

BEYOND CONFLICTS OF INTEREST TO THE DUTY OF LOYALTY: FROM MARTIN V. GRAY TO R. V. NEIL

Richard F. Devlin and Victoria Rees*

The recent Supreme Court of Canada decision in R. v. Neil represents a subtle, but significant, reorientation in the language of Canadian legal ethics. Rather than focusing on the negative “avoidance of conflicts of interest,” the duty of loyalty engenders a more positive regulative ideal. However, the authors argue that a number of recent lower court decisions and commentaries from observers manifest some ambivalence in embracing a duty of loyalty. There is particular concern about the compatibility of a vigorous duty of loyalty with the so-called “business model of the law firm”.

La décision récente de la Cour suprême du Canada dans l'affaire R. c. Neil constitue une réorientation subtile mais significative, du discours au Canada au sujet de l'éthique juridique. Plutôt que de se concentrer sur la notion négative d'« éviter les conflits d'intérêts », l'obligation de loyauté comporte maintenant un idéal réglementaire plus positif. Cependant, les auteurs font valoir que diverses décisions rendues par des tribunaux de première instance, ainsi qu'un certain nombre de commentaires avancés par des observateurs, reflètent une certaine ambivalence à l'égard de l'obligation de loyauté. Les auteurs mettent particulièrement en évidence la compatibilité entre l'obligation stricte de loyauté et le « modèle commercial du cabinet juridique ».

- I. Introduction
- II. Overview of Conflicts of Interest
- III. Duty of Loyalty
 - a) *Stewart v. Canadian Broadcasting Corp.*
 - b) *R. v. Neil*
 - c) Cases since *R. v. Neil*
- IV. Recent Nova Scotia Discipline Decisions on Conflicts of Interest and the Duty of Loyalty
- V. Conclusion

Copyright © 2006 by Richard F. Devlin and Victoria Rees.

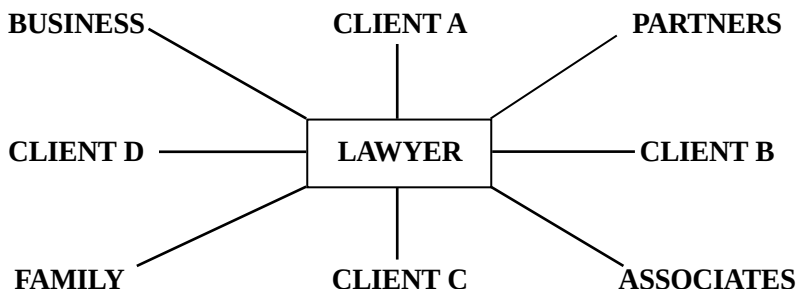
* Richard F. Devlin, Professor and Associate Dean Graduate Studies and Research, Dalhousie Law School; University Research Professor, Dalhousie University; Member, Ethics and Professional Responsibility Committee, Nova Scotia Barristers' Society. Victoria Rees, Director of Professional Responsibility, Nova Scotia Barristers' Society.

I. Introduction

Conventional wisdom tells us that conflicts of interest are probably the most common type of ethical challenge that lawyers experience in their everyday practice.¹ Some conflicts are obvious; for example, the obligation not to represent two sides in a dispute. Other conflicts are subtle, nuanced, obscure and complex; for example, what can a lawyer do with physical evidence of a crime?² Conflicts arise because lawyers find themselves caught in a complex web of relationships, both professional and personal. These include relationships with current clients, former clients, other lawyers, partners and associates, co-parties, witnesses, judges, adjudicators, and family members.

One way to visualize this complex set of relationships is to consider the following diagram:

LAWYER'S WEB OF RELATIONSHIPS



These potentially conflicting relationships give rise to a number of concerns:

This paper began life as a presentation to members of the Hearing Committee of the Nova Scotia Barristers' Society in July 2005. Special thanks to Kate Darling for her excellent research assistance and David Dzidzornu for his thoughtful comments.

¹ See e.g. Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, looseleaf (Scarborough, Ont.: Carswell, 2005) at 5-1. For two authoritative Canadian discussions see Paul M. Perell, *Conflicts of Interest in the Legal Profession* (Toronto: Butterworths, 1995) and M. Deborah MacNair, *Conflicts of Interest: Principles for the Legal Profession*, looseleaf (Aurora, Ont.: Canada Law Book, 2005). See also Richard E. Flamm, *Lawyer Disqualification: Conflicts of Interest and Other Bases* (Berkeley, Cal.: Banks & Jordan Law, 2003) for a review of the American context and Janine Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Oxford: Hart, 2002) for an analysis of the English context.

² See e.g. *R. v. Murray* (2000), 144 C.C.C. (3d) 289 (Ont. S.C.J.); "Forum on Legal

- Disclosure of confidential information about client A to client B;
- Divided loyalties between two clients, C and D;
- Resolute advocacy: because of loyalty to A, a lawyer may not be a strong enough advocate for C;
- Fiduciary obligations: the client's interests should have priority, but there may be economic self-interest on the part of an individual lawyer;
- Client choice: if a lawyer is conflicted, some clients may be denied access to the lawyer of their preference;
- If conflict requires a transfer of a file to another lawyer, this may cause a duplication of work and generate delay, disruption and expense;
- Conflicts claims can be used tactically to impose expense on the other side, and deprive the other side of access to effective and experienced lawyers (a.k.a. beauty contests or taint shopping);
- Economic interests of the legal profession generally.

One straightforward solution to these challenges is to go back to first principles: lawyers are fiduciaries, clients are sovereign, justice should not only be done but manifestly and undoubtedly be seen to be done, hence a lawyer should avoid even the appearance of impropriety. In short, there is a principle of absolute loyalty. As Harradence J.A. has said in *Ramrakha v. Zinner*:

A solicitor is in a fiduciary relationship to his client and must avoid situations where he has, or potentially may, develop a conflict of interests: ... [t]he logic behind this is cogent in that a solicitor must be able to provide his client with complete and undivided loyalty, dedication, full disclosure, and good faith, all of which may be jeopardized if more than one interest is represented.³

As we shall see, however, this has not been the practice in Canada, and it is not what most codes of conduct demand.⁴ This paper seeks to do three things: review how the “law of lawyering” has dealt with the relationship between conflicts of interest and the duty of loyalty in the last two decades; highlight some significant tensions in the case law; and endorse a more comprehensive and vigorous conception of the loyalty principle.

Ethics: The Obligation of Counsel to Both Client and Court” (2001) 50 U.N.B.L.J. 169.

³ (1994), 24 Alta. L.R. (3d) 240 at para. 70, 157 A.R. 279, 77 W.A.C. 279 (C.A.).

⁴ For the purposes of this paper we will refer primarily to the Canadian Bar Association, *Code of Professional Conduct*, online: <<http://www.cba.org/CBA/activities/code>> [CBA Code], the *Legal Ethics and Professional Conduct Handbook* of the Nova Scotia Barristers' Society, online: <www.nsbns.ca/handbook/handbk_jan17_01.pdf> [NS Handbook] and the Law Society of Upper Canada's *Rules of Professional Conduct*, online: <www.lsuc.on.ca/regulation/a/profconduct/> [LSUC Code].

Our analysis unfolds as follows. In Part II we provide an overview of how conflicts of interest have been traditionally conceptualized, culminating with the principles outlined by the Supreme Court of Canada in 1990 in *Martin v. Gray*.⁵ In Part III we begin with a review of recent case law on the duty of loyalty focusing on *R. v. Neil*,⁶ and then proceed to argue that *Neil* has engendered two types of responses, a conventionalist understanding and a revisionist understanding. We then use this same dichotomy to analyse recent case law applying the *Neil* decision to argue that currently there is a significant lack of cohesion in the courts as to what the principle of loyalty entails. Part IV argues that the underappreciation of the requirements of the duty of loyalty is manifest not only in the courts, but also in the decision-making of some practising lawyers, as evidenced by several recent decisions from the discipline committee of the Nova Scotia Barristers' Society. Finally, Part V identifies six more thematic concerns.

II. Overview of Conflicts of Interest

Although it may appear surprising, nowhere in any of the codes in Canada is there a foundational principle of absolute loyalty. There is nothing that is the equivalent of Chapter 1 of the NS *Handbook*, Chapter 1.03 of the LSUC *Code*, and Chapter 1 of the CBA *Code*, all of which create a foundational principle of Integrity. Instead we have a few passing references⁷ to loyalty and a series of extensive but piecemeal and ad hoc sets of provisions⁸ that deal with various aspects of the problems of conflicts of interest.⁹

Traditionally in Canada, we have tended to categorize conflicts into three distinct groupings: client-client, lawyer-client and *sui generis* conflicts:¹⁰

⁵ [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249 [*MacDonald Estate* cited to S.C.R.].

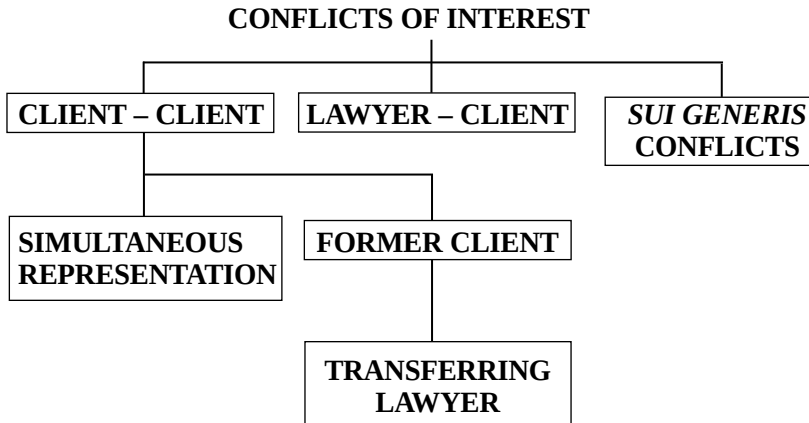
⁶ [2002] 3 S.C.R. 631, 168 C.C.C. (3d) 321 (S.C.C.) [*Neil* cited to S.C.R.].

⁷ NS *Handbook*, *supra* note 4, c. 6.1; LSUC *Code*, *supra* note 4, c. 2.03, 2.04(1); CBA *Code*, *supra* note 4, c. 5.1.

⁸ NS *Handbook*, *supra* note 4, c. 6, 6a, 7-8; CBA *Code*, *supra* note 4, c. 5-7; LSUC *Code*, *supra* note 4, c. 2.04-2.05.

⁹ Perell, *supra* note 1, does give loyalty prominence in Chapter 3, and Hon. Michel Proulx & David Layton proclaim that "[t]he leitmotif of conflict of interest is the broader duty of loyalty," *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 287.

¹⁰ See generally Perell, *supra* note 1 and MacNair, *supra* note 1.



Discussion of *sui generis* conflicts is beyond the scope of this essay, but examples include a lawyer acting for a corporation, serving as a prosecutor, or fulfilling public office.¹¹

The historic focus has been on client-client conflicts. The rule is that in any dispute simultaneous representation is prohibited. But note that this is not absolute; simultaneous representation is permissible if there is informed consent.¹² With respect to subsequent matters, i.e. acting against a past or former client, the basic rule is that there is a prohibition on acting in the “same or related matter” but, if it is “a fresh and independent matter wholly unrelated” to the first then there is no prohibition.¹³ The justification for these exceptions for “informed consent” and “unrelated, fresh and independent matters” is that it is necessary to balance the rights of a former client to confidentiality, the rights of a new client to a lawyer of her choice, and the economic self-interest of law firms.

The Codes also make it clear that the prohibition on subsequent matters applies to “associates” so, as Gavin MacKenzie points out, “[i]n general, if a lawyer has a conflict of interest, every other lawyer in his or her firm has a conflict of interest too.”¹⁴ A fruitful way to approach this problem is to go to the next stage of our tree chart — conflicts arising as a result of a transfer between law firms.

¹¹ See generally Perell, *supra* note 1, c. 5, and MacNair, *supra* note 1, c. 8-9, 12.

¹² NS Handbook, *supra* note 4, c. 6; CBA Code, *supra* note 4, c. 5; LSUC Code, *supra* note 4, c. 5.01(6).

¹³ NS Handbook, *supra* note 4, c. 6 Guiding Principles 8 and 9; CBA Code, *supra* note 4, c. 5 Guiding Principles 8 and 9; LSUC Code, *supra* note 4, Rule 2.04.

¹⁴ MacKenzie, *supra* note 1, c. 5 at 20.13.

This issue came to the fore in *Martin v. Gray*, a.k.a. *MacDonald Estate v. Martin*,¹⁵ i.e. a lawyer in a firm representing client A, transfers to a firm which is representing the other side. The primary concern of the Supreme Court of Canada was that there might be an abuse of confidential information.¹⁶ There was consensus on the Court that the transferring lawyer is conflicted out, but disagreement on whether the new law firm is also conflicted out. Sopinka J., for the majority of four, held that the presumption of shared confidences, and hence vicarious disqualification, was rebuttable if the new law firm could demonstrate clear evidence of institutional mechanisms such as so called “Chinese walls” and “cones of silence” put in place to safeguard against any potential breach of confidentiality. Cory J., for the dissent of three, held that the presumption of shared confidences was irrebuttable, and that the public interest could not be satisfied by any in-house measures adopted by the new law firm. For the purposes of this paper, it is important to note the rationales offered by Justices Sopinka and Cory. Sopinka J. explicitly argued that too strict a rule would have a negative impact on lawyer mobility, the growth of larger law firms, and the ability of subsequent clients to have their choice of lawyer.¹⁷ Cory J., by contrast, argued that neither lawyer mobility nor growth of law firms could justify the exception, and expressed concerns about the genuine efficacy of the “cones of silence” or “Chinese walls.”¹⁸

The core point is that all the Codes follow Sopinka J.:¹⁹ while individual lawyers are disqualified, law firms are not necessarily disqualified if they can show that their representation is in the “interest of

¹⁵ *Supra* note 5. The case has spawned extensive commentary. See e.g. Brent Cotter, “The Supreme Court of Canada Speaks on Lawyers’ Conflicts of Interest” (1991) 17 N.S. Law News 125; Graham Steele, “Imputing Knowledge From One Member of a Firm to Another: *MacDonald Estate v. Martin*” (1991) 13 Advocates’ Q. 90; Archie J. Rabinowitz & Neil S. Rabinovitch, “More About Imputing Knowledge from One Member of a Firm to Another: *MacDonald Estate v. Martin*” (1991) 13 Advocates’ Q. 370; Paul M. Perell, “Classifying Conflicts of Interest” *Law Society of Upper Canada Gazette* 28:1 (March 1994) 11; Rodney Massel, “Case Comment: *MacDonald Estate v. Martin* and Subsequent Decisions in British Columbia Courts” (1992) 50 Advocate (B.C.) 251; Miriam R. Dean & Christopher F. Finlayson, “Conflicts of Interest: When may a lawyer act against a former client?” (1990) N.Z.L.J. 43; Graham Steele, “Imputing Knowledge From One Member of a Firm to Another: ‘Lead Us Not Into Temptation’” (1990) 12 Advocates’ Q. 46.

¹⁶ *MacDonald Estate*, *supra* note 5 at 1246.

¹⁷ *Ibid.* at 1243ff.

¹⁸ *Ibid.* at 1266ff.

¹⁹ In response to *Martin v. Gray*, the Federation of Law Societies drafted a “Model Rule on Conflicts Arising as a Result of Transfer Between Law Firms,” online: <www.flsc.ca/en/publications/conflictRule.asp>. The basic tenets of the Rule have been adopted in most, but not all, jurisdictions in Canada: see MacNair, *supra* note 1 at 4-3. See e.g. CBA Code, *supra* note 4, c. 5; NS Handbook, *supra* note 4, c. 6a, LSUC Code, *supra* note 4, c. 2.05.

justice” and they have established “appropriate institutional mechanisms” to ensure that confidentiality is not compromised. In other words, neither the Supreme Court of Canada nor the Codes subscribe to the ideal of absolute loyalty. The economic interests of the legal profession are also recognized as an extremely important variable. As we will see, Justice Binnie in *R. v. Neil* comes at these issues slightly differently.

However, before we get to *Neil*, it is also important to mention, albeit briefly, the other part of our tree chart, i.e. lawyer-client conflicts. Once again, there are a series of prohibitions: on business transactions, gifts, loans, and standing bail.²⁰ But yet again there are exceptions: business transactions are deemed legitimate if there is informed consent; and gifts are acceptable if independent legal advice has been given.²¹ Such exceptions represent a tempering of the idea of absolute loyalty.

III. Duty of Loyalty

Martin v. Gray was released in 1990. The Federation of Law Societies’ Model Rule was adopted in most jurisdictions in the mid 1990s.²² The basic point to be taken from these developments was that, while loyalty is acknowledged to be important, so too are other countervailing values. Particular solicitude has been shown for the needs of the business model of the law firm. Recently the pendulum may have begun to swing in the other direction. In support of this suggestion we will briefly consider *Stewart v. Canadian Broadcasting Corp.*,²³ and then more extensively, *R. v. Neil* and its progeny.

a) *Stewart v. Canadian Broadcasting Corp.*

This case arose out of Edward Greenspan’s participation as host and narrator on a C.B.C. television program called “The Scales of Justice”. He discussed at length a criminal negligence causing death case in which he had served as a defence lawyer for Mr. Stewart some thirteen years previously. After the program was aired, Stewart sued Greenspan (and the C.B.C.) for breach of contract and his fiduciary duties. The trial level judge made several very important points which emphasized the positive regulative ideal of a duty of loyalty rather than the negative prohibition on conflicts of interest:

²⁰ See *NS Handbook*, *supra* note 4, c. 7-8; *CBA Code*, *supra* note 4, c. 6-7; and *LSUC Code*, *supra* note 4, c. 2, 6.04.

²¹ *Ibid.*

²² *MacNair*, *supra* note 1 at 4-3.

²³ (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.).

- Lawyers are in an intense fiduciary relationship with their clients, and the relationship exists beyond the duration of the retainer;
- The fiduciary relationship imposes a positive duty of loyalty;
- Loyalty is not dependent on confidentiality; it is a larger, freestanding obligation;
- Loyalty arises because of the vulnerability and dependency of clients vis-à-vis the lawyer;
- Loyalty is crucial because the legal profession is an important social institution, and the public needs to have faith and confidence in such institutions.

As a result, the judge found that Greenspan breached the duty of loyalty by favouring his own financial interests, putting his own self-promotion before plaintiff's interests, and increasing the adverse public effect on Stewart of the crimes he committed.

More generally, as Proulx and Layton have emphasized, in the criminal context, "[t]he importance of loyalty to the lawyer-client relationship is underlined by the adversarial nature of the criminal justice system. ... As agents for the litigants, lawyers operate within this adversarial setting, making loyalty towards the client absolutely essential."²⁴ As they continue to point out, loyalty is vital not only for the individual client, but also the administration of justice.²⁵ This theme has been followed up by the Supreme Court of Canada.

b) R. v. Neil

The appellant, David Lloyd Neil, was a paralegal in Edmonton. In October 1994, the Law Society of Alberta supplied the Prosecutors' Office in Edmonton with complaints that the appellant was providing legal advice, contrary to the *Alberta Legal Profession Act*. The ensuing police investigation led to a 92-count indictment against the appellant for a number of different transactions related to different complainants.

The trial judge decided that these 92 counts would be divided into five indictments. The Supreme Court dealt with two of the indictments, one which charged that the accused had fabricated court documents in a divorce action (the Doblanko Divorce) and another that contained charges regarding an alleged scheme to defraud Canada Trust. In response to these charges, Neil argued that the Venkatraman law firm, in particular Gregory Lazin, with whom he had a solicitor-client relationship, was in a conflict of interest with respect to these charges.

²⁴ Proulx & Layton, *supra* note 9 at 287.

²⁵ *Ibid.*

Neil argued that the firm acted simultaneously for the appellant in the Canada Trust proceedings and for his business associate, Helen Lambert, in divorce proceedings at a time when they knew, or ought to have known, that she would also be charged in the Canada Trust criminal proceedings, with an interest adverse to his. The trial judge concluded that Lazin attended for no purpose, except to collect information from the appellant that would be useful to him in his defence of Helen Lambert in the anticipated criminal proceedings. Neil was advised only after the fact that the Venkatraman law firm would not act for him in the Canada Trust criminal case because of its involvement with Helen Lambert. Neil claimed further that in July 1995, Lazin guided Darren Doblanko (of the Doblanko Divorce) to report the forged documents to the same police officer who was dealing with the other indictments against Neil. This, Neil argued, was to strengthen the defence Lazin was preparing on behalf of Helen Lambert in the Canada Trust case.

The Supreme Court of Canada unanimously held that in the context of the Doblanko charges, the Venkatraman law firm (not just Lazin) owed a duty of loyalty to Neil. The firm should have refused Doblanko's retainer. While the Doblanko mandate was factually and legally unrelated to the trust company matter, it was adverse to Neil's interest. Doblanko was an alleged victim of Neil's behaviour in the civil matter, while a client of Venkatraman in the criminal matter. The Court held that the law firm cannot serve two masters at one time and that there was a breach of the duty of loyalty.

The decision in *Neil* has generated two broad responses: the "conventionalists," who claim that it simply reiterates conventional ethical wisdom; and the "revisionists," who, by contrast, suggest that it represents a significant shift in ethical norms for Canadian lawyers.

The conventionalists tend to argue that, given the particular facts, all the case does is to apply traditional conflicts rules.²⁶ First, conventionalists would point out that Binnie J. took as his cue for duty of loyalty Lord Brougham's famous early nineteenth-century defence of Queen Caroline:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that

²⁶ Michael Brooker, "R. v. Neil: A New Benchmark for the Duty of Loyalty?" *The Society Record (Nova Scotia Barristers' Society)* 22:1 (February 2004) 16; Paul M. Perell, "Disqualifying Conflicts of Interest, Reductio Ad Absurdum, and R. v. Neil" (2003) 27 *Advocates' Q.* 218 at 219 ["Reductio"].

of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.²⁷

Second, in the *Canada Trust* aspect of the case, Lazin was clearly in a conflict situation when he attempted to simultaneously represent both Neil and the co-accused, Lambert, especially when he planned to use a “cutthroat” defence and characterize Lambert as Neil’s innocent dupe.²⁸ Third, in the context of the *Doblanko* charges, the conventionalists would point to paragraphs 33-35 in which Justice Binnie held that Lazin and

[t]he Venkatraman firm breached their duty to the appellant in accepting a retainer that required them to put before the divorce court judge evidence of the illegal conduct of their client, the appellant, at a time when they knew he was facing other criminal charges related to his paralegal practice, in which their firm had had a long-standing involvement. It was contended that the *Doblanko* and *Canada Trust* cases were wholly unrelated in the sense that Lazin could not have obtained in the *Doblanko* mandate confidential information that would be relevant in the *Canada Trust* mandate. This, as stated, is not the test of loyalty to an existing client, and it is not entirely true either. While the two cases were wholly independent of each other in terms of their facts, the Lambert’s cutthroat defence was helped by piling up the allegations of dishonest conduct in different matters by different complainants in a way that would make it easier for the jury to consider her a victim rather than a perpetrator. ... It was the Venkatraman firm that put the cat among the pigeons by bringing the *Doblanko* application before the divorce court.

Fourth, the conventionalists would emphasize the particular importance of the role of the criminal defence lawyer in the adversarial system and that Lazin’s behaviour was simply outrageous.²⁹ Fifth, and finally, conventionalists will tend to highlight the fact that Binnie J. was wary of form trumping substance³⁰ and sensitive to the fact that loyalty arguments might be abused and need to be balanced against other equally important legal values:

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

The revisionists, by contrast, tend to highlight a number of other features of the case. First, they point out that this is a unanimous decision

²⁷ *Supra* note 6, para. 12.

²⁸ This would clearly fall within Rule 6 of the *NS Handbook*, *supra* note 4; Rule 5 of the *CBA Code*, *supra* note 4; and Rule 2.04 of the *LSUC Code*, *supra* note 4.

²⁹ See *e.g.* Proulx & Layton, *supra* note 9.

³⁰ *Supra* note 6, para. 15.

³¹ *Ibid.* para. 14.

of the Supreme Court of Canada and that its tone is designed to send a very clear message that loyalty is a *sine qua non* of professionalism.³² The Court “intertwines” loyalty with the fiduciary nature of the lawyer-client relationship,³³ dovetails it with the virtues of an independent bar and the adversarial system,³⁴ proclaims it to be “essential to the integrity of the administration of justice” and the maintenance of public confidence,³⁵ characterizes it as “unassailable”³⁶ and elevates it to the status of a “defining principle.”³⁷ In other words, loyalty is both a private good (individual clients should not be betrayed) and a public good (the community needs to be assured that the truth-seeking function of the adversarial system remains intact).

Second, revisionists emphasize the core proposition that there is a general prohibition against representing a client against a *current* client of the firm, even in fresh and independent matters wholly unrelated to any matter to which it has no relevant confidential information.³⁸ The only exception is where: a) both clients have given informed consent and b) the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.³⁹

Third, Binnie J. articulates an expansive conception of loyalty, specifying in addition to confidentiality three key dimensions: a duty to avoid conflicting interests; a duty of commitment to the client’s cause; and a duty of candour with the client on matters relevant to the retainer.⁴⁰ This is a strong endorsement of the suggestion that loyalty is a governing regulative ideal.

Fourth, while some commentators have dismissed the *Neil* case as an example of egregious conflict in the area of criminal law and, therefore, not of great significance, revisionists argue that this is a mistake because Binnie J. went out of his way to articulate quite carefully the Court’s reflections on the duty of loyalty, echoing the biblical homily that “No man can serve two masters: for either he will hate the one and love the other; or else he will hold to the one, and despise the other.”⁴¹

³² Perell, “Reductio,” *supra* note 26 at 218, 220, 223.

³³ *Supra* note 6, para. 16.

³⁴ *Ibid.* para. 13.

³⁵ *Ibid.* para. 12.

³⁶ *Ibid.* para. 18.

³⁷ *Ibid.* para. 12.

³⁸ *Ibid.* paras. 17, 29.

³⁹ *Ibid.* para. 29.

⁴⁰ *Ibid.* para. 19.

⁴¹ *Ibid.* para. 3. Matthew 6:24 (King James Version).

Consequently, and fifth, Binnie J. makes it clear that a business conflict can now be a legal conflict because “[l]oyalty includes putting the client’s business ahead of the lawyer’s business.”⁴² A lawyer’s desire to “hang onto a piece of litigation”⁴³ is insufficient justification. As a result, retainers will have to be declined because of business conflicts. Moreover, “Chinese walls” and “cones of silence” do not apply in the context of a breach of loyalty⁴⁴ because their concern is confidentiality, not loyalty.

Sixth, and finally, while *Neil* does not overrule *MacDonald Estate*, there may be a tension between Justice Sopinka’s view of ethical priorities in *MacDonald Estate* and Justice Binnie’s view in *Neil*. Sopinka J. justified the rebuttable presumption approach in part on the basis that “lawyer mobility” between law firms is desirable.⁴⁵ But Binnie J. emphasized that the profession’s interest in mobility was circumscribed by the duty of loyalty:

Lawyers are the servants of the system ... and to the extent their mobility is inhibited by sensible and necessary rules imposed for client protection, it is a price paid for professionalism. Business development strategies have to adapt to legal principles rather than the other way around.⁴⁶

Binnie J. explicitly acknowledged that “undoubtedly” his conception of the loyalty principle will be a major inconvenience especially to “national law firms with their proliferating offices in major centres across Canada...,”⁴⁷ but he continued:

Nevertheless it is the firm, not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.⁴⁸

In sum, this overview suggests that the revisionists may have more textual support on their side than the conventionalists. But the obvious

⁴² *Ibid.* para. 24.

⁴³ *Ibid.* para. 24.

⁴⁴ *Ibid.* para. 18; see also Kimberly J. Jakeman & Shanti M. Davies, “The Bright Line: The Decision of *R. v. Neil* and its Impact on the Business of Law in Canada” (2003) 61:5 Advocate (B.C.) 715 at 721.

⁴⁵ *Supra* note 5 at 1263.

⁴⁶ *Supra* note 6, para. 15.

⁴⁷ *Ibid.* para. 29.

⁴⁸ *Ibid.* para. 29 [emphasis in original].

question is: what has been the impact of *Neil*? Have lawyers and law firms attempted to change their practices and norms as a result? Unfortunately, that is a difficult empirical question that we have not had an opportunity to rigorously pursue. There is evidence that some law firms have, and others have not, done anything to respond to *Neil*, such as the adoption of tighter internal control mechanisms.⁴⁹ This sense of ambivalence is reflected in some of the reactions by commentators in the legal profession.

Some analysts have argued that the key phrase — “interests are directly adverse to the immediate interests of another current client” — is highly indeterminate and in need of further clarification by the Supreme Court of Canada.⁵⁰ Others have expressed concerns about how the duty of loyalty may be used strategically: one party could retain a firm on a relatively minor matter and, thereby, preclude a competitor from retaining the same law firm in order to act against it, even in unrelated proceedings.⁵¹ The decision has also been criticized because it could backfire on small occasional clients, in so far as law firms may be reluctant to take a modest retainer for fear of losing a client who will bring in more lucrative retainers.⁵² Finally, it has been suggested that the proposition “[l]oyalty includes putting the client’s business ahead of the lawyer’s business,”⁵³ may have a major impact upon the practice of law, and in particular the practice of corporate law.⁵⁴ This is because, currently, many large law firms’ litigation departments may represent a number of different clients, in unrelated matters, but where there may be business conflicts. Some predict that this will cause these firms to shrink and increase the number of boutique firms; others predict that law firms will have to develop more rigorous regimes for both opening and closing files⁵⁵ and conflict search systems.⁵⁶

To get a sense of whether these criticisms, concerns, fears or hopes have materialized, it might be helpful to review the twenty cases that have substantively considered the ethical dimensions of *Neil* since it was released in 2002.⁵⁷ We organize our discussion by mapping our analysis

⁴⁹ Victoria Rees has conducted an informal survey of law firms in Nova Scotia on this point.

⁵⁰ Perell, “Reductio,” *supra* note 26, para. 230.

⁵¹ Brooker, *supra* note 26 at 17.

⁵² *Ibid.*

⁵³ *Neil*, *supra* note 6, para. 24.

⁵⁴ Jakeman & Davies, *supra* note 44.

⁵⁵ Brooker, *supra* note 26 at 17; Beth Marlin “It’s not you, it’s us” *National Post* (26 January 2005).

⁵⁶ Jakeman & Davies *supra* note 44 at 720-721.

⁵⁷ 3464920 *Canada Inc. v. Strother*, [2005] 5 W.W.R. 108, 2005 CarswellBC 83, 28 C.C.L.T. (3d) 159, 2005 D.T.C. 5059, 2005 BCCA 35 [*Strother I* cited to W.W.R.]; 3464920

onto the distinction we have drawn between the conventionalists and the revisionists.

c) Cases since R. v. Neil

i) Conventionalists

As we have previously suggested, the conventionalists argue that *Neil* has not generated any real difference in the law. Recent decisions from several courts can be used to buttress this position.

First, in *Côté v. Rancourt*,⁵⁸ the Supreme Court of Canada adopted a fairly timid understanding of the duty of loyalty. *R. v. Neil* was only cursorily mentioned. The Court drew a distinction between “some situations [where] the integrity of the judicial system is at stake, while in others the only interests in play are those of the parties,”⁵⁹ inferring that in

Canada Inc. v. Strother (2005), 256 D.L.R. (4th) 319, [2005] 5 C.T.C. 107, 8 B.L.R. (4th) 4, [2005] B.C.W.L.D. 5949, 2005 BCCA 385 [*Strother II*]; *Chiefs of Ontario v. Ontario* (2003), 63 O.R. (3d) 335 (Sup. Ct. J.); *Côté v. Rancourt*, [2004] 3 S.C.R. 248, 244 D.L.R. (4th) 25, [2004] R.R.A. 1066, 325 N.R. 279, 2004 CarswellQue 2348, 2004 CarswellQue 2349, 2004 SCC 58 [*Côté* cited to S.C.R.]; *Coutu v. Jorgensen* (2004), 202 B.C.A.C. 67, 2004 CarswellBC 1742, 331 W.A.C. 67, [2004] B.C.W.L.D. 987, [2004] B.C.J. No. 1562, 30 B.C.L.R. (4th) 344, 2004 BCCA 400 [*Coutu* cited to B.C.A.C.]; *de Guzman v. de la Cruz*, 2004 CarswellBC 85, [2004] B.C.J. No. 72, 2004 BCSC 36 [*de Guzman*]; *Dobbin v. Acrohelipro Global Services Inc.* (2004), 240 Nfld. & P.E.I.R. 313, 2004 NLSCTD 178 [*Dobbin I*]; *Dobbin v. Acrohelipro Global Services Inc.* (2005), 246 Nfld. & P.E.I.R. 177, 2005 CarswellNfld 99, 2005 NLCA 22 [*Dobbin II*]; *First Property Holdings Inc. v. Beatty* (2003), 66 O.R. (3d) 97, 2003 CarswellOnt 2792, 37 C.P.C. (5th) 181, [2003] O.J. No. 2943 (Sup. Ct. J.) [cited to O.R.]; *Frumusa v. Ungaro*, 2005 CarswellOnt 3418, [2005] O.J. No. 2412 (Sup. Ct. J.) [*Frumusa*]; *GMP Securities Ltd. v. Stikeman Elliott LLP* (2004), 71 O.R. (3d) 461, 2004 CarswellOnt 3227, 37 C.L.R. (3d) 113, [2004] O.J. No. 3276 (Sup. Ct. J.) [*GMP Securities* cited to O.R.]; *Phillips v. Goldson* (2003), 68 O.R. (3d) 737, 2003 CarswellOnt 5096 (Sup. Ct. J.) [*Phillips* cited to O.R.]; *R. v. Angers*, [2004] J.Q. no 7415 (C.Q. crim.) [*Angers*]; *R. v. McCarroll*, 2005 CarswellOnt 949 (Sup. Ct. J.); *R. v. Shamray*, 2005 CarswellMan 10, [2005] M.J. No. 10, 2005 MBQB 1 [*Shamray*]; *Ribeiro v. Vancouver City* (2002), 8 B.C.L.R. (4th) 207 (C.A.) [*Ribeiro*]; *River Colony Estates General Partnership v. Hee*, 2003 CarswellBC 2106, 2003 BCSC 1327 [*River Colony*]; *Stoneman v. Gladman* (2003), 174 O.A.C. 1, 2003 CarswellOnt 2442, 37 C.P.C. (5th) 216 (Div. Ct.) [*Stoneman* cited to O.A.C.]; *Toddglen Construction Ltd. v. Concord Adex Developments Corp.* (2004), 34 C.L.R. (3d) 111, 2004 CarswellOnt 1689, [2004] O.J. No. 1788 (Sup. Ct. J.) [*Toddglen Construction* cited to C.L.R.]; *Uniform Custom Countertops Inc. v. Royal Designer Tops Inc.*, 2004 CarswellOnt 2976, [2004] O.J. No. 3090 (Sup. Ct. J.) [*Uniform Custom Countertops*]; *West Fork Ranch Ltd. v. Marcotte*, 2005 CarswellBC 1452, 2005 BCSC 898 [*West Fork Ranch*].

⁵⁸ *Côté v. Rancourt*, *ibid.*

⁵⁹ *Ibid.* para. 11 [footnote omitted].

the latter situation the prohibition against conflicts of interest is lower. The Supreme Court of Canada also suggested that there is no real difference in emphasis between the logic of *MacDonald Estate* and *Neil*,⁶⁰ thereby allowing for ongoing representation despite a conflict of interest. Finally, on the facts, it found that even though two lawyers, each representing one of two co-accused “shared the same offices, the same receptionist, the same secretary and the same area of practice,” they did not share files.⁶¹ So when one of the accused tried a “cutthroat” defence, the Court did not find a disqualifying conflict.⁶² It did, however, comment that “the situation should have been avoided.”⁶³

Second, a number of lower courts have tended to interpret *Neil* quite narrowly. In *Ribeiro* the British Columbia Court of Appeal pointedly confined *Neil* to its particular facts.⁶⁴ In *Stoneman*, the Ontario Divisional Court gave a very specific reading of *Neil* by only discussing “shared confidences” and by suggesting that *Neil* might only apply to national or international law firms.⁶⁵ In *Uniform Custom Countertops*, the Ontario Superior Court of Justice recognized that *Neil* has somewhat broader ambit than *MacDonald Estate*, but indicated that they are broadly compatible.⁶⁶ Moreover, the same court put a great deal of emphasis on the absence of relevant confidential information.⁶⁷ Justice Cumming also pointed out that while there was one minor technical legal relationship between the lawyer and the client, this was not sufficient to generate a “current meaningful relationship.”⁶⁸ In *Frumusa*, the Ontario Superior Court of Justice refused to apply *Neil*’s duty of loyalty standard to the quality of representation a lawyer might provide.⁶⁹

Third, several lower courts have shown deference to values that might conflict with an excessively robust theory of loyalty. In *Coutu*, while the British Columbia Court of Appeal did give a wide range to the substance of a duty of loyalty, it was also highly sensitive to “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.”⁷⁰ In *de Guzman*, the British Columbia Supreme Court refused to disqualify a lawyer because “the petitioners

⁶⁰ *Ibid.* paras. 13-14.

⁶¹ *Ibid.* para. 15.

⁶² *Ibid.* paras. 15-16.

⁶³ *Ibid.* para. 15.

⁶⁴ *Supra* note 57, para. 26.

⁶⁵ *Supra* note 57, para. 27.

⁶⁶ *Supra* note 57, para. 32.

⁶⁷ *Ibid.* paras. 45-51.

⁶⁸ *Ibid.* para. 54.

⁶⁹ *Supra* note 57, paras. 10-17.

⁷⁰ *Supra* note 57, para. 31.

[had] identified no prejudice” and, perhaps more importantly, because it feared that (quoting Justice Binnie) the loyalty argument was being used “merely as a flag of convenience.”⁷¹

Fourth, a number of courts have emphasized that not only must there be loyalty, there must be a “harm” or “prejudice” attributed to any alleged breach.⁷² In *River Colony*, the court found that any breach of duty of loyalty must demonstrate a “loss.”⁷³ In *Phillips v. Goldson*, the Ontario Superior Court of Justice agreed that *Neil* expanded *Martin v. Gray* but also pointed to paragraph 31 of *Neil* to argue that Binnie J. may have “smudged the bright line” by defining conflict to add two additional conditions: “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.”⁷⁴ Similarly, in *West Fork Ranch*, the British Columbia Supreme Court held that a breach of loyalty must have “caused or materially contributed to the Plaintiff’s loss.”⁷⁵

ii) Revisionists

Revisionists, however, can point to a series of other cases to argue that lower courts are developing an expansive interpretation of *Neil*. First, the vast majority of these recent cases are commercial/corporate law cases, thereby repudiating the suggestion that *Neil* should be limited to its particular criminal law context. Corporate solicitors owe a manifest duty of loyalty.⁷⁶ Second, appellate and trial level courts in British Columbia, Manitoba, Ontario, and Newfoundland and Labrador have reaffirmed that loyalty has a larger compass than confidentiality, “including the duty to avoid conflicting interests and the duty of commitment to the client’s cause.”⁷⁷ Third, courts have begun to put increasing emphasis on the duty to respond candidly and completely, especially where the lawyer’s

⁷¹ *Supra* note 57, paras. 28-29.

⁷² See e.g. *de Guzman*, *ibid.*

⁷³ *Supra* note 57, para. 35.

⁷⁴ *Supra* note 57, paras. 13, 15-16. See also Richard Peck, “Serving Two Masters: Conflicts of Interest, the Duty of Loyalty and Removal of Defence Counsel” (Paper presented as part of the National Criminal Law Program, Dalhousie University, July 2004) [unpublished].

⁷⁵ *Supra* note 57, para. 101.

⁷⁶ See also Kimberly J. Jakeman & Julie K. Gibson, “The Bright Line vs. The Bottom Line: Consequences of Crossing the Bright Line,” online: <www.harpergrey.com/publications/commercial-litigation/bright-vs-bottom.htm>.

⁷⁷ *Coutu*, *supra* note 57, para. 28; *de Guzman*, *supra* note 57, para. 25; *Strother I*, *supra* note 57, paras. 7, 29; *River Colony*, *supra* note 57, para. 29; *Toddglen Construction*, *supra* note 57, para. 56; *GMP Securities*, *supra* note 57, para. 17; *Shamray*, *supra* note 57, paras. 33-34; and *Dobbin II*, *supra* note 57, para. 45.

own economic interests have potential to come into play.⁷⁸ Silence about a conflict, real or potential, is unacceptable.⁷⁹

Fourth, several courts which have explicitly recognized the importance of competing values and the potential abuse of loyalty arguments have, nevertheless, decided that priority must be given to loyalty. In *Angers*, the Quebec Criminal Court, while acknowledging the competing values of preserving the integrity of the legal system, a client's right to choice of counsel, and mobility of the legal profession, emphasized that not only a real conflict of interest, but also a perceived/potential conflict of interest might put the duty of loyalty at risk, and so disqualify a lawyer.⁸⁰ The Ontario Superior Court of Justice in *GMP Securities* recognized that while there might be concerns about delay, strategic or tactical abuse, or prejudice to third parties brought about by motions to disqualify, the duty of loyalty trumped.⁸¹ A similar sentiment was expressed by the Newfoundland and Labrador Court of Appeal in *Dobbin II*.⁸² In *First Property Holdings Inc. v. Beatty*, the Ontario Superior Court of Justice was unequivocal that if the law firm sought to work against a current client, it was essential to have a bright line "to avoid uncertainty and shades of grey," and that the nuanced balancing of competing interests only took place if: a) a law firm considers suing a former client; or b) in the context of a merger.⁸³ This bright line applies even if the firm is doing "mechanical" work for the client.⁸⁴

Fifth, in cases such as *Shamray*,⁸⁵ *Toddglen*⁸⁶ and *GMP Securities*,⁸⁷ there is a manifest concern that lawyers and law firms who are "blindly" pursuing the business model are failing to take seriously the loyalty that they owe to their clients, and that the courts are trying to send a clear message that this will not be tolerated.⁸⁸ Moreover, in *Toddglen*, the court pointed out a firm cannot avoid the duty of loyalty to an existing client by terminating one retainer when another more lucrative one comes along.⁸⁹

⁷⁸ *Shamray*, *supra* note 57, paras. 42-43; *Strother I*, *supra* note 57, para. 17.

⁷⁹ *Strother I*, *ibid.* para. 25.

⁸⁰ *Supra* note 57, para. 11.

⁸¹ *Supra* note 57, paras. 37-44.

⁸² *Supra* note 57, para. 55.

⁸³ *Supra* note 57, paras. 17, 25.

⁸⁴ *Ibid.* para. 3.

⁸⁵ *Supra* note 57, para. 46.

⁸⁶ *Supra* note 57, para. 85.

⁸⁷ *Supra* note 57, paras. 17, 25.

⁸⁸ See also Philip Slayton, "For the elites, no safe place" *Canadian Lawyer* 29:4 (April 2005) 48 at 49.

⁸⁹ *Supra* note 57, para. 85.

Sixth, in *Strother I*, there is a suggestion that aspects of the duty of loyalty might continue even after the lawyer's written retainer has terminated, if the lawyer has "ascendancy" over the client.⁹⁰

Seventh, there is also the important issue of consent. Traditionally, the informed consent of the client has usually provided lawyers with a shield against conflict allegations. The decision in *Neil* both reinforced this principle and opened up further questions. As we have already noted, Binnie J. explicitly acknowledged an exception to the loyalty rule where a) both clients consent after receiving full disclosure and preferably independent legal advice and b) the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.⁹¹ There are a couple of issues here. "Preferably" and "reasonable belief" are highly contextual, and dangerously slippery, criteria. Moreover, Binnie J. raised the possibility in exceptional cases of "inferred consent" on the part of "governments," "chartered banks" and "entities that could be described as professional litigants."⁹² Some of these questions came into sharp relief in *Chiefs of Ontario v. Ontario* when the Ontario Superior Court held that the consent obtained by the law firm (even though it was supported by independent legal advice) was inadequate to cover "the quality and degree of adversity" which was "direct and extreme."⁹³ In other words, even consent from a client may not be enough because the larger concern is public perception of the integrity of the administration of justice.⁹⁴

In sum, the foregoing analysis suggests that not only may there be a tension between *Martin v. Gray* and *R. v. Neil*, there is a significant lack of consensus in the judiciary on the requirements of a principle of loyalty. However, the dominant trend in both *Neil* itself and the subsequent case law seems to be that what is required is a more comprehensive and vigorous understanding of the duty of loyalty. In the next section we will briefly consider if this message is getting through to the practicing bar.

IV. Recent Nova Scotia Discipline Decisions on Conflicts of Interest and Duty of Loyalty

In spite of the judicial trend emphasizing the central importance of the duty of loyalty, the fact remains, regrettably, that some lawyers have failed miserably in their conflicts analyses, with the result that clients' interests, and the reputation of the legal profession, have been severely negatively impacted. Several recent cases from Nova Scotia are illustrative.

⁹⁰ *Supra* note 57, paras. 13, 24.

⁹¹ *Neil*, *supra* note 6, para. 29.

⁹² *Ibid.* para. 28.

⁹³ *Supra* note 57, paras. 51-52.

⁹⁴ *Ibid.* para. 126.

In the case of *Nova Scotia Barristers' Society v. Cushing*,⁹⁵ Mr. Cushing provided legal services for various fisheries clients while operating a fish quota business and engaging in business transactions with these clients. The Hearing Panel found:

It is clear to the panel that when Mr. D'Eon approached the firm and had discussions with Mr. Cushing on a legal matter that Mr. Cushing used this opportunity and intertwined his personal interests in acquiring quota from the client of the firm without advising Mr. D'Eon to seek and obtain independent legal advice. In doing so, Mr. Cushing had a parallel agenda for his own personal benefit of obtaining assets (permanent quota) from his client when he was engaged solely for the purpose of resolving the legal issue that Mr. D'Eon was facing concerning the land lease related to his freezer building.⁹⁶

In relation to a separate business transaction with another client, the Panel concluded:

A client who approaches a law firm or solicitor for advice must have the assurance and the comfort that the matter will be addressed and handled by the solicitor free of any enticement, pressure or requests of any kind from the solicitor. The client must also be assured that the solicitor will not insert or interpose his or her own interests into the business affairs of the client.

A solicitor who carries on or conducts business with a client must do so in strict accordance with the provisions of the legal ethics and professional conduct [handbook] and at the very minimum must ensure that the clients have complete free, unbiased, independent legal advice from a solicitor unrelated to the firm with respect to the proposed transaction. It is unacceptable that a solicitor would use his law firm or his legal practice to gain knowledge of an economic or business proposal into which he inserts himself as a principal and not as a legal advisor without the client having independent legal advice.⁹⁷

Mr. Cushing was ordered suspended for nine months. The temptation for lawyers to enter into business transactions with clients is great, as is making use of business information that comes to the lawyer as a result of a solicitor-client relationship. Efforts to terminate the client relationship in order to subsequently take advantage of information obtained for personal gain are unacceptable. The duties of loyalty and confidentiality must always be a lawyer's primary consideration.

⁹⁵ 2004 NSBS 3, online: Nova Scotia Barristers' Society <<http://www.nsbs.ns.ca/notices/04Cushingdecision.pdf>>.

⁹⁶ *Ibid.* at 13

⁹⁷ *Ibid.* at 17.

In the case of *Nova Scotia Barristers' Society v. Romney*,⁹⁸ the Hearing panel found that in accepting "gifts" from elderly clients of cash, property and other assets, including joint ownership of an investment account, without independent legal advice, Mr. Romney was in a conflict of interest, even in the face of evidence that the cash and assets came into Mr. Romney's hands from the clients voluntarily. The Panel determined:

Once he became a joint owner of the account...Mr. Romney had a personal interest in the affairs of that joint account, and that he breached his obligation to the clients. Mr. Romney was in conflict, in part, because he then gave advice and encouraged his clients to transfer other financial investments, which the clients had at the time, into the account in which he was a joint owner.⁹⁹

In respect of having joint ownership of an account for which credit cards had been issued, with the credit only being used by Mr. Romney, the Panel found:

On this issue we have concluded that there was property, in the form of the credit availability and that, in so doing, Mr. Romney did not obtain independent legal advice for his other co-owners, [the clients], nor did he see that they were independently represented when he made the application and acquired the credit, and thereby violating Rule 7(e).¹⁰⁰

Later, and significantly in our opinion because of the loyalty principle, the Panel noted that even though Mr. Romney may have suggested that his clients obtain independent legal advice, the rules require that this take place even if the clients express no interest in doing so:

It is accepted that Mr. Romney did possibly suggest independent legal advice with them both, in terms of the warranty deed, and possibly even in terms of the wills....We don't have any documentation to show that there was a waiver of independent legal advice. This would not have cured the ill anyway, because...Rule 7(e) doesn't provide for informed consent, as it does in other sections of Rule 7. The fact remains, he obtained the gift from clients and they did not have independent legal advice or representation.¹⁰¹

Mr. Romney was ordered suspended for 12 months, and to pay restitution to the clients in the amount of \$23,000.

⁹⁸ 2004 NSBS 7, online: CanLII <<http://www.canlii.org/ns/cas/nsbs/2004/2004nsbs7.html>>.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

It has been reiterated by the Society's Ethics Committee on many occasions that the interests of, and loyalty to, the client must be paramount. If the lawyer believes his actions are being driven by his, not his client's best interests, he clearly should withdraw.¹⁰² In one situation, a lawyer was both counsel to a corporate board and an officer and director. In these capacities, he became privy after the fact to information about possible financial mismanagement by a staff person in the company. Eventually, the Canada Revenue Agency filed demands for information from the company and threatened to hold the lawyer and other officers personally responsible. The lawyer had information in his capacity as an officer that would personally exonerate him by showing the exercise of due diligence. Subsequently, in a Notice to the Profession, the Ethics and Professional Responsibility Committee advised that

...extreme caution must always be exercised when a lawyer places him/herself in a multiple-capacity position, such as corporate solicitor and director. ... In order for the lawyer to attempt to satisfy the due diligence provision, he would of necessity have to release confidential information which may not have been in the interests of the remaining directors or the corporate entity.¹⁰³

The Committee advised that "the solicitor-client relationship with the company and its directors was such that the lawyer had a duty to hold in strict confidence all information concerning the business affairs of the company." Absent a clear authorization from the client, the Committee felt that the member was not at liberty to provide any information to the Canada Revenue Agency for the purpose of raising a due diligence defence. Therefore, even in the face of personal "peril," the lawyer must adhere to his or her duty of loyalty and the related duty of confidentiality.

While there is no way to provide absolute safeguards against lawyers who intentionally take advantage of their position, we suggest that a greater emphasis on the more positive duty of loyalty, rather than the negative avoidance of conflicts of interest, can instill in lawyers a deeper awareness of their professional obligations and a counterbalance to the temptations sometimes generated by the business model of the law firm.

V. Conclusion

It is premature to say with certainty where we now stand in the light of *Neil*. But we can venture the following thoughts.

¹⁰² Legal Ethics Committee Minutes (13 November 1997).

¹⁰³ *Professional Responsibility Today* 2, Notice No. 1 (January 2002), online: <<http://www.nsbs.ns.ca/publications/prtodayissues/prtodayno2.htm>>.

First, *Neil* may represent a subtle, but significant, reorientation in the language of Canadian legal ethics. As we have noted, historically the dominant approach has been to approach lawyer's relationships with clients through the negative prism of "avoiding conflicts of interest." *Neil*, however, foregrounds a more positive regulative ideal, a multi-pronged duty of loyalty, where avoidance of conflicts is only one of several obligations.

Second, while *Neil* and its progeny undoubtedly expand and intensify the duty of loyalty, they do not go so far as to render it absolute. Justice Binnie, and the lower courts, are all sensitive to the danger of tactical abuse and competing values embedded in maintaining the integrity of the administration of justice. While "[b]usiness development strategies have to adapt to legal principles rather than the other way around," Binnie J. also added:

Yet it is important to link the duty of loyalty to the policies it is intended to further. An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its 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.¹⁰⁴

Third, the law on the duty of loyalty will continue to unfold in the coming years because many open questions remain. For example, are lawyers who act as "agents" for other firms caught by the duty of loyalty?¹⁰⁵ Is the performance of merely technical or mechanical tasks on behalf of a client sufficient to generate the duty of loyalty?¹⁰⁶ What is the standard of loyalty that is owed to "deemed clients?"¹⁰⁷ If a lawyer breaches a duty of loyalty, is the law firm also jointly and severally liable

¹⁰⁴ *Supra* note 6, para. 15. Consequently, Justice Adams' recent assertion in *Dobbin I* that "[t]he assurance of complete and unequivocal loyalty and confidentiality of the lawyer to the client is one of the cornerstones of a system of justice which has evolved to be the envy of much of the world" (*supra* note 57, para. 42) may be slightly hyperbolic.

¹⁰⁵ Compare *Stoneman*, *supra* note 57, with *Uniform Custom Countertops*, *supra* note 57.

¹⁰⁶ Compare *Stoneman*, *ibid.*, with *First Property Holdings Inc. v. Beatty*, *supra* note 57.

¹⁰⁷ See N.S. Barristers' Society Reg. 4.3.2, online: <<http://www.nsbs.ns.ca/regs/CURRENTREGS.pdf>>, which provides:

where, in the circumstances, a person borrowing money from, or loaning money to, a practising lawyer or law firm expects on reasonable grounds that he or she may look to the practising lawyer or law firm for advice and guidance in respect of the borrowing or lending, the relationship of lawyer and client shall be deemed to exist between the practising lawyer or law firm and that person.

for the consequences of such a breach?¹⁰⁸

Fourth, the debate on loyalty raises important questions of institutional responsibility. In *Martin v. Gray* Sopinka J. stated very clearly that:

... it must be borne in mind that the legal profession is a self-governing profession. The Legislature has entrusted to it and not to the court the responsibility of developing standards. The court's role is merely supervisory, and its jurisdiction extends to this aspect of ethics only in connection with legal proceedings.¹⁰⁹

Given the conflicting responses to *Neil*, law societies across the country have been slow, if not laggard, in responding to *Neil*. Greater emphasis needs to be put on the importance of the duty of loyalty. A recent initiative by the Federation of Law Societies to draft a more comprehensive Model Rule on Conflicts is to be applauded,¹¹⁰ although perhaps it could do more to emphasize the more positive message of loyalty.

Fifth, the tension between the business model of the law firm and the professional model is likely to intensify as a result of *Neil*. *Neil* reaffirms the ideal of client loyalty and that there is a "price [to be] paid for professionalism."¹¹¹ But, as Janine Griffiths-Baker points out, there are large structural economic forces at play that complicate the conventional model: the emergence of specialized legal services, the globalization of commerce, the dramatic growth in the size of law firms, a significant increase in mobility within the legal profession, and increasingly competitive legal markets.¹¹²

¹⁰⁸ *Strother I*, *supra* note 57, paras. 87-94. In *Strother II*, *supra* note 57, the British Columbia Court of Appeal held that Davies would only be directly liable for the profits made by Sentinel if it either gave knowing assistance to Strother or was reckless or willfully blind to Strother's misconduct vis-à-vis Monarch. Nor did it find Davies vicariously liable because Strother was not acting in the ordinary course of the firm's business, the firm did not know of the Sentinel venture until the tax ruling was obtained, and when the managing partner did find out, he told Strother not to pursue the new venture. Davies was, however, vicariously liable to Monarch for Strother's breach of his fiduciary duties and, therefore, they had to disgorge the legal fees which Monarch and Sentinel paid after the conflict arose. For further discussion see Philip Slayton, "*Strother Redux*" *Canadian Lawyer* 29:10 (October 2005) 12. The British Columbia Court of Appeal's narrow construction of "the ordinary course of business" may be in tension with the Supreme Court of Canada's pronouncement in *Neil* that it is the firm as well as the lawyer that owes the duty of loyalty (*supra* note 6, para. 29).

¹⁰⁹ *Supra* note 5 at 1262.

¹¹⁰ See Federation of Law Societies, *Model Code of Conduct, Model Chapter on Conflicts* (August 2005) [draft, on file with authors].

¹¹¹ *Supra* note 6, para. 15.

¹¹² *Supra* note 1 at vii, 164.

Finally, loyalty is also interesting from a discipline perspective. In *Neil*, the Supreme Court of Canada recognized that if a lawyer breaches her duty of loyalty, the aggrieved client may pursue various avenues of redress; one that Binnie J. specifically mentioned is “[a] complaint to the relevant governing body.”¹¹³ We are not sure if the duty of loyalty would change the *outcome* in most of the cases that reach discipline panels. But it might have an impact on the penalty a panel might impose because if loyalty is, like integrity, a “defining” and “unassailable” principle, then it might be part of a general deterrence message that governing bodies endorse. Furthermore, given the broad parameters of loyalty as articulated in *Neil*, there may be situations that would otherwise not have made it to a hearing panel that will surface. Of particular importance here is the duty of candour, and especially the duty of candour in the context of doing business with a client. Further developments are inevitable.

¹¹³ *Supra* note 6, para. 37.