How Murky Can a Bright Line Be?

Coping with Conflicts of Interest in the wake of *R. v. Neil*

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Table of Contents

I. Introduction

In *R. v Neil*[1], the Supreme Court of Canada opined on troublesome issues concerning potentially disqualifying conflicts of interest in the legal profession. *Neil* is the Court's second important decision on the subject. Its decision in *MacDonald Estate v Martin*[2] has frequently been applied, and has resulted in the adoption of rules and guidelines by professional bodies in an effort to balance competing interests.

Neil too is destined to be applied frequently. Although it arose in the context of a criminal case, the Court explicitly recognized that its decision would have important implications for consumers and providers of legal services in a broad range of fields and practice settings. The case's influence will extend not only to civil litigation and tribunal work but also to non-litigious matters. As at least one commentator has already pointed out[3], "*Neil* can be interpreted in a way that will radically reshape the practice of law."

Neil articulates what the Court described as a "bright line" test by establishing "a 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."[4]

The issues raised by *Neil* include the following, among others:

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1 [2002], 3 S.C.R. 631.
2 [1990] 3 S.C.R. 1235.
3 See Paul M. Perell, "Disqualifying Conflicts of Interest, Reductio ad Absurdum, and R. v Neil", 27 Advocates' Quarterly 218 (2003).
4 Paragraph 29.

1. In what circumstances will a retainer be considered to be "directly" adverse to the "immediate" interests of another client? If, for example, one member of a firm represents a plaintiff who claims punitive damages in a product liability case, may another represent a defendant against whom a claim for punitive damages is made in another product liability case in which the parties, and the product, are different? Would the possibility of a precedent being established in the former case that is harmful to the firm's client in the latter be sufficient to disqualify the firm from acting?

2. Should the bright line test be applied in the same way in cases in which a firm is retained for a limited purpose on a specific matter and in cases in which a firm has acted exclusively for a client on all its legal matters for many years?

3. How should the rule apply in cases of conglomerate clients, joint ventures, or "corporate families"? For example, should a firm's representation of a company prevent the firm from acting in an unrelated matter in which the outcome may be directly adverse to the immediate interests of a subsidiary or a more distantly related affiliate? Should the firm's representation of a shareholder or director prevent it from acting for a corporation?

4. Should the bright line test be applied strictly in cases in which clients would thereby be deprived of effective representation, for example where the proposed retainer is in a specialized field or in a community in which only a few lawyers practise?

5. In what circumstances may a client's consent to a retainer be inferred? May a client's acquiescence to a firm's acting against its interests on prior occasions be treated as an implied consent?

6. What measures should law firms adopt to ensure that a client's consent to the firm's acting contrary to the client's interest is valid and enforceable?

7. What measures should law firms adopt to ensure that all potential conflicts of interest that may offend the *Neil* rule are promptly identified?

8. What measures should law firms adopt to minimize the likelihood of their offending the *Neil* rule? For example, may potential conflicts be minimized by written retainers that permit firms to act in unrelated matters in which the client's interests may be adversely affected, and by ensuring that files are closed promptly and lawyer-client relationships terminated?

These issues implicate competing values of importance not only to lawyers, but to the public generally. The competing values include the interests of members of the public in expecting both undivided loyalty from lawyers whom they retain and freedom to be represented by experienced and competent counsel of their choice.

This paper will examine how Canadian courts and law societies address these competing values, and will endeavour to provide practical guidance to law firms who must grapple with the complexities of conflict of interest issues in a rapidly changing environment. We will analyse the *Neil* case in the context of the fundamental principles that underlie conflicts of interest in the legal profession, and will analyse both *Neil* itself and the cases that have been decided since then. We will review changes that have been effected over the last several years to Canadian rules of professional conduct addressing conflicts of interest. Finally, we will examine how Canadian law firms are adapting, and should adapt, their practice management standards to minimize the risk of conflicts arising while observing the duties of loyalty and confidentiality that underlie conflict of interest concerns.

II. The Context of *Neil*: Conflicts of Interest In the Legal Profession

Conflict of interest allegations have become a pervasive feature of the practice of law in Canada in recent years. Their incidence has increased for a multitude of related reasons: commerce has become more global; leading law firms have grown dramatically, spanning multiple offices and jurisdictions; lawyers have become more mobile; the practice of law has become more fragmented as the demand for specialized legal services has grown; clients who formerly employed the same law firm for all their legal needs now employ multiple firms for different (and sometimes for similar) services.[5] It is ironic, and not irrelevant, that the proliferation of conflict issues, which are often based upon the duty of loyalty owed by lawyers to clients, has resulted in no small part from the fact that clients are themselves so much less loyal than they once were.

Before 1990, when the Supreme Court of Canada released its decision in *MacDonald Estate v. Martin*[6], motions to disqualify counsel from acting based upon alleged conflicts of interest were uncommon. In a 1992 decision, Chief Justice Esson of the British Columbia Supreme Court observed that until then "applications to remove lawyers were so rare an event that, at least in this jurisdiction, few judges or lawyers seemed to be more than vaguely aware that such a remedy existed."[7] Since then, such motions have become a common feature of major litigation.

This dramatic increase in the frequency with which lawyers and judges must struggle with conflict issues has not come about because the principles underlying conflict of interest rules have changed, but because of pronouncements by courts that articulate those principles in more

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5 See Janine Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Oxford-Portland, Oregon, Hart Publishing, 2002), 3-8.

6 *Supra*, note 2.

7 *Manville Canada Inc. v. Ladner Downs* (1992), 88 D.L.R. (4th) 208, 63 B.C.L.R. (2d) 102, affirmed 76 B.C.L.R. 121 (C.A.), at 224 D.L.R.

absolute terms than the traditional common law. Two broad duties that are fundamental to the lawyer-client relationship are at the root of all conflict problems: confidentiality and loyalty. These two duties have been the foundations of the lawyer-client relationship for as long as professional responsibilities have been recognized.[8] It is the duty of confidentiality that formed the basis of the Supreme Court of Canada's decision in *MacDonald Estate v. Martin*,[9] while it is the duty of loyalty that sparked the Court's decision in *Neil*.

The rule against acting where there is or is likely to be a conflicting interest may be considered a modern elaboration of the biblical injunction that "no man can serve two masters."[10] Today the duty of loyalty finds expression in Canadian rules of professional conduct that provide that the reason for the conflict of interest rule is that clients may suffer serious prejudice unless their lawyers' judgment and freedom of action on the clients' behalf are as free as possible from compromising influences.[11] The duty of confidentiality also finds expression in rules of professional conduct, which emphasize the necessity of lawyers who are asked to act for more than one client in a matter advising the clients that no information received from one in connection with the matter can be treated as confidential so far as the others are concerned,[12] and which invoke the duty of confidentiality as the basis for determining when a lawyer may act against a former client[13]. The fundamental importance of the duty of confidentiality to the conflict of interest rule is apparent. Clients whose choices are either to conceal relevant information from their lawyer – thereby inhibiting the lawyer's ability to provide legal advice

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8 See Charles Wolfram, *Modern Legal Ethics* (St. Paul, Minnesota: West, 1986), 313-314 and 316-317.

9 *Supra*, note 2.

10 St. Matthew 6:24.

11 Canadian Bar Association Code of Professional Conduct ("C.B.A. Code"), chapter V, commentary 2; Law Society of Upper Canada *Rules of Professional Conduct* ("Ontario rules"), rule 2.04 (1) and (3) and accompanying commentary.

12 C.B.A. Code, chapter V, commentary 5; Ontario rule 2.04 (6); Law Society of British Columbia, *Professional Conduct Handbook*, ("B.C. rules"), chapter 6, rule 4.

13 C.B.A. Code, chapter V, commentary 8; Ontario rule 2.04 (4) and accompanying commentary.

and representation effectively[14] - or to divulge confidential information that they fear may be disclosed to and perhaps used for the benefit of other parties, are placed in an intolerable position. They must be satisfied that their confidences will not be disclosed or used by their lawyer for the benefit of another client to whom the lawyer also owes a duty of loyalty.

Loyalty and confidentiality are not, however, the only values that must be considered in the analysis of conflict of interest problems. Canadian rules of professional conduct provide that lawyers may act despite actual or likely conflicts of interest if fully informed clients consent to their doing so.[15] "As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties or obligations," the rules add, "in practice this factor may not always be decisive. Instead it may be only one of several factors that the client will weigh when deciding whether to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay, and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In the result, the client's interests may sometimes be better served by not engaging another lawyer."[16]

The policy option of prohibiting lawyers absolutely from acting in matters when they have or may have a conflict of interest has thus been rejected by law societies in favour of a more

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[14] See C.B.A. Code, chapter IV, commentary 1; Ontario rule 2.03 (1) and accompanying commentary; see also Wolfram, *supra* note 8, at 317.

[15] C.B.A. Code, chapter V, rule, and commentary 4 thereto; Ontario rule 2.04 (3) and accompanying commentary; British Columbia rules, chapter 6, rules 3 and 4.

[16] C.B.A. Code, chapter V, commentary 4; Ontario rule 2.04 (3) and accompanying commentary. In *McCauley v. McVey*, [1980] 1 S.C.R. 165, the Supreme Court of Canada recognized that in small communities other lawyers are not always available to act on the other side of a transaction. In *Clark Boyce v. Mouat*, [1993] 4 All E.R. 268 the Judicial Committee of the Privy Council affirmed that there is no general rule of law that a lawyer should never act for both parties in a transaction where their interests might conflict; rather, lawyers are entitled to act for both parties in transactions in such circumstances if they obtain the informed consent of both parties.

flexible standard designed to accommodate countervailing factors. The identification of a potential conflict of interest is only the first step in the process of attempting to resolve the problem. Some conflicts of interest may be neutralized in such a way as to avoid any taint of impropriety.

Against this background, we may proceed to consider the *Neil* case.

III The Facts of Neil

David Lloyd Neil carried on business as a paralegal in Edmonton, Alberta, for many years. He regularly consulted a lawyer, "Pops" Venkatraman, about issues arising in his files. When he was advised by Mr. Venkatraman that matters exceeded his competence, Mr. Neil referred his client to Mr. Venkatraman's law firm. As Justice Binnie put it in his judgment on behalf of the Supreme Court of Canada, "[t]he Law Society of Alberta took the view that these referrals did not take place frequently enough."[17] In October 1994, the Law Society supplied the Prosecutors' Office in Edmonton with complaints that Mr. Neil was providing legal advice contrary to the *Alberta Legal Professional Act*, S.A. A police investigation ultimately led to a 92-count indictment against Mr. Neil based on a variety of transactions related to different complainants.

The Supreme Court of Canada found that the Venkatraman firm had placed itself in conflicts of interest that came from two sources. First, the firm acted simultaneously for Mr. Neil and for his business associate Helen Lambert, in circumstances in which the interests of the firm's two clients were adverse. On April 18 1995 Mr. Neil was in custody on charges of perpetrating a fraud on Canada Trust. A member of the Venkatraman firm met with Mr. Neil for

[17] Paragraph 4.

approximately two hours to take instructions. A second member of the firm, Gregory Lazin, joined the meeting for about 12 minutes. Mr. Neil did not know that Mr. Lazin's purpose in attending the meeting was to acquire information, not to represent Mr. Neil, but to represent Ms Lambert, who anticipated being charged in connection with the alleged Canada Trust fraud. Mr. Lazin planned to advance a "cut-throat" defence on Ms Lambert's behalf: she would testify against Mr. Neil in exchange for immunity from prosecution for herself. Mr. Lazin's plan, in Justice Binnie's words, was to seek "to paint the appellant as the manipulative criminal and Helen Lambert as an innocent dupe".[18] In due course, Mr. Lazin attempted to negotiate a deal with the Crown Attorney's office whereby Ms Lambert would testify against Mr. Neil if the charges against her were dropped. The Venkatraman law firm belatedly informed Mr. Neil that it would not act for him on the Canada Trust indictment because of its representation of Ms Lambert.

The second source of a conflict of interest arose in July 1995 when Mr. Lazin was approached by Darren Doblanko, whose wife had obtained a divorce with the assistance of Mr. Neil some years earlier. Mr. Doblanko's wife had relied on an affidavit of service on Mr. Doblanko. The affidavit turned out to be false, and was found to have been prepared by Mr. Neil. Although his firm was still acting for Mr. Neil, Mr. Lazin urged Mr. Doblanko to report the falsified affidavit, and a second court document that contained a forged signature of Mr. Doblanko, to the police officer who was responsible for the Canada Trust indictment and other cases pending against Mr. Neil. He did so, and additional criminal charges were brought against Mr. Neil. Mr. Lazin's strategy was evidently to multiply the allegations of dishonesty against Mr. Neil to

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[18] Paragraph 8 (i).

strengthen the credibility of the "cut-throat" defence he planned to advance on behalf of Ms Lambert in the Canada Trust trial.

The Doblanko indictment was the first of five against Mr. Neil to go to trial. Mr. Neil was convicted. He was then tried on the Canada Trust indictment, but a mistrial was declared. Mr. Neil moved successfully for a stay of all proceedings, including a stay of the verdict on the Doblanko indictment. The trial judge stayed further action on the jury's verdict on the Doblanko indictment. He decided that, having presided over the stay application, he should not proceed to hear the Canada Trust case. He added, however, that in his opinion those proceedings ought to be stayed as well.

The stay was vacated and the verdict on the Doblanko indictment was restored by the Alberta Court of Appeal. It may be indicative of the influence of the Supreme Court of Canada's emphasis in *MacDonald Estate v. Martin* on the duty of confidentiality that the Alberta Court of Appeal in *Neil* considered the key point to be that the Venkatraman firm did not disclose to a new client "any confidential information attributable to a solicitor and client relationship"[19] with an existing client.

IV The Court's Analysis

Although the Supreme Court of Canada dismissed Mr. Neil's appeal from the Alberta Court of Appeal's decision that the stay ordered by the trial judge was unwarranted, it did so on the ground that the extraordinary remedy of a stay of a jury's verdict of guilt was not warranted: the Venkatraman charges were serious and would almost certainly have been laid in any event, and the law firm's conduct did not affect the fairness of the trial. At the same time, the Supreme

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[19] (2000), 266 A.R. 363, para. 4, as quoted by the Supreme Court of Canada in *Neil* at para. 2.

Court of Canada unequivocally rejected any implication that, as long as no confidential information is disclosed, a law firm may simultaneously act for clients whose interests are adverse to each other, even in unrelated matters. The Venkatraman firm owed a duty of loyalty to Mr. Neil at the material time, and its representation of Mr. Doblanko, though factually and legally unrelated to the Canada Trust matters, was adverse to Mr. Neil's interest. As a fiduciary, the Court held in a passage redolent of the biblical injunction referred to above, the law firm could not serve two masters at the same time.[20]

"While the Court is most often preoccupied with uses and abuses of confidential information in cases where it is sought to disqualify a lawyer from further acting in a matter, as in *MacDonald Estate*," the Court observed, "the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or not play a role".[21] The Court cited with approval the judgment of Justice Ground of the Ontario Court of Justice (General Division) in *Drabinsky v. KPMG,*[22] in which the plaintiff sought an injunction restraining the accounting firm KPMG, of which the plaintiff was a client, from further investigating the financial records of a company of which the plaintiff was a senior officer. Justice Ground, who assimilated the duties owed by lawyers and accountants, wrote in *Drabinsky* that "the fiduciary relationship between the client and the professional advisor, either a lawyer or an accountant, imposes duties on the fiduciary beyond the duty not to disclose confidential information. It includes a duty of loyalty and good faith and a duty not to act

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[20] Paragraph 3. See note 10.
[21] Paragraph 17.
[22] (1998), 41 O.R. (3d) 565 quoted by the Supreme Court of Canada in *Neil* at paragraph 18.

against the interests of the client". Insofar as the legal profession is concerned, Justice Binnie held in *Neil*, "Ground, J.'s view of the duty of loyalty to current clients is unassailable."[23]

The Supreme Court of Canada explained the underlying premise of the lawyer's duty of loyalty by quoting with approval from the judgment of Wilson, J.A. (as she then was), in *Davey v. Woolley, Hames, Dale & Dingwall*[24]: "human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith."

The Court also relied on the judgment of the House of Lords in *Bolkiah v. KPMG*[25] (a case we will discuss below on the question of whether a law firm owes a duty of loyalty to a *former* client), in which Lord Millett stated as follows:

> " My Lords, I would affirm [possession of confidential information] as the basis of the court's jurisdiction to intervene on behalf of a former client. It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation ….".

The Court commented that the facts of the *Neil* case illustrate a number of important objectives that are served by the principle that a lawyer's judgment and fidelity to the client's interests must be free from compromising influences. "Part of the problem here seems to have been Lazin's determination to hang onto a piece of litigation. When Lazin was asked about 'the ethical issue' in acting for Lambert, he said 'maybe it was a question of not wanting to give up the file'.

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23 Paragraph 18.
24 (1982), 35 O.R. (2d) 599 (C.A.), at 602.
25 [1999] 2 A.C. 222 at pp. 234-35.

Loyalty includes putting the client's business ahead of the lawyer's business." Moreover, the Court added, it is understandable that Mr. Neil felt betrayed when he learned that his own law firm had disclosed evidence of Mr. Neil's alleged wrongdoing in the Doblanko divorce proceedings. Compliance by lawyers with their duty of loyalty is important also to the maintenance of public confidence in the administration of justice. "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 appears to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies"[26], the Court asserted. In the *Neil* case itself, the Court added, "the public in Edmonton, where the prosecution of the appellant had attracted considerable notoriety, required assurance that the truth had been ascertained by an adversarial system that functioned clearly and without hidden agendas."[27]

The Court concluded that "a bright line is required", and promulgated the governing principle in the following words: "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."[28]

The Court held that the Venkatraman firm was bound by this general prohibition to avoid acting contrary to the interest of Mr. Neil, a current client, who was a highly vulnerable litigant. The Court nevertheless dismissed Mr. Neil's appeal on the ground that the conflict of interest did not

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[26] Paragraph 12. The Court cited *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 2, *Smith v. Jones*, [1999] 1 S.C.R. 455, and *R. v. McCallen* (1999), 43 O.R. (3d) 56 at p. 67.

[27] Paragraph 24.

[28] Paragraph 29.

result in the criminal charges being so vitiated as to render it an abuse of process for the Crown to seek a conviction at a new trial, bearing in mind that a stay will be justified only in the clearest of cases.

It is clear from the Court's judgment that the bright line that it drew should not be equated with an absolute prohibition against law firms acting adversely to the interests of other clients. The modifiers "directly" (adverse) and "immediate" (interests) require lawyers to engage in a balancing exercise in applying the Court's test to particular circumstances; they make what would otherwise be an absolute principle a workable one. Moreover, the Court's characterization of the bright line as a "general" rule suggests that exceptions will be recognized. The Court expressly recognized that law firms may act in such circumstances with the informed consent of both affected clients. It also acknowledged that, in exceptional cases, client consent may be inferred:

> " For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied."[29]

The Court also adopted a definition of "conflict" that makes it clear that, in order for a law firm to be disqualified, the risk of harm must be substantial, and the potential harm to the client's interests must be material. The definition of "conflict" adopted by the Court was 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

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[29] Paragraph 28.

a third person."[30] Both the degree of risk of the potential harm, and the materiality of the potential harm, must accordingly be assessed before one may reliably conclude that the bright line has been crossed.

The Court recognized too that to grant relief on conflict grounds may in some circumstances undermine the integrity of the administration of justice: "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."[31]

To illustrate this concern the Court cited with approval the decision of the Newfoundland Court of Appeal in *R. v Parsons*[32]. The Crown in that case had sought to remove defence counsel on the basis that he had previously acted for the father of the accused in an unrelated matrimonial matter, and might in future have to cross-examine the father at the son's trial for murder. The accused and his father had both obtained independent legal advice, after full disclosure of the relevant facts, and waived any conflict. The father also waived solicitor-client privilege. The Court of Appeal was satisfied that there was no issue of confidential information. On these facts, the Court of Appeal concluded that "public confidence in the criminal justice system might well be undermined by interfering with the accused's selection of the counsel of his choice".[33]

Finally, the Supreme Court of Canada in *Neil* observed that "an unnecessary expansion of the duty [of loyalty] may be as inimical to the proper functioning of the legal system as would its

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30 Paragraph 31, quoting from section 121 of the Restatement Third, The Law Governing Lawyers (2000), Vol. 2, at pp. 244-245.
31 Paragraph 14.
32 (1992), 100 Nfld. & P.E.I.R. 260.
33 Paragraph 30 of *Parsons*, as quoted in paragraph 14 of *Neil*.

attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests."[34]

Thus, while the rule adopted by the Court is explicitly formulated as a bright line, it is apparent from the *Neil* judgment itself that its application will require a balancing of competing considerations. Cases that have been released since *Neil* have emphatically reaffirmed the continuing vitality of this balancing exercise.

V Case Law Since *Neil*

Cases decided since *Neil* have provided at least preliminary answers to some of the questions raised about its meaning and scope. Other questions must remain unanswered until higher courts explore the practical limits of the duty of loyalty.

In at least one decision, at the court of appeal level, the *Neil* case has been considered to provide little assistance in the resolution of other cases because the principles articulated by the Supreme Court of Canada were based on such unusual facts. More frequently, the courts have reaffirmed the continuing need to balance competing considerations in determining whether a law firm should be disqualified from continuing to act in a matter because of an alleged breach of the duty of loyalty.

In some cases the scope of the *Neil* principle appears to have been extended beyond what a narrow reading of the case might suggest. In other cases, the courts have declined to give effect to the duty of loyalty even in circumstances in which at least a broad reading of *Neil* would result in a finding that a firm has a disqualifying conflict of interest.

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[34] Paragraph 15.

In the meantime, the law governing lawyers' conflicts of interest based on *MacDonald Estate v Martin* confidentiality duties has continued to evolve.

We discuss below the most important post-*Neil* Canadian conflict of interest cases.

(a) Balancing Competing Objectives

(i) In *Chiefs of Ontario v Ontario*[35], Justice Archie Campbell of the Ontario Superior Court ordered that the plaintiffs' solicitors be removed on a motion brought by one of the defendants, for whom the plaintiffs' solicitors had acted in related matters. The decision turned on the scope of a consent provided by the moving party, and is discussed in more detail in that context below. What is important for present purposes is that Justice Campbell's only references to the Supreme Court of Canada's decision in *Neil* (which was released after the *Chiefs of Ontario* case had been argued but before it was decided) were to the effect that in *Neil* the Court "used the language of bright lines and also the language of balancing competing considerations"[36]; and that the determination of the *Chiefs of Ontario* case turned on the application of well-settled legal principles, "including those in *MacDonald Estate v Martin* … as further explained in *Neil*"[37]

Thus, in the *Chiefs of Ontario* case, the Court observed that notwithstanding the bright line drawn in *Neil*, the Supreme Court of Canada nevertheless expressly balanced competing considerations. The Court's determination that the *Chiefs of Ontario* case turned on the application of well-settled legal principles, including those in *MacDonald Estate v Martin* as further explained in *Neil*, suggests that it did not regard *Neil* as having fundamentally altered the legal principles that are applicable on the determination of whether a law firm has a disqualifying conflict of interest. At a minimum, it is clear that the Court did not regard the

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35 (2003), 63 O.R. (3d) 335.
36 At page 340, footnote 5.
37 Page 340, including footnote 6.

bright line painted in *Neil* to have obliterated the need to balance competing considerations before deciding.

(ii) In *Ribeiro v Vancouver (City)*[38] (which, like *Chiefs of Ontario v Ontario*, was argued, but not decided, before the *Neil* decision was released) the British Columbia Court of Appeal made no reference to either the Supreme Court of Canada's bright line or to the need to balance competing considerations. What can be said with certainty, however, is that the Court of Appeal did not read Justice Binnie's bright line to mean that a law firm may never act directly adverse to the immediate interests of a current client in the absence of informed consent, as that is precisely what the firm in question did in *Ribeiro*. The Court of Appeal summarily dispensed with the *Neil* case by saying only that "the facts of that case are so beyond and removed from the facts in the case before us that I cannot see the principles set forth in it as being of any material assistance to the Court in the disposition of this case."[39]

In *Ribeiro* the plaintiff brought an action against the City of Vancouver in which he alleged negligence on the part of police officers employed by the Vancouver Police Department. At the time the action was commenced the plaintiff's solicitors, Lindsay Kenney, also represented the City in two other actions (the Chan actions) involving police officers who had been sued. The firm had also acted for the City's police department in the past in other cases. The City demanded that Lindsay Kenney withdraw from acting in both the Chan actions and the *Ribeiro* action. Lindsay Kenney approached the Insurance Corporation of British Columbia, from which it was receiving instructions in the Chan actions, and the Insurance Corporation terminated those

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38 (2002), 8 B.C.L.R. (4th) 207. See also David O'Connor and Ian Campbell, "*R. v. Neil* – The Supreme Court of Canada Decision on Conflicts and its Treatment by Lower Courts" in (2003), IX Commercial Litigation Journal, No. 4, page 482.

39 Reasons of Hollinrake, J.A., for the majority, at paragraph 26.

retainers. The City brought a motion in the *Ribeiro* action for an order removing Lindsay Kenney from acting for the plaintiff.

At first instance, the British Columbia Supreme Court judge who heard the motion referred to the "conflicting policy values" raised by the case, namely, the right of a litigant of counsel of choice, on the one hand, and the right of a client to be advised and represented by a lawyer without fear that confidential communications passing between client and lawyer will be disclosed or used contrary to the client's interest.[40] The judge at first instance held that the Chan actions were unrelated to the *Ribeiro* claim. He felt constrained, however, to order the firm's removal based on a rule of professional conduct promulgated by the Law Society of British Columbia in 2001, which precluded a lawyer from acting against the interests of any client. Although the judge was "troubled by the absolute character of this prohibition",[41] as the Law Society had created a rule in the name of "undivided loyalty" that could work substantial injustice on a member of the public, the judge found that the Law Society was entitled to deference from the Court, and that the only available interpretation of the rule was that Lindsay Kenney could not act for the plaintiff.

The majority of the Court of Appeal held that the judge at first instance erred in considering himself bound by a rule of professional conduct. Rather, the majority of the Court of Appeal held, the courts should apply the principle expressed in *MacDonald Estate v Martin* that though rules of professional conduct should be regarded as important statements of public policy, the

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40 Quoted in the Court of Appeal's decision at paragraphs 9 through 11.
41 Paragraph 15.

courts are not bound to apply such a code of ethics when called upon to consider removing from the record solicitors who have a conflict of interest.[42]

The Court of Appeal agreed with the judge at first instance that the Law Society of British Columbia rule prohibiting a law firm from acting against the interests of a client was engaged on the facts of the case, as Lindsay Kenney "was acting for both the appellant and the respondents" for a significant period of time.[43] The Court of Appeal also declined to interfere with the judge's conclusion that Lindsay Kenney's retainers in the Chan actions and the *Ribeiro* action were not sufficiently related to require the firm's disqualification on the application of the principles in *MacDonald Estate v Martin*.[44]

In the Court of Appeal's view, as the Chan actions and the *Ribeiro* action were not "sufficiently related", no presumption should be drawn that the firm had confidential information from the Vancouver Police Department that was relevant to the *Ribeiro* action. It referred to the three competing values cited by Justice Sopinka in *MacDonald Estate v Martin*, namely the maintenance of the high standards of the legal profession and the integrity of our system of justice; the need not to deprive litigants of counsel of choice without good cause; and the desirability of permitting reasonable mobility in the legal profession. The Court of Appeal in *Ribeiro* applied *Manville Canada Inc. v Ladner Downs*[45], in which Esson, C.J.S.C., emphasized "the drastic nature of the remedy which is asked for in a proceeding of this kind":

> " One litigant applies to deprive the opposing litigant of the services of the lawyer which it has chosen and which has represented it for years. Such a remedy necessarily imposes hardship and, given that the party deprived of its representative is an innocent bystander in an issue between its lawyer and the opposite party, some degree of

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42 *Ribeiro* at paragraph 5, citing *MacDonald Estate v Martin*, *supra* note 2, at pps. 1244-1246. See also *Gainers Inc. v Pocklington* (1995), 125 D.L.R. (4th) 50 at 53 (Alta. C.A.).

43 Paragraph 7.

44 Paragraph 8.

45 (1992), 63 B.C.L.R. (2d) 102, affirmed (1993), 76 B.C.L.R. (2d) 273 (C.A.).

> injustice on the innocent party. The imposition of such hardship and injustice can only be justified if it is inflicted to prevent the imposition of a more serious injustice on the party applying. It follows that the injunction should be granted only to relieve the applicant of the risk of 'real mischief', not a mere perception."[46]

The Court of Appeal added that the background of the appellant, who was suffering from paranoid schizophrenia, should lead the court to place greater weight than might otherwise be the case on the right of a litigant to choose counsel.[47]

Accordingly, the Court of Appeal allowed the appeal and dismissed the defendant's motion to remove the plaintiff's solicitors of record.

Thus, in a case in which it acknowledged that the law firm in question had for a significant period of time acted directly against the interests of a current client of the firm, the British Columbia Court of Appeal weighed the competing considerations and declined to order the firm's removal on the basis that the plaintiff's right to counsel of choice outweighed any competing considerations. It did so not only in the face of the Supreme Court of Canada's bright line general rule as expressed in *Neil* that a law firm must not act directly adverse to the immediate interests of a current client in the absence of informed consent, but also in the face of a rule of professional conduct binding on the plaintiff's lawyers that is to the same effect.

(iii) In *de Guzman v de la Cruz*,[48] Justice Ross of the British Columbia Supreme Court dismissed an application brought on behalf of the plaintiff to disqualify counsel for two of the defendants. The moving party contended that there was a conflict of interest inherent in having a single counsel act for the two defendants.

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46 Quoted in *Ribeiro*, at paragraph 20.
47 Paragraph 25.
48 [2004] B.C.J. No. 72.

After quoting from the Supreme Court of Canada's decision in *Neil*, including the bright line general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client without informed consent, Justice Ross dismissed the application on the basis that the interests of the two clients were parallel rather than adverse. While there was a potential for conflict, there was no actual conflict at the time the application was determined, and the defendants' counsel's joint retainer did not breach his duty of loyalty.[49]

Justice Ross also introduced, however, as additional reasons for dismissing the application, two balancing considerations, namely the lateness of the application and the absence of prejudice arising from the joint representation: "here the lateness of the application and the absence of prejudice are such that the fairness of the process would, in my view, be undermined if the relief were to be granted."[50]

(iv) In *Jorgensen v San Jose Mines Ltd.*[51] the British Columbia Court of Appeal allowed an appeal from an order of Justice Pitfield of the British Columbia Supreme Court disqualifying counsel from acting both for the petitioners and for one of the respondents in a proceeding under the British Columbia *Company Act*. On appeal, the appellants contended that counsel should be permitted to continue to act for the petitioners, but accepted that he could not simultaneously act for one of the respondents.

The litigation involved a dispute between two groups of shareholders of a company, San Jose Mines Ltd., namely the Jorgensen Group and the Coutu Group. Counsel for the Jorgensen Group also acted for the respondent San Jose Mines Ltd. after the Jorgensen Group assumed control of the company.

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49 Paragraphs 26-27.
50 Paragraph 29.
51 [2004] B.C.J. No. 1562.

The Court of Appeal cited *Neil*, *Ribeiro*, and *de Guzman*, and held that counsel's representation of the petitioners did not present any actual or potential conflict of interest insofar as the moving parties, the Coutu Group, were concerned, in that counsel had never acted for those shareholders.

As in *de Guzman*, however, the Court went on to engage in a balancing exercise. It observed that "this Court has previously taken a cautious approach to ordering the removal of counsel contrary to the wishes of the clients," Levine, J.A., wrote on behalf of the Court, citing *Ribeiro* and *Manville Canada Inc. v Ladner Downs*.[52] "This cautious approach acknowledges the right of a litigant to his or her choice of counsel and the prejudice from being forced to change counsel in the course of litigation," Justice Levine added. "Balancing those interests are, of course, the interests of public confidence in the integrity of the legal profession and the administration of justice."[53]

"On the peculiar facts of this case" Justice Levine concluded, "where [counsel] had acted for the Jorgensen Group prior to them taking control of San Jose, was jointly retained by them and San Jose for only thirteen days, had never acted for the Coutu Group, and where the Coutu Group alleges no prejudice to him acting for the Jorgensen Group, this Court should not interfere with the entitlement of the Jorgensen Group to counsel of their choice."[54]

(v) Finally, in *Phillips v Goldson*[55] Justice Ferguson of the Ontario Superior Court of Justice dismissed a motion for an order removing the plaintiff's counsel. The motion was brought on behalf of the defendant, who was the widow and estate trustee of a man who had formerly been represented by the plaintiff's counsel.

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52 *Supra*, note 7.
53 Paragraph 31.
54 Paragraph 32.
55 (2003), 68 O.R. (3d) 737.

Justice Ferguson found that the plaintiff's counsel had received from his former client no confidential information relevant to the present litigation and held, therefore, that the test adopted by the Supreme Court of Canada in *MacDonald Estate v Martin* had not been met. Justice Ferguson then proceeded to consider the applicability of the test adopted by the Supreme Court of Canada in *Neil*.

After quoting the bright line general rule expressed by the Supreme Court of Canada in *Neil*, Justice Ferguson observed that "the court smudged the bright line" by defining a conflict as 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" (emphasis added by Justice Ferguson).[56] Justice Ferguson observed that this definition introduces two additional conditions that must be met before a solicitor can be removed because of a conflict of loyalty: "that there is a substantial risk that the new client's representation will be adversely affected and that it will be affected in a material way."[57] Justice Ferguson concluded that the moving party's evidence in *Phillips* did not satisfy those conditions, as the plaintiff's lawyer's retainer could not be said to create a "substantial" risk that his representation of either the present or former client would be "materially" and adversely affected. Justice Ferguson also observed that "while it is not mentioned in the Supreme Court's formula, I can also understand that other factors may be relevant and, in particular, the fact that there is sensitivity entailed in the previous or current subject matter. However, that is not a factor here."[58]

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56 Paragraph 31 of *Neil*, as quoted in paragraph 15 of *Phillips*.
57 Paragraph 16.
58 Paragraphs 17 and 18.

(b) Relevance of Nature of Retainer

In two-post *Neil* cases the Ontario Superior Court has considered the extent to which, if at all, the nature of the services performed by a law firm for a client should be a factor in determining whether it has breached its duty of loyalty by acting contrary to the client's interest.

(i) In *First Property Holdings Inc. v Beatty*[59] Justice Wilson ordered the removal of the solicitors of record for the plaintiffs on the ground that, at the time the action was commenced, the firm had a solicitor-client relationship with one of the defendants. Justice Wilson allowed an appeal form an order of a Master, who had concluded that the work done by the firm on behalf of the defendant - which required a law clerk to complete financial documents that were filed with the Ontario Securities Commission and thereupon entered the public domain - was purely mechanical in nature, and did not give rise to a duty of loyalty that would prevent the firm from acting against the client.

Justice Wilson observed that the allegations in the action commenced by the firm were related to the work performed by the firm for the defendant, in that it was alleged in the statement of claim that disclosure reports prepared by the client and transcribed and sent to the OSC by the firm, were deficient. Justice Wilson also made note of the fact that a lawyer at the firm asked the law clerk handling the client's OSC filings what she knew about a certain filing. The law clerk confirmed that that filing had not been made for a specified period of time. This specific allegation was reflected in the statement of claim. Although the information disclosed was public, Justice Wilson found that "this incident does not, in my view, pass muster."[60]

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59 [2003] O.J. No. 2943.
60 Paragraph 10.

Apart altogether from the relationship between the work performed by the firm and the allegations made against the client, Justice Wilson held that there should not be different classes of clients, with differing duties owed to them depending upon the nature of the work performed and advice given. "A current client of a law firm, even a client for whom mechanical tasks are performed, is entitled to a duty of loyalty. It is not within the reasonable expectations of the client in these circumstances or a member of the public that the law firm could be retained by a third party to sue them," Justice Wilson held.[61] On the authority of *Neil*, Justice Wilson concluded that "the bright line test applies with respect to suing an existing client of the law firm."[62] The Master had erred, in Justice Wilson's opinion, by embarking on an analysis based on the balancing of competing interests, including a review of the nature of the work performed by the law firm. As the moving party was a current client of the firm at the time the action was commenced, the firm owed it a duty of loyalty that prevented it from acting directly adverse to the client's immediate interests.[63]

Finally, Justice Wilson observed that the result of the motion may have been different if the firm had set up its retainer in such a way that it was clearly acting only as a filing agent on behalf of the client's outside corporate counsel, rather than acting for and taking instructions directly from the client.[64]

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61 Paragraph 12.

62 Paragraph 16.

63 Paragraph 37.

64 Paragraph 44. Justice Wilson cited the decision of Gillese J. (as she then was) in *Smith v Salvation Army in Canada* (2000), 50 C.P.C. (4th) 331 (Ont. S. Ct.) In *Smith*, the law firm in question was retained as agent by another law firm to swear affidavits and serve and file materials on a motion on behalf of its client. There was no direct retainer between the agent law firm and the client. The agency relationship for work on behalf of that client occurred only once. Perhaps most importantly, in *Smith* the law firm's retainer was completed before it accepted a retainer to act against its former client. The *Smith* case pre-dated *Neil*, but because there was no current solicitor-client relationship at the time the new retainer was accepted, it would not in any event have come within the *Neil* prohibition against acting directly adverse to the immediate interests of a current client.

(ii) In *Uniform Custom Countertops Inc. v Royal Designer Tops Inc.*[65], Justice Cumming dismissed a motion for an order removing the solicitors of record for the defendants. The plaintiffs alleged that the defendants' solicitors had a current solicitor-client relationship with a 50% shareholder, who was also a director and officer, of the corporate plaintiff in a continuing matter.

Justice Cumming considered the motion on the basis of both a *MacDonald Estate v Martin* analysis and a *Neil* analysis.

He concluded that the firm was not prohibited from acting in the present matter on a *MacDonald Estate v Martin* analysis, as it had no confidential information relevant to the new matter.[66]

On a *Neil* analysis, Justice Cumming cited with approval the finding of Justice Wilson in *First Property Holdings Inc. v Beatty* that a lawyer owes a duty of loyalty to a client even if the task performed by the lawyer is mechanical in nature.[67] Although the law firm maintained an open file on behalf of a company wholly owned by a 50% shareholder of the plaintiff, Justice Cumming found that as the only matter that remained outstanding on that file was "a relatively routine, simple, technician-like task (completion of compliance with the Ontario *Bulk Sales Act*)"[68]. Justice Cumming found that this was "an insufficient matter", and that the delay in its completion was due entirely to the client. "In my view," Justice Cumming held, "the reality is that there is not any current meaningful relationship" between the law firm and the 50% shareholder of the plaintiff "such that any conflict of interest either exists, or can be perceived to

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65 [2004] O.J. No. 3090 (Ont. S. Ct.).
66 Paragraphs 48 and 51.
67 Paragraph 53.
68 Paragraph 43.

exist on an objective test by any reasonable person."[69] Accordingly, Justice Cumming dismissed the disqualification motion.

(c) Impermissibility of Withdrawing from Current Retainer to Avoid a Neil Conflict

In *Toddglen Construction Ltd. v Concord Adex Developments Corporation*[70] a law firm was asked by a defendant to represent it in a construction lien action. The firm was already acting, however, for the plaintiff and its president with respect to continuing corporate, commercial, and estate-planning advice and other solicitors' work. The plaintiff was represented by a different firm in the construction lien action.

The law firm decided that the retainer to act on behalf of the defendant in the construction lien action would be more lucrative than the relatively modest continuing work it was doing for the plaintiff and its president. It decided that, if the plaintiff would not consent to the firm's accepting the new retainer, it would terminate its relationship with the plaintiff and its president and accept the retainer in any event. The plaintiff refused to consent, and the firm terminated its relationship with the plaintiff and its president.

Master Sandler granted the plaintiff's motion to remove the law firm as solicitors for the defendant. He held that the firm could not convert the status of the plaintiff and its president to that of former clients by the artificial device of contending that, strictly speaking, the firm did not finalize its retainer by the defendant until after the solicitor-client relationship with the plaintiff and its president had been terminated. "In my view," Master Sandler wrote, "the proper realistic way of looking at the situation is that [the defendant] was in the process of becoming an existing client of [the law firm] and was, therefore, within the concept of being a client at the

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69 Paragraph 54.
70 [2004] O. J. No. 1788 (Master).

time, and that [the plaintiff and its president] were still existing clients of the firm, so that the rule that should apply is the *Neil* rule and the not the *MacDonald [Estate] v Martin* rule."[71]

(d) Applicability of the Duty of Loyalty to Former Clients

The general rule expressed in *Neil* applies only to current clients of the affected lawyer's firm. This is clear from (i) Justice Binnie's formulation of the issue in the opening sentence of the Court's judgment; (ii) the Court's refusal to disturb the trial judge's finding that a solicitor-client relationship existed between the appellant and the Venkatraman's law firm at all relevant times;[72] (iii) the Court's consequential rejection of the Crown's submission that the relevant principles are those that govern acting against former clients rather than the stricter rules about acting against current clients;[73] (iv) the summary of the Court's holding in paragraph 3 of the judgment ("the law firm, as fiduciary, could not serve two masters at the same time"); and (v) the Court's statement of the general rule itself, that is, that 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….".[74]

Nevertheless, nothing in *Neil* is inconsistent with the recognition of a more limited duty of loyalty to former clients. The Supreme Court of Canada relied on the judgment of the House of Lords in *Bolkiah v KPMG*[75] in which the House of Lords affirmed that possession of confidential information is "the basis" of the court's jurisdiction to intervene on behalf of a former client while affirming a lawyer's fiduciary duty as the basis of the court's jurisdiction to intervene in cases involving current clients. The Court in *Neil* also, however, quoted

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71 Paragraph 52.
72 Paragraph 23
73 Paragraph 21,
74 Paragraph 29 (emphasis in original).
75 *Supra*, note 25 and accompanying text.

approvingly from the judgment of the Ontario Court of Appeal in *Re Regina and Speid*[76] in which Dubin, J.A. (as he then was), stated that "we would have thought it axiomatic that no client has a right to retain counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client *and a former one*." (Emphasis added.)[77]

It is clear from a close reading of *Speid* that the Ontario Court of Appeal was concerned not only about the possible disclosure or misuse of confidential information, but also was concerned that it would be a breach of a lawyer's duty of loyalty to act contrary to a former client's interest in relation to the matter on which the lawyer was retained. "It was fundamental to [the former client's] rights that her solicitor respect her confidences and that he exhibit loyalty to her. A client has every right to be confident that the solicitor retained will not subsequently take an adversarial position against the client with respect to the same subject-matter that he was retained on. That fiduciary duty, as I have noted, is not terminated when the services rendered have been completed."[78]

The Supreme Court of Canada in *Neil* also cited *Stewart v Canadian Broadcasting Corp.*[79], in which Justice MacDonald applied *Speid* in holding that a lawyer breached his fiduciary duty to his former client by participating in a television programme about a case on which he had served as defence counsel approximately 12 years earlier. The lawyer participated as host, narrator and consultant in the production of the programme over the objections of his former client. The former client had been convicted of a serious criminal offence that had attracted considerable notoriety but had attempted to re-establish himself and put the conviction behind him in the

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76 (1983), 8 C.C.C. (3d) 18
77 Quoted in *Neil* at paragraph 13.
78 At page 21.
79 (1997), 150 D.L.R. (4th) 24 (Ont. Ct. (Gen. Div.)).

interim. The television program was based on trial transcripts and other public documents, and there was no suggestion that the lawyer had disclosed confidential information. Justice MacDonald held, however, that the fiduciary relationship between lawyer and client does not end with the termination of the lawyer and client relationship itself. "Duties arising from that fiduciary relationship may well restrain the lawyer from speaking about the former client's issues or business which were the subject of the concluded retainer, or from taking steps which affect them," Justice MacDonald held.[80] Justice MacDonald paraphrased Justice Gale in *Tombill Gold Mines Ltd. v Hamilton (City)*[81], as follows: "in a fiduciary relationship, the lawyer is prohibited from acting disloyally in matters which are related to the subject matter of the retainer."[82]

The applicability and extent of a lawyer's duty of loyalty to a former client has arisen in at least four post-*Neil* decisions. Three of these are also discussed above.

(i) In *Phillips v Goldson*[83]Justice Ferguson of the Ontario Superior Court of Justice dismissed a motion to remove the plaintiff's counsel, who had formerly acted for the defendant's husband. Justice Ferguson recognized that in some circumstances the duty of loyalty will extend to former clients, though the rules concerning current clients are more strict than those applicable to former clients.[84] He found, however, that the retainer of the plaintiff's lawyer in *Phillips* did not create a "substantial" risk that his representation of either the present or former

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80 Paragraph 301.
81 [1954] O.R. 871 (Ont. H.C.).
82 Paragraph 129.
83 *Supra*, note 55.
84 Paragraph 12.

client would be "materially" and adversely affected, as required by the definition of a "conflict" in paragraph 31 of *Neil*.[85]

(ii) In *Uniform Customs Countertops Inc. v Royal Designer Tops Inc.*[86]Justice Cumming dismissed a motion for an order removing the defendants' counsel. Justice Cumming held that the law firm in question did not have relevant confidential information, and that there was no *current meaningful relationship* between the firm and anyone associated with the defendant such that a conflict of interest either existed, or could be perceived to exist on an objective test by any reasonable person.[87] Justice Cumming made it clear that in his view, reading *MacDonald Estate v Martin* and *Neil* together, a law firm will not have a disqualifying conflict of interest unless (1) it had a previous solicitor-client relationship with the moving party (or one or more persons associated with it) that is sufficiently related to the new retainer, or (2) it has a current solicitor-client relationship with the moving party (or, again, persons associated with it).[88] The mere fact that the law firm previously acted for the moving party does not prevent the law firm from acting against its former client in an unrelated matter.[89]

(iii) In *Chiefs of Ontario v Ontario*[90]Justice Archie Campbell of the Ontario Superior Court of Justice ordered the disqualification of the plaintiff's solicitors, who had previously acted for one of the defendants in related matters. *Neil* (which was released after argument in the *Chiefs* case but before Justice Campbell's decision) was referred to only in passing. The principal issue in the case was the scope of a consent obtained by the law firm to act for the plaintiffs. It is

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85 *Phillips*, paragraphs 15-18.
86 *Supra,* note 65.
87 Paragraphs 45-54.
88 Paragraph 32.
89 This is consistent with applicable rules of professional conduct. See, for example, Law Society of Upper Canada, *Rules of Professional Conduct*, rule 2.04 (4); Canadian Bar Association *Code of Professional Conduct,* Chapter V, commentary 8.
90 *Supra,* note 35.

clear that one of the Court's concerns was the possible use of confidential information by the law firm against its former client. The issues were complicated by the fact that the moving party was a current client of the law firm at the time the consent was obtained, but was a former client by the time the disqualification motion was brought. Justice Campbell's reasons treat the plaintiff's law firm's allegations of impropriety against its (then) former client in an action related to matters on which the law firm advised and represented the client, to be a breach of the law firm's duty of loyalty. "The public interest in the administration of justice requires the confidence of every litigant," Justice Campbell observed, "that their legal advisors will not later attack their honour in matters closely related to their confidential retainers."[91] Justice Campbell concluded that: "There are some things that a law firm simply cannot do. A law firm cannot act for a client under a million dollar, five-year confidential retainer as general counsel and then, without explicit consent, attack the client for alleged breach of fiduciary duty, deception and bribe-taking in respect of closely related matters."[92]

(iv) Finally, the most thorough analysis of the issue of whether lawyers owe a duty of loyalty to former clients is found in decision of the Ontario Securities Commission in *Re Universal Market Integrity Rules*; *Re Credit Suisse First Boston Canada Inc.*[93] The disqualification motion in *Credit Suisse* was brought during a formal investigation commenced by Market Regulation Services Inc. (RS) of Credit Suisse. Credit Suisse retained Stikeman Elliott LLP to act for it in connection with the investigation. Stikeman Elliott had previously been retained by the Toronto Stock Exchange to provide advice on how best to structure and deliver market regulation services in the wake of the rationalization of Canadian stock exchanges, the demutualization of the TSE, and the eventual incorporation of a new corporate entity in the form of RS to deliver

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91 Paragraph 112.
92 Paragraph 146.
93 June 24 2004.

market regulation services. The objective that RS be, and be perceived to be, a neutral and independent market regulator was central to its creation. Stikeman Elliott drafted numerous agreements and documents that were necessary to create RS and to transfer regulatory authority from the TSE to RS.

In the *Credit Suisse* investigation, Stikeman Elliott took the position, on Credit Suisse's behalf, that the relationship between the TSE and RS was so "impermissibly close and overlapping" that it evidenced a bias by RS in favour of the TSE's interests and thereby deprived RS of jurisdiction; and that the TSE had not succeeded in effectively delegating its regulatory authority to RS. RS maintained that in raising these defences Stikeman Elliott was attacking the very advice it had provided previously to the TSE and, indirectly, to RS, once it was incorporated. A hearing panel of RS agreed, and ordered Stikeman Elliott's disqualification. This order was upheld by a panel of the Ontario Securities Commission.

The Commission (overruling the hearing on panel on this point) found that during its original retainer Stikeman Elliott had acquired confidential information that was relevant to the issues it raised on behalf of Credit Suisse. That finding would have been sufficient to justify disqualification on a *MacDonald Estate v Martin* analysis. Nevertheless, the Commission proceeded to consider whether Stikeman Elliott also owed a duty of loyalty to its former client that prevented it from acting contrary to RS's interests.

The Commission observed that while *MacDonald Estate*, *Neil*, *Bolkiah*[94] and *Chapters v Davies Ward & Beck*[95] are all relevant in deciding whether a retainer by a former client creates a disqualifying conflict of interest, they are all focused on the more typical case where

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94 *Supra*, note 25.
95 (2001), 52 O.R. (3d) 566 (C.A.).

confidential information is in issue. However, the Commission held, none of these decisions foreclose a duty of loyalty to a former client in appropriate circumstances.[96]

The Commission held that "[t]here is no doubt that a lawyer's duty of loyalty to a former client is less onerous than its duty to a current client. However, based on our review of the relevant authorities, we have concluded that *Speid*, *Stewart* and *Chiefs* all provide support for the view that the law in Canada provides for a subsisting duty of loyalty to a former client."

The Commission added that a law firm does not necessarily offend a duty of loyalty merely by acting for a new client against a former client. The Commission agreed with the hearing panel, however, that Stikeman Elliott could not, in acting for Credit Suisse, attack the very legal advice it had provided to the TSE and, by extension, RS.

The *Credit Suisse* case also raised issues concerning whether a lawyer's duty of loyalty to a former client may be extended to other parties in some circumstances, and the sufficiency of a general consent by the former client to its law firm acting against it in future. These issues are dealt with below.

In summary, *Neil* did not itself extend the lawyer's duty of loyalty to former clients. Cases that pre-dated *Neil* did, however, extend the duty to former clients, and those pre-*Neil* cases have been applied since *Neil* was released to prevent lawyers from acting contrary to their former clients' interests. Both of the post-*Neil* cases in which law firms were disqualified could have been decided exclusively on the basis that the law firm in question possessed relevant confidential information that would have prevented it from acting even if the duty of loyalty to a former client had not been engaged. The duty of loyalty to a former client is much less onerous than is the duty of loyalty to a current client, and will prevent a law firm from acting against the

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[96] Paragraph 133.

former client only where to do so would require the law firm to attack the very advice that it provided to its former client (*Credit Suisse*), to cross-examine the former client about matters relevant to the previous retainer (*Speid*), to deprive the former client of a benefit of the former retainer (*Stewart*), or to pursue allegations of impropriety against the former client in a matter relevant to the prior retainer (*Chiefs of Ontario*).

(e) Extension to Non-Clients

In several post-*Neil* decisions Canadian courts have considered motions to disqualify counsel from acting by reason of duties owed to parties who were neither clients nor former clients of the lawyer's firm. Although the universe of parties to whom duties of loyalty and confidentiality are owed has been expanded as a result of these decisions, that is not as a result of the *Neil* decision itself; the general rule adopted in *Neil* applies to current clients of a lawyer's firm. Again, the extension to non-clients of the duties owed by lawyers is due more to principles that were recognized before *Neil* was released than to the Supreme Court of Canada's clarification of the implications of the lawyer's duty of loyalty in *Neil* itself.

(i) The first post-*Neil* decision in which the issue arose is *Phillips v Goldson*[97], which is discussed under the sub-heading "Balancing Competing Objectives", above. In that case, while he dismissed the disqualification motion for the reasons referred to above, Justice Ferguson (unsurprisingly) accepted that the duties of confidentiality and loyalty owed to a former client are owed equally to the personal representative (who, in *Phillips*, was the widow) of the former client.

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[97] *Supra*, note 55.

(ii) The Ontario Securities Commission reached the same conclusion in the *Credit Suisse* case[98], which is discussed under the sub-heading "Applicability of the Duty of Loyalty to Former Clients" above. In that case, the moving party Market Regulation Services Inc. (RS) sought to disqualify Stikeman Elliott LLP from acting for Credit Suisse First Boston Canada Inc. in relation to a formal investigation undertaken by RS. The basis for the disqualification application was Stikeman Elliott's prior retainer by the Toronto Stock Exchange to advise on the structure and delivery of market regulation services, a retainer that culminated in the incorporation of RS.

Counsel for Credit Suisse argued that Stikeman Elliott owed no duty to RS, which did not even exist at the time of Stikeman Elliott's prior retainer by the TSE.

The Commission rejected this reasoning and, indeed, relied upon the fact that it was impossible for the still inchoate RS to be separately represented to conclude that Stikeman Elliott owed solicitor-client duties to RS. The Commission relied upon commentary to rule 1.02 of the Law Society of Upper Canada's *Rules of Professional Conduct*, which reads as follows:

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

Relying upon the Supreme Court of Canada's decision in *MacDonald Estate v Martin*[99] the Commission held that this commentary "is an important statement of public policy from the

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98 *Supra,* note 93.
99 *Supra*, note 2, at page 1245.

body which regulates the legal profession in Ontario".[100] The Commission added that the Law Society's commentary "re-enforces our determination that it would be inappropriate, in the circumstances of this case, to take too rigid and mechanical an approach as to whether RS became a client and as to whether Stikeman Elliott owes duties to RS notwithstanding the absence of a formal retainer between them."[101]

The Commission was also influenced by the fact that in its prior retainer Stikeman Elliott was dealing with the division of the TSE – TSE Regulatory Services – that ultimately became RS when it was spun off into a separate corporate entity. "The functions, role and personnel that had previously resided within the TSE Regulatory Services division were largely transferred to RS", the Commission observed. "[I]t would be an elevation of form over substance were we to conclude that duties were owed by Stikeman Elliott as long as regulatory services continued to be performed in-house by TSE Regulatory Services but did not extend to RS when it was created for the very purpose of assuming those regulatory responsibilities," the Commission concluded.

(iii) In *Uniform Custom Countertops Inc. v Royal Designer Tops Inc.*[102], which is discussed under the sub-heading "Relevance of Nature of Retainer" above, Justice Cumming dismissed a disqualification motion based on findings that the principles established in *MacDonald Estate v Martin* and *Neil* were inapplicable to the facts established in evidence. Justice Cumming nevertheless held that the duty of loyalty owed to a corporate client by its solicitor may pass through to the shareholders of the corporation in certain situations. Justice Cumming cited rule 2.04 (4) of the Law Society of Upper Canada's *Rules of Professional Conduct*, which provides that:

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[100] Paragraph 98.
[101] Paragraph 98.
[102] *Supra,* note 65.

> " 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
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> (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." (Emphasis added)

(iv) In *Métro Inc. v Régroupement des Marchands Actionnaires Inc.*[103] the Quebec Court of Appeal ordered the disqualification of the defendant's solicitors, Fasken Martineau DuMoulin LLP (Faskens). Although Faskens had previously acted on behalf of the plaintiffs (Métro), the Court of Appeal found that those prior retainers did not create a disqualifying conflict of interest. It was Faskens' representation of underwriters on public offerings of Métro shares, and specifically the firm's acquisition of relevant confidential information concerning Métro's business, that, in the Court of Appeal's view, made it improper for Faskens to act against Métro.

The Court of Appeal's analysis was based entirely on the duty of confidentiality and the principles established by the Supreme Court of Canada in *MacDonald Estate v Martin*. It referred to *Neil* only to make the point that the Supreme Court of Canada there had cited *MacDonald Estate v Martin* with approval, reaffirming the continuing vitality of the principles established in *MacDonald Estate*.[104]

The Court of Appeal accepted that as a result of their participation, often over a matter of weeks, in the due diligence process, lawyers for underwriters become privy to a great deal of confidential information about the issuer, including information regarding such matters as the

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[103] [2004] J.Q. No. 11004.
[104] Paragraphs 32 and 33.

issuer's business strategies and planned acquisitions. Much of this information is not made public through disclosure in a prospectus.

The Court of Appeal quoted commentary to Chapter V of the Canadian Bar Association's *Code of Professional Conduct*[105], which is materially identical to rule 2.04(4) of the Law Society of Upper Canada's *Rules of Professional Conduct*, which was applied by Justice Cumming in the *Uniform Custom Countertops* case. The Court of Appeal concluded that even though Métro was separately represented in the public offerings in which Faskens represented the underwriters, it was nevertheless "involved in or associated with Faskens' client in those matters"; "We must presume Métro management held nothing back and told all to the Fasken lawyers regarding their corporate situation," the Court found, "particularly with respect to the company finances." The company's prospects were revealed in a spirit of collaboration, the Court added, as they should have been. "In fact, there can be no doubt that during the public offerings, Métro acted with the conviction that the facts and intentions it had confided that had remained unpublished could not eventually be held against it," the Court added.[106]

(v) The Newfoundland and Labrador Court of Appeal came to a similar conclusion in *Dobbin v Acrohelipro Global Services Inc*.[107] It disqualified a law firm from acting against a company on the ground that the law firm had acquired confidential information that was relevant to the litigation when it acted for a bank that renewed a credit facility for the company. Again, the Court of Appeal's analysis was based entirely on confidentiality principles and the reasoning in *MacDonald Estate v Martin*. Again, the Court of Appeal applied the commentary to the

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105 Paragraph 57.
106 Paragraphs 89-90.
107 [2005] N.J. No. 124.

applicable rules of professional conduct[108] in holding that the bank was "involved in or associated with" the moving party in the law firm's retainer to act on the renewal of the credit facility.[109]

(vi) The only post-*Neil* decision in which a duty to a non-client was recognized based on pure loyalty principles is *GMP Securities Ltd. v Stikeman Elliott LLP*[110], a decision of Justice Hoy of the Ontario Superior Court of Justice. There was no allegation in that case that the solicitor whose disqualification was sought had confidential information that was relevant to the transaction in issue. Rather, it was alleged that the law firm breached the duty of loyalty it owed to its client, and that the duty was owed not only to the underwriter by whom it was retained, but also to the underwriter's client, which was separately represented.

The applicant GMP Securities Ltd. had retained Stikeman Elliott LLP on a proposed equity financing on which GMP had been retained as lead agent by Wheaton River Minerals Ltd.

While acting for GMP on this proposed transaction, and without GMP's knowledge, Stikeman Elliott accepted a retainer to act for Coeur D'Alene Mines Corporation on what was initially a friendly approach to, and what later became a hostile bid for, Wheaton. If successful, the Coeur offer would have prevented the completion of the proposed transaction, and GMP would not realize the fees that it would earn if the proposed transaction proceeded. When it learned (from a press release issued on behalf of Coeur announcing its proposal to acquire Wheaton) of Stikeman Elliott's retainer by Coeur, GMP terminated its retainer of Stikeman Elliott because of

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[108] Commentary 8 to Chapter V of the Law Society of Newfoundland and Labrador's *Code of Professional Conduct*, which is materially identical to the provisions of the Ontario rules and the CBA *Code* that were applied in *Uniform Custom Countertops* and *Métro Inc. v Regroupement*, respectively.

[109] Paragraphs 38 and 52.

[110] [2004] O.J. No. 3276.

what it alleged was a conflict of interest, and GMP and Wheaton sought an order restraining Stikeman Elliott from acting for Coeur.

Justice Hoy held that Coeur's objective of acquiring Wheaton was directly adverse to the immediate interests of GMP, which was at the material time a current client of the firm. Justice Hoy also found that Stikeman Elliott owed a more limited duty of loyalty to Wheaton, even though Wheaton was represented by its own counsel. Justice Hoy relied (as did Justice Cumming in *Uniform Custom Countertops*[111]) on rule 2.04 (4) of the Law Society of Upper Canada's *Rules of Professional Conduct*, and found that Wheaton was involved in or associated with GMP with respect to the proposed transaction.[112] Justice Hoy rejected Stikeman Elliott's submission that an enormous problem would be created for law firms if investment bankers' counsel were held to owe a duty of loyalty to investment bankers' clients. "I suspect that most investment bankers believe that their counsel will not act against the interests of the investment banker's client in respect of the transaction involving that client that the investment banker has retained counsel to provide advice on, to the extent the investment banker's clients' interests are consistent with the investment banker's," Justice Hoy stated. "In fact," she added, "I suspect most investment bankers would be shocked to think that their counsel could so act." Justice Hoy added that companies that retain investment bankers reasonably believe the investment banker's counsel will not act against the interests of the company with respect to that transaction, to the extent such interests are consistent with those of the investment banker. Because the law firm has a duty to act in the investment banker's interests where those interests differ from the interests of the investment banker's client, the law firm's duty of loyalty to the investment banker's client is limited, Justice Hoy held.

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111 As discussed above, the courts in *Métro* and *Dobbin* relied on materially identical provisions in the CBA *Code* and the Law Society of Newfoundland and Labrador's *Rules of Professional Conduct*, respectively.

112 Paragraph 54.

In supplementary reasons[113], Justice Hoy observed that her conclusion that Stikeman Elliott owed a limited duty of loyalty to Wheaton was influenced by the fact that an investment banker and its counsel are often in essence part of a team which includes the investment banker's client and its counsel, working together with the common objective of effecting a particular transaction the client company seeks to complete. Stikeman Elliott was part of such a team with respect to the proposed transaction, in that it provided advice with respect to the proposed transaction as a whole, and not just with respect to GMP's role as investment banker.

(f) Requirements for an Effective Consent

As discussed above, the Supreme Court of Canada in *Neil* expressly recognized that law firms may act directly adverse to the immediate interests of a current client if both affected clients provide informed consent. The Court also acknowledged that, in exceptional cases, client consent may be inferred and cited, as examples, governments, chartered banks, and other entities that may be described as professional litigants (and who retain many different law firms to act on their behalf), where the law firm's retainer to act against the client is sufficiently unrelated that there is no danger of confidential information being abused.

The scope and effectiveness of a client consent has been considered in two post-*Neil* decisions, *Chiefs of Ontario v Ontario*[114] and *Credit Suisse*[115]. In neither case was the law firm that relied on the consent found to have been permitted to act against its by then former client on the specific facts of each case.

(i) In *Chiefs of Ontario*, Justice Archie Campbell of the Ontario Superior Court ordered that the plaintiffs' solicitors be removed on a motion brought by one of the defendants, for whom the

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113 [2004] O. J. No. 3277.
114 *Supra*, Note 35.
115 *Supra*, Note 93.

plaintiffs' solicitors had acted in related matters. The moving party, the Chippewas of Mnjikaning First Nation (MFN) had been represented by Blake, Cassels & Graydon (Blakes) on matters related to MFN's interest in a casino known as Casino Rama, in which 133 other Ontario First Nations also had an interest. The interests of the other First Nations and MFN (on whose reserve lands the casino was built) were the same in certain regards, but different in others. Eventually, Blakes were retained by the Ontario First Nations (including MFN) to pursue an action against the Province of Ontario. Blakes were also retained by the Ontario First Nations other than MFN to defend an anticipated action by MFN relating to the division of revenues from the casino among the First Nations.

MFN expressly consented in writing to Blakes acting for the other First Nations in both actions. The consent was in the form of a letter to Blakes from counsel retained by MFN to act on its behalf on certain matters in which MFN's interests differed from those of other First Nations. Blakes continued to act for MFN on matters related to Casino Rama after the consent was provided, but MFN had terminated the retainer by the time it brought its motion to disqualify Blakes.

Some time after MFN provided its consent, Blakes (on behalf of the other First Nations) brought a motion to amend its statement of claim in the action against the Province of Ontario by (among other things) joining MFN as a defendant and alleging that MFN had breached its fiduciary duty to other First Nations for its own financial benefit.

Justice Campbell found that the consent was valid and binding "as far as it goes"[116] but that the attack levelled by Blakes against MFN was outside the scope of the consent.

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[116] Paragraph 5.

Justice Campbell concluded that MFN's consent was fully informed on the part of MFN, was sought by Blakes on the basis of full disclosure to MFN, was made by MFN on the basis of independent legal advice, and involved no breach by Blakes of any fiduciary or other professional duty to MFN, and was therefore valid and binding.[117]

Justice Campbell found, however, that the consent was ambiguous. It did not use the word "adversity" or "conflict" or "potential conflict" or any other term suggesting adversity of any kind, let alone adversity of the kind that became manifest in the amendments sought to the statement of claim. "No one looking at the document, then or now, can suggest that it explicitly authorizes on its face a direct and violent attack of the kind Blakes now asserts against the honour of its then client,"[118] Justice Campbell found.

Nor did the consent authorize such an attack by implication, Justice Campbell added. Justice Campbell drew this conclusion based upon four factors: (i) the quality and degree of potential adversity contemplated by Blakes and MFN when the consent was given; (ii) the quality and degree of adversity between Blakes and MFN created by Blakes' motion to transform the action against the Province of Ontario into an attack on MFN as well as the government; (iii) the nature of the retainer between Blakes and MFN throughout the retainer and at the time of the consent; and (iv) the nature of the information to which Blakes had access.[119]

Noting that the adversity at the time of the motion, as evidenced by the amendments to the statement of claim, was "direct and extreme"[120], Justice Campbell found that if Blakes "really wanted a blank cheque to accuse its client of breach of fiduciary duty" it would have done much more to protect itself and its prospective client against a disqualification motion. Specifically,

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117 Paragraph 45.
118 Paragraphs 48 and 49.
119 Paragraph 51.
120 Paragraph 52.

had it adverted to the things it claimed to be covered by the consent, Blakes would have insisted on a clear and unambiguous consent to do what it claimed on the motion that the consent permitted it to do. "The best evidence of what Blakes contemplated at the time, is what Blakes did and did not do at the time," Justice Campbell found. "It did nothing and said nothing at the time to evidence the slightest thought on its part that it would act directly against its then client by expelling it from [the action against the Province of Ontario], making it a defendant, and accusing it of breach of contract, breach of fiduciary duty, and breach of trust. It is a very heavy step for a law firm to do this to a former client, let alone a client with whom it had such a longstanding and lucrative retainer in closely related matters. The clearest consent is required before taking such a heavy step."[121] Justice Campbell concluded that the evidence pointed to the fact that Blakes had no contemplation at the time the consent was obtained of the degree and quality of adversity that ultimately existed between it and MFN, and that at the time Blakes in good faith sought and obtained a *pro forma* consent to acting in the same interest in MFN in the action against the Province of Ontario.[122]

Justice Campbell added that if there were any doubt about the scope of the consent, the issue would be decided adversely to Blakes on the basis of onus. The evidentiary onus is on a law firm that wants to attack a former client to ensure the clarity of the consent. "If the law firm fails to ensure clarity, the law firm pays the price", Justice Campbell held.

Upon balancing an array of competing considerations[123], Justice Campbell ordered Blakes' disqualification. "There are some things that a law firm simply cannot do," Justice Campbell concluded. "A law firm cannot act for a client under a million dollar, five-year confidential

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[121] Paragraph 71.
[122] Paragraph 74.
[123] Listed in paragraph 111.

retainer as general counsel and then, without explicit consent, attack the client for alleged breach of fiduciary duty, deception and bribe-taking in respect of closely related matters."[124]

(ii) In the *Credit Suisse* case, which is discussed above under the sub-heading "Applicability of the Duty of Loyalty to Former Clients", Stikeman Elliott relied on an oral consent obtained from the Chief Executive Officer of the Toronto Stock Exchange, obtained during the course of its retainer to advise on the structure and delivery of regulatory services, that Stikeman Elliott would be free to accept future mandates that could be adverse to the interests of the TSE.

The Ontario Securities Commission found the *Chiefs of Ontario* decision to be directly relevant to a determination of the adequacy of the TSE's consent. The Commission adopted Justice Campbell's holding that the evidentiary onus was on the law firm that seeks to act adversely to the interests of a former client to ensure the clarity of the consent. The Commission found that Stikeman Elliott had not discharged the evidentiary burden of ensuring clarity of consent. The Commission found that there was nothing in the evidence to suggest that the TSE's chief executive officer understood that she was consenting to Stikeman Elliott attacking, at some point in the future, the regulatory structure that it was retained to advise on and to help create. Because the nature and scope of the consent was imprecise and ambiguous, in the Commission's view, the Commission declined to conclude that it was informed or that the scope of the consent was broad enough to extend to the types of allegations that Stikeman Elliott sought to advance on behalf of Credit Suisse, which would be tantamount to permitting the firm to repudiate the very advice it was retained to provide.[125]

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[124] Paragraph 146.
[125] Paragraphs 109 to 112.

(g) Scope of Retainer

The British Columbia Court of Appeal had occasion to consider the interaction between a law firm's duty of loyalty and its contractual obligations, as defined by a written or oral retainer, in *3464920 Canada Inc. v. Strother*[126], in which the Court reversed a decision of Justice Lowry of the British Columbia Supreme Court[127] dismissing an action by a client against a lawyer, Robert Strother, and his firm, Davis & Company, among others. The Court of Appeal found that Mr. Strother and Davis & Company had breached their fiduciary duties to the plaintiff.

The Court of Appeal decision in *Strother* has attracted considerable attention, largely because of the significant amount of money at stake. The case arose out of what Justice Lowry at trial accurately described as a "convoluted factual background".[128] It is by no means clear that the Court of Appeal's judgment establishes any new principles or extends the principles established by the Supreme Court of Canada in *Neil*, particularly in light of the extent to which the decisions of both Justice Lowry and the Court of Appeal were driven by the unusual and complex facts of the case. At this writing, a motion for leave to appeal to the Supreme Court of Canada is pending, and the profession will have further guidance from that Court if leave is granted.

The plaintiff (which was then known as Monarch Entertainment Corporation) had retained Davis & Company to advise on tax assisted production services financing (TAPSF), a film industry tax shelter. Monarch and Davis & Company entered into a written retainer agreement covering the years 1996 and 1997, whereby Davis & Company agreed to provide such services exclusively to Monarch, and Monarch agreed to pay fees that varied depending on the volume of transactions.

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126 [2005] B.C.C.A. 35.
127 [2002] B.C.J. No. 1982.
128 Paragraph 34.

In late 1996, the Federal Minister of Finance introduced new rules under the *Income Tax Act* that were intended to end the availability of TAPSF syndications in Canada. The rules came into effect on November 1 1997. Strother advised Monarch (just as other lawyers across Canada advised their clients) that the film industry tax shelter business was over. Mr. Strother advised Monarch that he had no "technical fix" and, acting on this advice, Monarch closed down its TAPSF business after October 31 1997.

Justice Lowry found that the written retainer agreement was not renewed, and could not have been renewed, at least on the basis of providing legal services for the tax shelter business based on fees that were dependent on the volume of transactions.[129]

Nevertheless, Monarch continued to be a client of Davis & Company. In late 1997 and early 1998 Monarch consulted with Mr. Strother and others in the firm about various matters, and the firm billed on the basis of its standard hourly rates. The firm did some continuing clean-up work on the pre-existing TAPSF syndications, and Monarch sought and obtained Mr. Strother's advice on various matters. Monarch enquired about other business opportunities that might be available to Monarch in light of the demise of the film industry tax shelter business. Justice Lowry found, however, that Monarch was not consulting Mr. Strother for advice on the rules that had put an end to their film industry tax shelter business or to explore whether there was any possibility of that business in some way being continued. "What they wanted to know was whether Monarch could do anything else apart from tax-sheltered financing."[130]

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[129] Paragraph 106.
[130] Paragraph 100. See also the Court of Appeal's decision at paragraph 13.

In the meantime, beginning in January 1998[131], Mr. Strother was consulted by a former employee of Monarch, Paul Darc. (Monarch had terminated Mr. Darc's employment at the end of October 1997 pursuant to notice given him eight months earlier, when Monarch determined that it was likely that Monarch's business of promoting tax-assisted financing for American-made films would be wound down.) In March 1998, acting on Mr. Darc's instructions, Mr. Strother sought an advance tax ruling for a tax-assisted production services financing of an American film. Mr. Strother prepared the request for the ruling without charge in return for Mr. Darc's agreement that Mr. Strother would participate equally in any profit realized through a share option should the desired ruling be granted. Responsibility for expenses associated with the request were to be borne by Messrs. Darc and Strother.

The request for an advance tax ruling was based on an exception to the new rules under the *Income Tax Act.* Revenue Canada issued an advance tax ruling in October 1998. Messrs. Darc's and Strother's new business, which they called Sentinel Hill, was then in operation. It managed by the end of 1998 to close transactions with a total value of $260 million in studio production. Mr. Strother left Davis & Company on March 31 1999 to join Sentinel Hill.

Justice Lowry found that, because the retainer between Davis & Company and Monarch that contained an exclusivity agreement had come to an end, the firm no longer had a duty to advise Monarch of the possibility that TAPSF syndications could be revived. He concluded that, in 1998, there was no advice Mr. Strother was required to give Monarch that fell within the scope of the firm's retainer after the end of 1997. Justice Lowry added that the scope of the post-1997 retainer did not oblige Mr. Strother to tell Monarch what he held in confidence by virtue of his

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[131] Justice Lowry found at trial that Messrs. Strother and Darc did not act in concert during the last two months of 1997 to subvert Monarch's interests: "I find that Mr. Strother concealed nothing from Monarch in 1997 in order to take a benefit for himself." See paragraphs 78 and 91.

acting for Mr. Darc.[132] While recognizing the fiduciary nature of the relationship between Davis & Company and Monarch, Justice Lowry observed that "that is not to say that his duty to advise was not governed by the scope of the retainer on which his services were provided as found in its terms, express or implied. His fiduciary duty did not serve to broaden his contractual duty in the sense of requiring him to give advice or provide information beyond what his firm's retainer required."[133] Justice Lowry also found that Davis & Company never acted against Monarch: "At best, Monarch and Sentinel Hill were no more than commercial competitors."[134]

The Court of Appeal disagreed with Justice Lowry's statement that Mr. Strother's fiduciary duty "did not serve to broaden his contractual duty in the sense of requiring him to give advice or provide information beyond what his firm's retainer required." The Court of Appeal emphasized that "the very reason that Monarch had abandoned its TAPSF business and was looking around for other alternatives was that Mr. Strother had told them that there was nothing to be done in the way of TAPSF syndications under the new rules. The Court of Appeal acknowledged that if the idea for circumventing the intent of the rules designed to bring an end to TAPSF financings was confidential information of Mr. Darc's, Mr. Strother had a duty not to disclose it to Monarch. The Court of Appeal added that "having undertaken to work toward a tax ruling that would contradict the continuing advice that he had given and was continuing to give Monarch – either by his silence or by telling his principals there was 'nothing to be done' - Mr. Strother had placed himself in a position of conflict of duty and of interest."[135] The Court of

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[132] Paragraph 22.
[133] Paragraph 45.
[134] Paragraph 113.
[135] Paragraph 25.

Appeal stated that Mr. Strother "should have told Mr. Darc that he 'could not accept this business'."[136]

It is unclear to what extent the Court of Appeal was influenced by Mr. Strother's personal financial interest in Sentinel Hill. Certain passages from the Court of Appeal's judgment, however, suggest that this was an important factor in the Court's view. "It was in [Mr. Strother's] personal interest to ensure that Monarch remained ignorant of what he knew – that a 'technical fix' was a possibility", the Court observed.[137] The Court also pointed out that Monarch was relying for advice from a lawyer who was entitled to 50% of the profits and equity shares of Sentinel Hill: "unbeknownst to Monarch, Mr. Strother himself *was* 'the competition'".[138]

(h) Acting for Competitors

Strother is the only case in which the courts have been called upon to consider whether acting for a competitor of a client offends the Supreme Court of Canada's injunction in *Neil* against representing one client whose interests are directly adverse to the immediate interests of another client. At trial, Justice Lowry held that solicitors must be free to act for commercial competitors unless they possess or acquire confidential information that raises a conflict that precludes them from accepting a retainer or from continuing a retainer once commenced.[139]

The Court of Appeal did not doubt "as a general proposition" that solicitors may routinely act, and must be free to act, for clients who are competitors. The Court of Appeal held, however, that that general proposition was not determinative in *Strother* itself. "Not only were Monarch

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[136] Paragraph 25. The words in single quotes are from the judgment of Lord Cozens-Hardy M.R. in *Moody v Cox and Hatt*, [1917] 2 Ch. 71.
[137] Paragraph 27.
[138] Paragraph 29.
[139] Paragraph 115.

and Sentinel Hill 'commercial competitors'; Monarch was relying for advice from a lawyer who was entitled to 50% of the profits and equity shares of Sentinel Hill.[140]

(i) When is a New Mandate Directly Adverse to a Client's Immediate Interests?

There has been surprisingly little elaboration to date on the meaning of the modifiers "directly" (adverse) and "immediate" (interests) in the Supreme Court of Canada's bright line general rule. In *R v. Shamray*[141], however, Justice McCawley had little hesitation in disqualifying a law firm from acting for an accused person who was charged with defrauding another current client of the firm, in circumstances in which the firm represented the clients on the very transaction that gave rise to the criminal charges. Justice McCawley regarded the possible misuse of confidential information by the firm as "a minor issue"[142] in light of the loyalty issues raised by the case. Justice McCawley applied *Neil* and *Speid* in deciding that to allow the firm to continue to act for the accused person "would seriously undermine public confidence in the administration of justice."[143]

(j) Migrating Lawyers and Law Firm Mergers

In two post-*Neil* cases Canadian courts have ordered the disqualification of law firms from acting in civil litigation by reason of a conflict that arose by reason of the prior representation of an adverse party to the litigation by a lawyer (or lawyers) who later joined the firm (in one case, by way of a merger).

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140 Paragraph 29.
141 [2005] M.J. No. 10.
142 Paragraph 34.
143 Paragraph 60.

(i) In *Skye Properties Ltd. v. Wu*[144] the Divisional Court upheld an order removing the solicitors of record for approximately 100 investors who were parties to litigation that had been continuing for more than seven years. The order was made shortly before the trial was scheduled to commence.

The investors' solicitors, Gowlings, merged with another law firm, Smith Lyons, effective September 1 2001. Smith Lyons had been retained by the opposite parties to the litigation to advise on the investment and to prepare necessary documents including an offering memorandum that was alleged by the investors to have been misleading. Smith Lyons' clients had put Smith Lyons on notice of a potential claim over in the event that the investors' allegations concerning the offering memorandum were to succeed at trial, and they entered into a standstill agreement with Smith Lyons whereby they agreed not to institute proceedings against the law firm with respect to matters in issue in the investors' action in exchange for Smith Lyons' agreement to waive any limitation period or argument based on delay in the event that the clients were to institute such proceedings based upon the outcome of the investors' action. Smith Lyons also agreed "to provide reasonable cooperation without charge, except for actual disbursements, to counsel for [the clients] in defending against the allegations made by the investors….".[145]

The potential conflict was identified by the merged firm, which erected an ethical screen as of October 5 2001, on which date the two firms physically integrated their offices, but five weeks after the effective date of the merger.

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144 [2003] O.J. No. 3481.
145 Paragraph 48.

The Divisional Court upheld the disqualification order on a traditional *MacDonald Estate v Martin* confidentiality analysis. It accepted that it was appropriate for the Court to balance the competing considerations in determining the motion. The fact that Gowlings did not ensure that an effective screening mechanism was put in place immediately upon the effective date of the merger weighed heavily, however, in the Court's determination that a reasonably well informed member of the public could not be satisfied that there could be no possibility that confidential information would be shared among members of the merged firm.[146]

The Court came to the same conclusion on loyalty grounds. It did not cite *Neil*, which was decided approximately three months before the Divisional Court heard the appeal in *Skye Properties Ltd. v. Wu*, and approximately nine months before the Divisional Court's decision was released. In the Divisional Court's view, the obligation in the standstill agreement to cooperate in defending against the allegations of the investors put the Smith Lyons part of the merged firm in a position of conflict with the Gowlings part of the merged firm.[147]

The Court concluded that the firm had diverging interests internally as to outcome of the litigation, in that as counsel for the investors its interest was in seeing that the investors succeeded, while as potential defendants in a substantial claim over by its former clients, its interest was in seeing that the investors failed.[148] "How can one group of partners in a merged firm advance the interests of the investors in that regard, while another group of partners simultaneously has a duty of loyalty to the defending parties in relation to those same issues?"

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146 The Court said that "there is abundant authority for the proposition that, absent sufficient explanation, the screening mechanism must be in place when the conflict first arises", and cited *Re Ford Motor Co. of Canada, Ltd. v. Osler, Hoskin & Harcourt* (1996), 131 D.L.R. (4th) 419 (Ont. Gen. Div.), *Saint John Shipbuilding Ltd. v. Bow Valley Huskey (Bermuda) Ltd.* (2002), 18 C.P.C. (5th) 216 (N.B.C.A.), and *Feherguard Products Ltd. v. Rocky's of B.C. Leisure Ltd.*, [1993] 3 F.C. 619 (Fed. C. A.).

147 Paragraph 49.

148 Paragraph 51.

the Court asked rhetorically.[149] To dismiss the disqualification motion, the Court held, would be to offend the rule against the simultaneous representation of adverse parties – a breach that cannot be cured through a screening mechanism.[150]

The Ontario Court of Appeal dismissed an appeal from the order of the Divisional Court[151], stating simply that the Court was not persuaded of any error in the decision of the Divisional Court, and that the Court agreed with the reasons given on behalf of the Divisional Court.

(ii) In *Alcan Inc. v Farris, Vaughan, Wills & Murphy*[152] Justice Kirkpatrick of the British Columbia Supreme Court granted a motion brought by the defendant (Alcan) to disqualify the solicitors of record (Farris, Vaughan) for the plaintiff (the District of Kitimat) on the ground that a lawyer who had previously represented Alcan in matters closely and substantially related to the proceeding while at another firm had joined Farris Vaughan. The lawyer had had no involvement in the Kitimat action since joining Farris, Vaughan, and had sworn an affidavit deposing that he had never discussed any information related to Alcan with any member of the firm. Farris, Vaughan did not become aware of the potential conflict until 17 months after it accepted Kitimat's retainer. It then put into place an ethical screen to ensure that the lawyer would be isolated from the Kitimat action.

Justice Kirkpatrick held that the preservation of the integrity of the justice system required that Farris, Vaughan be disqualified from acting in the Kitimat action, as the lawyer had confidential information attributable to a solicitor and client relationship that was directly relevant to the action. The 17-month gap between the potential for disclosure and the erection of the ethical

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149 Paragraph 57.
150 Paragraph 56, citing *Saint John Shipbuilding Ltd. v Bow Valley Husky (Bermuda) Ltd., supra,* note 146 at pp. 229- 230.
151 [2004] O. J. No. 3948.
152 [2004] B.C.J. No. 1199.

screen was found to have been excessive and, in Justice Kirpatrick's view, suggested that the firm had not taken all reasonable measures to ensure that no disclosure of confidential would occur. Justice Kirkpatrick applied a series of decisions to the effect that, in the absence of a sufficient explanation, the court will not recognize the effectiveness of a screening mechanism to prevent the disclosure of confidential information unless it is put into place when the conflict first arises.[153] Justice Kirkpatrick held that it was not sufficient for Farris, Vaughan to simply say that the firm did not know that the lawyer had previously acted on behalf of Alcan. "Ignorance cannot be an answer, otherwise it would encourage wilful blindness on the part of law firms."[154]

The *Alcan* and *Skye Properties* decisions are of course among many cases since *MacDonald Estate v Martin* in which motions for disqualification have been brought based on the duty of confidentiality. Although they were released after *Neil*, their facts did not engage the duty of loyalty in any way. Nevertheless, the *MacDonald Estate v Martin* line of cases have important implications for law firms who must grapple simultaneously with the ramifications of the duty of loyalty as articulated in *Neil*. After reviewing how law societies and the Canadian Bar Association have reacted to *Neil* in their rules of professional conduct, we will turn to the measures that law firms should adopt to protect themselves from those ramifications.

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[153] Justice Kirkpatrick cited *Poehler v. Langer,* [1999] B.C.J. No. 217 (S.C.); *Chippewas of Kettle and Stoney Point v. Canada (Ministry of Indian Affairs)*, [1994] 2 C.N.L.R. 33 (Ont. Gen. Div.); *Feherguard Products Ltd. v. Rocky's of B.C. Leisure Ltd.*, [1993] 3. F.C. 619 (C.A.); *James v. Vogue Developments (Phase II) Inc.*, [2000] O.J. No. 4107 (Sup. Ct. J.); *Skye Properties Ltd. v. Wu*, [2003] O.J. No. 3481 (Sup. Ct. J.); *Ford Motor Co. of Canada Ltd. v. Osler, Hoskin & Harcourt* (1996), 131 D.L.R. (4th) 419 (Ont. Gen. Div.); and *Saint John Shipbuilding Ltd. v. Bow Valley Husky (Bermuda) Ltd.* (2002), 18 C.P.C. (5th) 216 (N.B.C.A.).

[154] Paragraph 73.

VI Post-*Neil* Amendments to Rules of Professional Conduct

The Supreme Court of Canada's decision in *Neil* has not resulted in fundamental changes to conflict of interest rules promulgated by law societies or the Canadian Bar Association. Although conflict rules have continued to evolve, the most significant amendments that have been brought into effect over the last few years can be traced to the emphasis in *MacDonald Estate v Martin* on the duty of confidentiality, rather than to the emphasis in *Neil* on the duty of loyalty. As discussed above[155] the duties of both loyalty and confidentiality found expression in Canadian rules of professional conduct governing conflicts of interest long before the *Neil* decision was released.

(a) CBA Code

The Canadian Bar Association adopted widespread amendments to its *Code of Professional Conduct* at its annual meeting in August 2004.[156] As a direct result of *Neil*, the CBA adopted a commentary to Chapter V (Impartiality and Conflict of Interest Between Clients) that adopts the Supreme Court of Canada's formulation of 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 matters are unrelated, unless both clients consent after receiving full disclosure and, preferably, independent legal advice."[157]

The CBA *Code* was also amended by the addition of a commentary to address the risk that a lawyer or law firm who responds to a request for proposals or other enquiries from potential

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[155] See text accompanying notes 11 to 13.

[156] The CBA *Code* is a prototype or model code which has been adopted (with amendments, in some cases) by law societies in Newfoundland, Prince Edward Island, the Northwest Territories, Yukon, and Nunavut. Portions of the CBA *Code* have also been adopted by law societies in other Canadian jurisdictions.

[157] CBA *Code*, Chapter V, commentary 4.

clients may be disqualified from acting for another party in a related matter as a result of its acquisition of confidential information. The added commentary reads as follows:

> **" Requests for Proposals and Other Enquiries**
>
> 17. Prospective clients often interview or seek proposals from several firms about potential retainers. During the course of such a process, a prospective client may provide confidential information about the potential retainer. As a result, there is a risk that it will be suggested that a lawyer who unsuccessfully participates in the process should be disqualified from acting for another party to the matter. Discussing a potential retainer with a prospective client or participating in a request for proposals process does not itself preclude a lawyer from acting in the matter for another party. Where the prospective client wishes to disclose confidential information as part of the process, the lawyer and the prospective client should expressly agree on whether the disclosure will prevent the lawyer from acting for another party in the matter if the lawyer is not retained by the prospective client. If the prospective client and the lawyer are unable to agree, the lawyer should insist that the prospective client not disclose confidential information unless and until the lawyer is retained."

The CBA also incorporated into the CBA *Code* commentary providing guidance to members respecting measures that should be taken when lawyers transfer between law firms that represent parties adverse in interest. The language of the new commentary was developed by the CBA and by the Federation of Law Societies as a result of the invitation by the Supreme Court of Canada in *MacDonald Estate v Martin* that professional bodies develop guidelines that would satisfy the public that confidential client information will not be disclosed or used in such circumstances.[158] Similar rules and commentary had already been adopted by most law societies. The guidelines at the end of the commentary list measures that law firms should have regard to in establishing effective ethical screens, and are quoted and discussed in this context below. The commentary provides that the guidelines "are intended as a checklist of relevant

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[158] CBA *Code*, Chapter V, commentaries 20 to 32 and accompanying guidelines. Most law societies have adopted rules based on a model rule drafted on behalf of the Federation of Law Societies, which in turn was based on a CBA task force report titled "*Conflict of Interest Disqualification: Martin v Gray and Screening Methods"* (1993).

factors to be considered", and adds that "adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others."

Finally, the CBA considered but rejected a thorough and thoughtful submission on behalf of six law firms who urged the CBA to amend Chapter V to permit law firms, with informed client consent, to represent two or more parties to a transaction on the basis that confidential information will not be shared among the lawyers who are representing different parties to the transaction. Such a regime would have entailed the use of screening mechanisms similar to those that are used where lawyers transfer from one firm to another. The proponents of such a proposed reform submitted that conflict of interest rules should promote freedom of choice for knowledgeable and sophisticated clients, and that where all clients involved consider it to be in their best interests that the same law firm act for all of them on the basis that confidential information will not be shared between clients, and are prepared to consent to such an arrangement, codes of professional conduct should not prevent their preference from being respected.

The CBA's Standing Committee on Ethics and Professional Issues was not prepared to recommend that Chapter V be amended to permit such arrangements. The Committee expressed concern that to allow a law firm to act for different parties to a transaction on such a basis would not be in the public interest in some cases. It was concerned that, notwithstanding the client's consent, a party who learns after the completion of a transaction of information that would have influenced the client's decision to enter into an agreement may justifiably object to the fact that

information known to the firm representing the client (though not the lawyer in that firm representing the client) was withheld.[159]

(b) Law Society of British Columbia

As mentioned in the context of the discussion of the *Ribeiro* case above,[160] the Law Society of British Columbia amended its *Professional Conduct Handbook* in 2001 to add a prohibition against acting against a current client without the client's informed consent. The added rules read as follows:

> " Acting against a current client
>
> 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."

The Supreme Court of Canada's decision in *Neil* was released 15 months after this prohibition was adopted. As discussed above, the British Columbia Supreme Court judge who heard the *Ribeiro* disqualification motion at first instance applied these provisions in ordering the

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[159] The Law Society of Upper Canada came to the same conclusion based on a similar recommendation when it adopted new *Rules of Professional Conduct* as of November 1 2000.

[160] *Supra*, note 38 and accompanying text.

disqualification of the law firm in question, while expressing concern about "the absolute character of this prohibition".[161] The Court of Appeal was evidently equally troubled, as it declined to apply the prohibition and held that the judge at first instance had erred in considering himself bound by a rule of professional conduct.

After the decisions of the Supreme Court of Canada in *Neil* and the Court of Appeal in *Ribeiro* were released, the Ethics Committee of the Law Society of British Columbia recommended that rule 6.3 be amended to enable a lawyer to act, without the client's express consent, against a current client who "regularly engages another lawyer", provided that the lawyer has notified the client in writing at the time the lawyer was initially engaged by that client that the lawyer may act against the client's interests in unrelated matters provided that the lawyer does not possess confidential information that is relevant to the adverse representation. The proposed amendment was opposed by a number of corporate counsel, and Convocation of the Law Society of British Columbia postponed a decision to allow time for consultation with law society members. As of July 2005, the proposed revisions have not been brought back before Convocation.

(c) Law Society of Alberta

In June 2004 and February 2005 the Law Society of Alberta's *Code of Professional Conduct* was amended by the addition of a commentary to provide guidance to lawyers who receive confidential information from prospective clients concerning a matter on which the lawyer ultimately does not act (whether it is because the client chooses not to retain the lawyer, because the lawyer declines to accept the proposed retainer, or because the lawyer is unable to act because of a conflict of interest). The Alberta commentary requires the lawyer to maintain the information received in confidence, but allows the lawyer's firm to act or continue to act

[161] Paragraph 15.

contrary to the interests of the prospective client if the lawyer takes adequate steps to ensure that the confidential information is not disclosed to other firm members representing clients adverse to the prospective client. The commentary reads as follows:

> " C. 3.4 Prospective client: A prospective client is a person who discloses confidential information to a lawyer for the purpose of retaining the lawyer. A lawyer must maintain the confidentiality of information received from a prospective client. Before doing a conflict check, a lawyer should endeavour not to receive more information than is necessary to carry out the conflict check: as soon as a conflict becomes evident the lawyer must, unless the conflict is resolved by the consent of the existing client and the prospective client or Court approval, decline the representation and refuse to receive further information. If the lawyer declines the representation, the information disclosed by the prospective client, including the fact that the client approached the firm, must not be disclosed to those who may act against the prospective client, notwithstanding Chapter 9, Commentary G.1. The firm may act or continue to act contrary to the interests of the prospective client in relation to the proposed retainer if the lawyer takes adequate steps to ensure that:
>
> (a) the confidential information is not disclosed to other firm members representing clients adverse to the prospective client, and
>
> (b) firm members who have the confidential information will not be involved in any retainer that is related to the matter for which the prospective client sought to retain the firm.
>
> The adequacy of the measures taken to prevent disclosure of the information will depend on the circumstances of the case, and may include destroying, sealing or returning to the prospective client notes and correspondence and deleting or password protecting computer files on which any such information may be recorded."

(d) Law Society of Upper Canada

The Law Society of Upper Canada adopted new *Rules of Professional Conduct* as of November 1 2000. Most of the changes to the conflict of interest rule were designed to make the rule more logical and coherent rather than to effect substantive change. The only substantive change that is important to law firms in managing potential conflicts of interest permits a law firm to act against a former client notwithstanding its receipt of relevant confidential information where it is

in the interests of justice that it act having regard to all relevant circumstances, including the adequacy and timing of screening measures. Rule 2.04 (5) reads as follows:

> " **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."

This new Ontario rule came into force two years before the Supreme of Canada's decision in Neil was released, and does not permit a law firm to act directly adverse to the immediate interests of a current client, as prohibited by the general rule promulgated in Neil. Rather, it adopts a balancing (rather than bright line) approach to permit a law firm to act contrary to the interests of a former client, in spite of the firm's receipt of relevant confidential information, where the law firm can demonstrate that it is in the interests of justice to do so.

VII What is a law firm to do?

We turn, then, to the practical implications for law firms of the Neil case and the jurisprudence concerning the duty of loyalty that has developed in its wake. As will be evident from the foregoing analysis of the post-Neil authorities, that jurisprudence cannot be considered in isolation from the authorities that have interpreted and applied the duty of confidentiality as

expressed in MacDonald Estate v Martin. Law firms must at the same time abide by applicable rules of professional conduct, which vary to some extent among jurisdictions.

(a) Computer assisted conflict searches

The heart of a law firm's conflict management system is the database that it maintains so that potential conflicts of interest are immediately identified when the firm is approached about a potential new mandate, and when it is considering employing a lawyer who has practised elsewhere.

Perhaps the most important lesson of the post-*Neil* jurisprudence is the importance of including in the database not only the names of clients, but also the names of other parties to transactions and litigation, and especially those from whom the firm may have acquired confidential information. Firms may be able to avoid disqualification at the instance of not only former clients but also non-clients (as in *Métro*[162] and *Dobbin*[163]) if they promptly identify the basis for concern and promptly put in place an effective ethical screen.

The database should include the proper corporate name of companies and organizational clients, as well as any trade name or alternative name under which the entity carries on business. Where the firm is retained by an insurer to represent an insured, the names of both should be included in the database. It should also include the proper and business names of relevant affiliated companies.

It does not follow from the fact that a firm is acting for an affiliate of a party adverse in interest to a potential client that the firm is precluded by *Neil* from undertaking the new matter. The post-*Neil* cases have not addressed the issue of in what circumstances (if at all) a firm owes a

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[162] *Supra*, note 103.
[163] *Supra,* note 107.

duty of loyalty to an affiliate of a corporate or organizational client. It is likely that neither an "all affiliates" nor a "no affiliates" rule would be adopted by Canadian courts, and that the courts would consider among other factors questions of ownership, operational control, and from whom the firm has been taking instructions on behalf of the affiliate.[164]

The database should be kept current during the course of the mandate by the addition of parties who become involved in the transaction or litigation after the file is opened.

The names of potential clients who ask the firm to respond to a request for proposals or otherwise take part in a selection process should also be included in the database, whether or not the firm is ultimately retained by the potential client. Again, the prompt identification of a party who may take the position that the firm has obtained relevant confidential information that disqualifies it from acting may permit the firm to act for a party adverse in interest if an effective ethical screen is put into place promptly. (Such a result may also be avoided by other means, which are discussed below.)

Finally, in order to avoid the unhappy result of the *Alcan* case[165], the database should include the names of clients previously represented by lawyers who join the firm after practising elsewhere, particularly if the matters on which the lawyers have acted are continuing at the time the lawyer joins the firm. Again, if the firm sets up an effective ethical screen in a timely way, it is likely that it will be able to avoid disqualification in the event that the firm is retained to act for a party adverse in interest to the transferring lawyer's former client.

It is also important that a lawyer who is approached by a potential new client is equally thorough in obtaining the names of all parties to the potential new mandate. The lawyer should insist

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[164] See Charles W. Wolfram, "Legal Ethics: Corporate-Family Conflicts", 2 J. Inst. Stud. Leg. Eth. 295.
[165] *Supra*, note 152.

upon obtaining no confidential information, and providing no advice, until the names are checked against those in the database and any potential conflicts are dealt with, for example by obtaining the informed consent of another client or setting up an ethical screen.

In some instances clients may insist on the names of parties to a transaction not being divulged even to members of the firm. This may occur, for example, where a hostile takeover bid is planned and the element of surprise is important. This should not prevent a proper conflict search from being conducted at the outset, but if the names of the parties are not recorded in the database that may prevent a proper conflict search from being conducted if, for example, another member of the firm is consulted by the target of the hostile bid. Nevertheless, the firm should honour the client's instructions not to divulge the names of the parties to others in the firm. One means of accomplishing this is to identify the matter by a name other than the client's name (*e.g.*, Project Success Story) while populating the database with numerous companies in the industry in question, including the client and the target. A partner (for example, the chair of the conflicts committee) should be assigned responsibility for dealing with conflict searches involving any names on the matter list, on a confidential basis. If and when the matter no longer requires such extraordinary treatment (for example, when a takeover bid becomes public) the names of the parties should be entered into the firm's database in the usual way.[166]

(b) Who decides whether the firm may act in the new matter?

There is general consensus today on the need to discover a potential conflict as soon as possible. The questions of whether the firm may undertake the new mandate and, if so, on what terms, will frequently be difficult, however, as they are likely to involve a balancing of factors arising on the peculiar facts of two or more actual or potential representations.

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[166] See Griffiths-Baker, *supra*, note 5, 105.

It is important to keep in mind that the identification of a potential conflict is only the first step in the process of resolving the problem. In some cases the firm will be unable to act at all, as, for example, when the firm has already been retained to act for an adverse party in litigation. In other cases, the firm will be free to act only with the informed consent of two or more current or former clients. In yet other cases, the firm will be free to act if the client and the firm agree to explicit limitations on the firm's retainer, or if the firm promptly sets up an effective ethical screen.[167]

The question of who within the firm decides whether the firm is free to act and, if so, on what terms, is also important. The lawyers who are directly involved, either because they are approached about a potential new mandate or because they act for another affected client, may not be objective. The temptation presented by a high profile or a lucrative case or transaction, or conversely the fear of alienating a significant client, may result in a skewed application of the governing principles if the decision whether to accept the mandate if left to lawyers who are directly involved. Moreover, a more junior or less influential member of the firm may find it difficult to resist pressure brought to bear by a more senior or influential partner.[168]

A preferable system is for potential conflicts to be resolved by a conflicts (or ethics) committee consisting of at least three partners who are not personally involved in any relevant representation or potential representation.

The conflict committee's function should be restricted to determining whether the firm can lawfully and ethically act and, if so, on what terms (for example, on the basis that an ethical screen be put into place, or that the firm's retainer is limited). Whether the firm should decline a

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[167] *Ibid*, 108.
[168] *Ibid*, page 120.

retainer by reason of a "business conflict" where the retainer is one which the firm may lawfully and ethically accept, should be a management decision. As a result of *Neil*, the question whether the firm may act in a new matter that may impinge adversely on the interests of a current client would be a question for the conflicts committee, but if the conflicts committee were to decide that the retainer may be accepted, management could nevertheless decide not to accept the retainer for business reasons.

Decisions of the conflicts committee should not be subject to appeal; it would be difficult for the firm to demonstrate that its determination was based solely on legal and ethical (rather than business) considerations if the firm's management were to overrule a conflicts committee determination that it would be improper for the firm to act. The conflicts committee should maintain a record of its reasons for determining whether the firm may act and, if so, on what terms, so that the firm can demonstrate that it paid due regard to all relevant considerations should its determination be challenged.

(c) Informed Consent

Apart from the prohibition expressed in rules of professional conduct[169] that a lawyer shall not advise or represent more than one side of a dispute, conflicts of interest may be waived by clients who are fully informed about both the relevant facts and the implications of such a waiver.

The decisions in the *Chiefs of Ontario*[170]and *Credit Suisse*[171]cases demonstrate, however, that the courts are unlikely to give effect to even a sophisticated or independently-advised client's

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169 See, for example, CBA *Code* Chapter V, Rule; Ontario rule 2.04 (2).
170 *Supra*, note 35.
171 *Supra*, note 93.

consent where the firm later seeks to act against the client in a matter that is substantially related to the firm's representation of the client.

There is less reason to be concerned about the validity of a waiver where it is sought promptly after the firm is approached by another client (or potential client) about a new mandate that is completely unrelated to any matter on which the firm has acted for the client whose consent is sought. Justice Binnie's judgment in *Neil* specifically allows a law firm to act in such circumstances (and, indeed, provides that in certain circumstances such a consent may be inferred).[172] Justice Binnie's judgment does not require independent legal advice in every case as a prerequisite to a valid waiver, though it suggests that that would be preferable. The absence of independent legal advice is likely to be important if the client is unsophisticated or vulnerable. It is unlikely to be important in the case of a sophisticated corporation or organizational client who employs a general counsel. In either case, the consent should be reduced to writing and should explicitly set out the relevant considerations and risks.

(d) Ethical Screens

The purpose of an ethical screen is to protect against the disclosure of confidential information. An ethical screen cannot have the effect of protecting a firm against a complaint asserted by a current client on loyalty grounds. It is clear from the Supreme Court of Canada's decision in *Neil* that "it is the firm not just the individual lawyer, that owes a fiduciary duty to its clients . . . ".[173]

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[172] See text accompanying note 29, *supra*.
[173] Paragraph 29.

As the discussion above concerning the *Skye Properties*[174] and *Alcan*[175] cases emphasizes, it is essential that a screen be set up promptly upon the potential conflict arising. This date may be the effective date of a merger, the date on which a lawyer joins the firm from another practice, or the date on which the firm learns of a potential conflict as a result of a potential new retainer. What is important is that the firm immediately take effective measures to ensure that any confidential information relevant to the matter on which the firm is acting is not accessible to any member of the firm involved in the representation.

The specific components of an effective ethical screen will vary from case to case. The most frequently invoked standards are based the guidelines developed by a Canadian Bar Association task force, which are now incorporated as commentary in the CBA *Code*[176] and in the rules of professional conduct of other jurisdictions.[177] Both the CBA *Code* and the Ontario rules make it clear that the guidelines are intended as a checklist of relevant factors to be considered, and that "[a]doption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others." The crucial question, as the Court expressed it in *Young v Robson Rhodes*[178], is "will the barriers work?" Although the guidelines were designed for conflicts arising upon the transfer of a lawyer from one firm to another, they are equally useful where a screen is necessitated by other circumstances requiring the protection of confidential information.

The guidelines read as follows:

" **GUIDELINES**

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174 *Supra*, note 144.
175 *Supra*, note 152.
176 Chapter V, commentary 32.
177 See, for example, the commentary to Ontario rule 2.05.
178 [1999] 3 All E.R. 524 (Ch.D.).

1. The screened member should have no involvement in the new law firm's representation of its client.

2. The screened member should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the previous representation with the screened member.

4. The current matter should be discussed only within the limited group that is working on the matter.

5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No member of the new law firm should show the screened member any documents relating to the current representation.

7. The measures taken by the new law firm to screen the transferring member should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

8. Undertakings should be provided by the appropriate law firm members setting out that they have adhered to and will continue to adhere to all elements of the screen.

9. The former client, or if the former client is represented in that matter by a member, that member, should be advised

   (a) that the screened member is now with the new law firm, which represents the current client, and

   (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

10. The screened member's office or work station and that of the member's secretary should be located away from the offices or work stations of lawyers and support staff working on the matter.

11. The screened member should use associates and support staff different from those working on the current matter.

12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office."

Lawyers, students, and staff may be added to the group that is working on the matter, provided of course that they have not been screened. Added members of the group should provide written undertakings that they have adhered to and will continue to adhere to all elements of the screen.

(e) Retainer Letters

Particularly as a result of the *Neil* decision, some law firms now decline to act for certain smaller clients for fear that doing so may prevent the firm from acting for larger clients on major matters in the future. Both the prospective client and the law firm, however, may be prepared to act if it is clear from the outset that the firm's acceptance of the retainer will not prevent it from acting against the client on unrelated matters either during the currency of the retainer or thereafter. Such an agreement should be reduced to writing in the firm's retainer letter. If the client is prepared to agree that the firm may act against the client even on matters in relation to which the firm has relevant confidential information, provided that a timely and effective ethical screen is set up and that the new matter is handled exclusively by lawyers and staff who have not been involved in the client's representation, that agreement should also be expressly reduced to writing in the firm's retainer letter.[179] Again, to be effective, the client's consent must be based on full disclosure of both the relevant facts and the implications of the consent. Depending upon the sophistication of the client, again, independent legal advice may be required in order for the consent to be enforceable.

Whether or not the client is prepared to consent to the firm acting against it in unrelated matters, it is highly desirable that the scope of the firm's retainer be recorded and communicated to the client in writing. The scope of the firm's retainer is relevant both to the question whether a later

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[179] Several firms in the United Kingdom, including Linklaters, Clifford Chance and Freshfields, are including some or all of these terms in their retainer letters: Julius Melnitzer, "*Conflicts: No Exit*" in Lexpert Magazine, May 2005, at page 67.

retainer is substantially related to an earlier one, and to the question whether the representation has been completed (that is, whether the client remains a current client). To avoid future conflicts, in other words, it is desirable that both the scope and the duration of the retainer be defined in writing as narrowly as possible.

Out of an abundance of caution, the retainer letter may specifically provide that the firm is free to act for competitors of the client, and that the solicitor-client relationship will be terminated upon the completion of the matter on which the firm is retained.

Where the firm is retained by another law firm as agent, the firm should make it clear both in a written communication to the retaining law firm and in identifying its principal when a file is opened that it is acting for the retaining law firm as agent only, so as to avoid any implication of a solicitor-client relationship with the retaining law firm's client. In *First Properties Holdings Inc. v Beatty*[180], Justice Wilson observed that the result of the disqualification motion before her may have been different if the law firm's retainer had been set up in such a way that it was clearly acting only as agent on behalf of outside counsel, rather than acting for and taking instructions from the client directly.[181]

(f) Acting for Competitors of Clients

There is no suggestion in the post-*Neil* authorities that the Supreme Court of Canada's injunction against law firms acting directly adverse to the immediate interests of current clients should be interpreted to prevent law firms from acting generally for commercial competitors of clients. As discussed above, in the *Strother* case[182] Justice Lowry held at trial that solicitors must be free to act for commercial competitors unless they possess or acquire confidential

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[180] *Supra*, note 59.
[181] See note 64, *supra*, and accompanying text.
[182] *Supra*, notes 126 and 127.

information that raises a conflict that precludes them from accepting or continuing a retainer. Although the Court of Appeal did not consider the point to be determinative on the particular facts before the Court, it accepted "as a general proposition" that solicitors may routinely act, and must be free to act, for clients who are competitors.[183]

That is not to say, of course, that a law firm that is representing a competitor of a current client may not, on the particular facts of the case, be found to be to acting directly adverse to the immediate interests of another current client who is a commercial competitor of the firm's other client. It is merely to say that a firm does not act directly adverse to the immediate interests of a current client merely by providing legal services to a commercial competitor.

(g) Issue Conflicts

Similarly, there is no suggestion in any of the post-*Neil* authorities that a law firm would breach its duty of loyalty if it were to act in a case which, if resolved by the courts favourably to the firm's client, may have an adverse effect on another client of the firm. If a firm obtains a favourable decision that establishes a precedent while acting for a plaintiff in a product liability case, for example, that alone would not amount to a breach of the firm's duty of loyalty to clients who are manufacturers. In these circumstances the firm would not be acting "directly" adverse to the "immediate" interests of another current client.

Nevertheless, in light of the absence of jurisprudence to date, it is impossible to be categorical on the subject. One cannot conclude that there is no risk that a firm may be held to breach its duty of loyalty if it acts simultaneously for clients contending for opposite determinations in two

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[183] See text accompanying notes 139 and 140, *supra*.

pending actions in which the same narrow legal issue arises. Such situations are likely to arise infrequently, as factual dissimilarities often distinguish cases that raise similar legal issues.

(h) New Client and Matter Lists

As a secondary means of identifying potential conflicts, lists of new clients and matters should be circulated throughout the firm at frequent intervals. Again, these lists should include the names of all parties. From time to time a potential conflict that was not identified through the initial conflict search (for example, because of the incompleteness of the database) will be identified by a member of the firm who reviews the list of new clients and matters. The new client and matter list should nevertheless be regarded only as a means of double checking to ensure that potential conflicts have not been overlooked. For the reasons discussed above, it is important that potential conflicts be identified before new files are opened.

(i) Requests for Proposals and Other Enquiries

Law firms who respond to requests for proposals from potential clients, or who otherwise participate in potential clients' processes for selecting outside counsel, risk being disqualified from acting against the potential client even if they are not selected to act, if they obtain confidential information from the potential client during selection possess. To guard against this possibility, law firms should expressly agree in writing with the potential client that if the firm is not selected to act, the potential client will not seek to prevent it from acting against the potential client. This agreement may take the form of an acknowledgement that the firm has not obtained any confidential information from the potential client. Alternatively, the potential client may wish to disclose confidential information but may agree that the firm may act against it if the firm is not selected, perhaps on the basis that any confidential information received will be

confined to a small group who are participating in the selection process who will be screened should the firm later undertake a representation against the potential client. If the potential client and the firm are unable to agree, the firm should insist that the potential client not disclose confidential information unless and until the firm is retained. In the absence of agreement with the potential client, members of the firm who may have received confidential information should be screened if the firm is later approached to act on a matter on which the potential client is adverse in interest.[184]

(j) Opening and Closing Files

Although law firms have been held to owe a duty of loyalty to former clients in narrow circumstances[185], the duty of loyalty as formulated by the Supreme Court of Canada in *Neil* is owed principally to current clients of the firm. It is advisable for firms to open separate files for each new matter on which they are retained by a client, and to close each file as promptly as possible after the matter is concluded. Particularly if the firm is acting on a discrete matter, it should write to the clients promptly when the mandate is concluded to confirm that the solicitor-client relationship has come to an end. Although it makes sense for a firm to maintain a general file for clients who seek the firm's advice and representation continually, where a firm keeps a general file open for a client who has not sought the firm's advice or representation for some time the firm may be prevented by the *Neil* doctrine from accepting a retainer to act against the client.

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[184] See the commentaries to the CBA *Code* and the Alberta rules that are quoted in section V (a) and (c), *supra*. See also *Ainsworth Electric Co. v Alcatel Canada Wire Inc.* (1998), 40 O.R. (3d) 123 (Master).

[185] See the discussion under subheading (d) "Applicability of the Duty of Loyalty to Former Clients", *supra*.

VIII Conclusions

(a) The Importance of Neil

In *Neil*, the Supreme Court of Canada held that the duty of loyalty that a lawyer owes a current client prevents the lawyer's firm from acting directly adverse to the client's immediate interests except with the client's informed consent. This prohibition applies regardless of whether the two matters are related, and regardless of whether the firm has confidential information from the client that is relevant to the new matter.

In spite of views to the contrary by some commentators[186], the *Neil* decision itself is not revolutionary. Rather, it is an unsurprising clarification of the nature and implications of lawyers' fiduciary duties to clients, which have long been recognized.

(b) The Increased Incidence of Conflict Issues

Nevertheless, conflicts of interest have become an increasingly frequent and persistent challenge for law firms in recent years. The attention focused on the problem as a result of *Neil* has undoubtedly contributed to the concern, though the specific holding in *Neil* is only one of many contributing factors. Others include the globalization of commerce, the growth (both geographically and in numbers of lawyers) of leading law firms, the increasing mobility of lawyers, increased specialization, and the employment by clients of multiple law firms. Apart altogether from the evolution of the law governing conflicts of interest based on the duty of loyalty as explained in *Neil*, the law based on the duty of confidentiality as explained by the Supreme Court of Canada in *MacDonald Estate v Martin* has continued to develop along a parallel course. As a result of all of these factors and more, conflict of interest issues have

[186] See, for example, Melnitzer, *supra*, note 179, at 68.

become a pervasive feature of the practise of law. The myriad of considerations that must be taken into account by a law firm when addressing potential conflict of interest issues has continued to expand.

(c) Managing Conflicts

Conflicts may arise in a bewildering variety of ways. In only a small proportion of cases, however, is a law firm absolutely prohibited from acting. A law firm must not act on more than one side of a dispute in any case, but in the vast majority of instances the firm may act with the informed consent of affected clients. In most cases in which issues arise as a result of the former representation of a client either by the firm or by a lawyer who has since joined the firm, concerns may be addressed by setting up ethical screens that protect former clients against the disclosure or use of confidential information.

What is important is that the potential conflict of interest be identified and resolved at the earliest possible opportunity. The transaction costs of establishing and administering a responsive conflict management system are considerable, but pale in comparison to the costs of not establishing and administering a responsive conflict management system. These costs include prejudice to clients' interests, harm to the firm's professional reputation, the potential forfeiture of fees charged, unrecoverable work in progress, non-billable time of firm members devoted to vindicating the clients' and the firm's interests, and potential exposure to disqualification motions, professional liability actions, and law society discipline proceedings.[187] These costs, and the risks of disqualification on conflict grounds generally, can be minimized by

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[187] See Simon Chester, "*Conflicts of Interest*" in Lundy, MacKenzie, and Newbury, Barristers & Solicitors in Practice (Markham, Ontario; Butterworths, 1998), at 10-11.

law firms that are conscientious in managing their practices, particularly in undertaking new mandates and in hiring lawyers who have practised elsewhere.

(d) The Continuing Vitality of the Balancing Approach

Although the Supreme Court of Canada in *Neil* purported to establish a "bright line" in promulgating the general rule that a law firm must not act directly adverse to the immediate interests of a current client, both a careful analysis of *Neil* itself and an examination of the authorities in which it has since been interpreted make it clear that in both loyalty cases and confidentiality cases the line is much less bright than a superficial reading of *Neil* might suggest. For example, as discussed above, in *Phillips v Goldson*[188], Justice Ferguson of the Ontario Superior Court of Justice observed that the Supreme Court of Canada in *Neil* "smudged the bright line" in the way in which it defined a conflict of interest.[189] The Court in *Neil* characterized the prohibition as a "general rule", made it clear that the prohibition may be waived by fully informed and properly advised clients, and added that clients' consent may be inferred in certain circumstances. The modifiers "directly" (adverse) and "immediate" (interests) require interpretation as they are applied in new contexts. Law firms generally do not risk disqualification merely because they act for competitors of current clients, or because they seek to obtain results in court that may incidentally have an adverse effect on the interests of another client of the firm.

(e) Expansion of the Universe of Persons to Whom Duties are Owed

In a few post-*Neil* cases courts and tribunals have extended the duties of loyalty or confidentiality (or both) to parties other than the firm's client. Law firms have been prohibited

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188 *Supra*, note 55.
189 See text accompanying note 56, *supra*.

from acting contrary to the interests of former clients on loyalty grounds, but only where to do so would undermine the value of legal services provided to the client in a matter related to the law firm's new retainer.

Courts have also extended the duty of confidentiality to law firms representing parties (including underwriters and bankers) who have obtained relevant information with an expectation that it would not be divulged or used against the party's client. This type of conflict, however, may be guarded against effectively if it is identified and addressed promptly through an effective screening mechanism.

(f) Amendments to Rules of Professional Conduct

Law societies' rules of professional conduct have not undergone a fundamental transformation as a result of *Neil*. Long before *Neil*, rules of professional conduct recognized both loyalty and confidentiality as the doctrinal bases for conflict of interest rules.

The rules in a number of jurisdictions have been revised over the last few years, however, to facilitate the management of potential conflicts of interest, for example by providing guidance to law firms who acquire confidential information from a potential client through their participation in a request for proposals or other selection process. The *Rules of Professional Conduct* of the Law Society of Upper Canada have been revised to expressly permit a law firm to act against a former client, even if the firm has obtained relevant confidential information from it, if the firm is able to establish that it is in the interests of justice that it act having regard to all relevant circumstances, including the adequacy and timing of measures taken to ensure that no disclosure of the former client's confidential information will occur.

(g) Conflict Management Systems

The most important feature of a responsive conflict management system is the database that the firm maintains for lawyers to access electronically to search for potential conflicts. The database should include not only the names of clients and former clients of the firm, but also the names of other parties to transactions and litigation, and particularly those from whom the firm may have acquired confidential information. Firms may be able to avoid disqualification at the instance of not only former clients but non-clients if they promptly identify the basis for concerns and promptly put in place an effective ethical screen. The database should also include any trade name or alternative name under which the entity carries on business, and the proper and business names of affiliated companies. Where the firm is retained by an insurer to represent an insured, the names of both should be included in the database.

The database should be kept current during the course of the mandate by the addition of parties who become involved in the transaction or litigation after the file is opened. Finally, the database should include the names of clients previously represented by lawyers who joined the firm after practising elsewhere, particularly if the matters on which the lawyers have acted are continuing at the time the lawyer joins the firm.

Lawyers who are approached by potential new clients must be equally thorough in obtaining the names of all parties to the potential new mandate. Lawyers should insist upon obtaining no confidential information, providing no advice, and taking no action, until the names are checked against those in the database and any potential conflicts are dealt with, for example by obtaining the informed consent of another client or setting up an ethical screen.

Potential conflicts should be resolved by a conflicts or ethics committee composed of partners who are not personally involved in any relevant representation. The conflicts committee should

be charged with the responsibility of determining whether the firm may ethically undertake a new retainer and, if so, on what terms (for example, whether an ethical screen should be set up or the retainer limited). The conflicts committee's determination should not be subject to appeal. If the conflicts committee decides that the retainer may be accepted, management may nevertheless decide not to accept the retainer for business reasons.

If a determination is made that the firm may act only if a client or former client consents, the firm must make full disclosure of all relevant facts and the implications of the consent. If the issue is complex, and particularly if the client is unsophisticated or vulnerable, the client should also have the benefit of independent legal advice. The consent should be in writing, and should fully explain the disclosure made to the client and the client's reasons for providing the consent.

If a determination is made that the firm may act provided that an effective ethical screen is set up, it is important that the ethical screen be established immediately. The components of an effective ethical screen will differ depending upon the circumstances, but the firm must take all reasonable measures to ensure that confidential information is not imparted to any lawyers or staff who are not screened.

Carefully drafted retainer letters should record clients' agreements that the firm's acceptance of a retainer will not prevent it from acting against the client on unrelated matters, either during the currency of the retainer or thereafter. Retainer letters should also identify the scope and duration of the firm's retainer. The retainer letter may specifically provide that the firm is free to act for competitors of the client, and that the solicitor-client relationship will be terminated upon the completion of the matter on which the firm is retained.

New client and matter lists should be circulated throughout the firm at frequent intervals as a secondary means of identifying potential conflicts.

Firms should open separate files for each new matter on which they are retained by a client, and should close each file as promptly as possible after the matter is concluded. Particularly if the firm is acting on a discrete matter, it should write to the client promptly when the mandate is concluded to confirm that the solicitor-client relationship has come to an end.

While the complexities of potential conflicts of interest should not be underestimated, the extent of the challenge can be significantly minimized through the establishment of a comprehensive database for lawyers to access in searching conflicts, through prompt identification of potential conflicts and thoughtful means of addressing them, and through the education of the firm's lawyers about the importance of identifying and resolving conflicts at the earliest possible opportunity.

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