse in interest or that would affect the ability to represent the client effectively. All of these aspects are covered by the CBA proposition.

Professor Cotter deals with another case in the same way. He says:

“In the fourth case referred to in the CBA’s Response, *Wallace v. Canadian Pacific Railway*, (decided after the Devlin-Rees study), Popescul J. gave greater consideration to the interplay of the ‘bright line’ rule and the ‘substantial risk of harm’ question, though in a context that is not central to his final determination... Essentially, Popescul J.’s interpretation suggests, as does the CBA interpretation, that Binnie J. overlooked to include ‘substantial risk’ as an additional component of the bright line rule. Popescul J. suggests that a more sophisticated reading of the decision leads to the need to incorporate ‘substantial risk’ as a supplementary aspect of the rule, the purpose for Binnie J.’s later reference to the definition of ‘conflict’ in his judgment. This is justified on the basis that there needs to be a qualification to the ‘bright line’ rule to provide courts with a mechanism to moderate the rule and be able to deal with ‘tactical advantage’ disqualification motions.”

Here again, it is as though the nature and content of conflict did not matter. The risk factor is not an addition, a supplementary aspect, it is a defining feature of the conflict. It is not a question of moderating the rule but of ensuring that its application is restricted to cases where there is a true potential for conflict; otherwise, there will simply be unacceptable interference with the right to choose counsel of one’s choice.

The Professor adds:

“The reason that there is no reference to ‘substantial risk’ in the ‘bright line’ rule is that it is not necessary. The very fact that a lawyer falls within the bright line rule means, by definition, that the lawyer has compromised his or her commitment to the loyalty owed to the client against whom he or she acts. The foundational principle of loyalty is basis of the bright line rule and Binnie J. made it clear in the whole design of the judgment that such violations of loyalty cannot be countenanced unless the client agrees, either expressly or impliedly.”

It is hard to follow this reasoning. Professor Cotter seems to be saying that since the “bright line rule” only applies when there is a conflict, it is not necessary to add to it anything that would assist in identifying the situation of conflict. I would have thought

that one first has to determine if there is a potential for conflict before applying the rule forcing a lawyer to abandon a case or a client by applying the rule. Even if I was to accept the way in which Professor Cotter formulates the test, I fail to see why it is wrong to put in the words suggested by Popescul J to make sure the rule is well understood, just because it is “not necessary”. It is all well and good to insist on consent, as does the Professor, but one must ask consent to what? Surely a situation that puts the client at risk. Client consent would be unnecessary absent risk.

Having considered all of the comments of Professor Cotter, I would like to formulate my general critique of his position by commenting on this pronouncement which, I think, best describes it. He says:

“In its essence the Supreme Court identified these circumstances – acting on behalf of a client whose interests are directly adverse to the immediate interests of another client, even in an unrelated matter – as, by definition, a violation of the loyalty principle. It is the violation of loyalty - the sense that the current client feels he or she has been betrayed – that constitutes the conflict. That is, the failure to adhere to the ‘bright line’ in itself constitutes a situation of ‘real and substantial risk’ for the client. Otherwise there is simply no need for the ‘bright line’ rule.” (The underlining is mine)

I think there would be no sense in saying an unfounded feeling of betrayal constitutes conflict. The term conflict can only have one legal meaning. Therefore, the failure to adhere to the “bright line” in the absence of a legal conflict as defined by the courts cannot be treated as a violation of the duty of loyalty as such, because for there to be a failure there must have been an obligation in the first place. The paragraph above is evidence of the fact that Professor Cotter sees the rule as an absolute without regard to circumstances; he can only accept a compromise with regard to abuses already denounced in the *Neil* decision itself.

Professor Cotter concludes;

“All of this is more than a question of the technical analysis of the text of the *Neil* judgment. When one considers the principle of loyalty upon which the conflict of interest analysis is based, it becomes clear that, absent absolute confidence in a lawyer’s loyalty to the client’s cause, the integrity of the justice system is jeopardized. In other words, it is in the public interest that this confidence is preserved. *Neil* builds upon and makes more precise the ‘public policy’ value of the integrity of the administration of justice and its requirements. Admittedly, this asks a great deal of both lawyers and in some cases clients, but a value of great public interest is under consideration, and that public interest deserves no less”.

The problem with this general pronouncement is that it has a built in definition of the concept of the integrity of the administration of justice. What, in the CBA recommendations, is contrary to that concept? How can the recommendations be seen to be failing in the eyes of the well informed public? The integrity of the administration of justice is not something that can be determined in a vacuum. The decisions of the courts in applying this concept are always contextual. There is no possibility of avoiding this approach when determining whether the duty of loyalty requires a lawyer to abandon a case or a client. The “bright line rule” is nothing more than a tool; it is not meant to discard the discretion of the judge in deciding if the integrity of the administration of justice is at risk. In deciding the issue, it is obvious that the judge will consider first of all the definition of conflict.

By way of conclusion, I would like to say that it is not the business of the law societies to develop the common law or to attempt to do so when it is obvious that it is in a state of flux, and that more experience with the interpretation and evaluation of the impacts of decisions is needed. What must be done is what is necessary to deal with the normal events, the development of rules that are well founded on principles that we all agree upon and that we believe will serve the public and the legal community well. I would therefore agree entirely with this passage from the response of the CBA to the Advisory Committee of the FLSC:

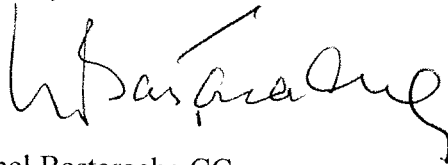
The proper public role of the law societies and the Federation must be to carefully apply the public interest understanding of the realities of legal practice. This is the advantage which the law societies have over the courts. Judges can only develop the law based on the cases before them. These cases are almost invariably litigation cases which ordinarily raise different public policy issues than are raised by non-contentious cases. As Justice Sopinka said for the majority in *MacDonald Estate*:

.... The governing bodies, however, are concerned with the application of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater part of the practice of law. It would be wrong, therefore, to shut out the governing body of a self-regulating profession from the whole of the practice by the imposition of an inflexible and immutable standard in the exercise of a supervisory jurisdiction over part of it. The law societies are able to take a deeper and broader view of legal practice, always in the public interest. They are able to examine whether there is an actual problem to be addressed and weigh the policy implications.

Assessing the nature and extent of the problem, if any, to be addressed, is crucial to the proper formulation of new rules. Especially when an overbroad rule is proposed, there is a need to carefully examine whether there is a real problem to be addressed and the extent of that problem, and what problems the proposed solution might create or exacerbate.

As stated earlier, I think Professor Cotter asked himself the wrong question because he misunderstood how the courts and law societies interact in this area of the law. What I would object to is his view of the development of formulae by the courts. The Supreme Court in particular will often try to give directions by suggesting ways of approaching difficult issues and formulate rules like the one discussed in *Neil*. These are meant as aides to judges in deciding cases; they are not set out in the form of laws or regulations to be interpreted as does Professor Cotter. They are certainly not meant to discard a contextual approach in deciding these issues. In my opinion, the CBA has produced a well reasoned and articulated response to the need to clarify the situation of conflicts.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michel Bastarache', with a long horizontal flourish extending to the right.

Michel Bastarache CC  
Counsel

Heenan Blaikie LLP

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