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CONFLICTS OF INTEREST AND THE CONCEPT OF LOYALTY

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Until the Supreme Court's decision in R. v. Neil,¹ a lawyer's duty of loyalty was little discussed by Canadian courts or commentators. Binnie J.'s explicit reliance on the concept of loyalty in Neil, however, brought loyalty out from the shadowy wings of legal discourse to centre stage. It is now common for a lawyer's fiduciary duties to be considered in terms of loyalty. To paraphrase Lord Templeman in C.B.S. Songs Ltd. v. Amstrad Consumer Electronics Plc.,² the fashionable claimant in cases involving conflicts of interest asserts a breach of the duty of loyalty. Loyalty seems to be like the new, bright, shiny tool that everyone wants to use, and use all of the time. There is, however, a danger that the useful edge of the loyalty concept may be dulled by use on the stony ground of situations for which it is not well suited. The objective of this article is to examine the origins and scope of the duty of loyalty as it applies to both current and former clients. Particular attention will be paid to the duration of that duty with respect to former clients.

Avant l'arrêt de la Cour suprême dans l'affaire R. c. Neil¹, les tribunaux canadiens et les commentateurs juridiques ne s'étaient que peu préoccupés du concept de l'obligation de loyauté de l'avocat. Toutefois, lorsque le juge Binnie a eu explicitement recours à ce concept dans l'affaire Neil, la question est sortie des coulisses ténébreuses du discours juridique pour revenir occuper les devants de la scène. Il est maintenant courant d'examiner les obligations fiduciaires de l'avocat sous l'angle de la loyauté. Pour paraphraser les propos de Lord Templeman dans

* Cooper, Halifax.

¹ 2002 SCC 70, [2002] 3 S.C.R. 631[Neil].

*C.B.S. Songs Ltd. c. Amstrad Consumer Electronics*², le demandeur « à la mode » fera valoir – dans le cadre de causes de conflits d'intérêts – qu'il y a eu manquement à l'obligation de loyauté. La loyauté est devenue le nouvel outil reluisant dont tout le monde veut se servir, en tout temps. Le danger existe, cependant, que la pointe de l'outil ne s'émousse sur les terrains rocaillieux de situations auxquelles l'outil ne convient pas bien. L'objectif du présent article est d'étudier les sources et la portée de l'obligation de loyauté, telle qu'elle s'applique aussi bien aux clients actuels qu'aux anciens clients. Une attention toute particulière sera portée à la question de la durée de cette obligation dans le cas d'anciens clients.

1. The Origins of Loyalty Terminology

The core duty of a fiduciary is now said to be a duty of undivided loyalty to the client or principal. In what is the leading recent English case on fiduciary obligations, *Bristol and West Building Society v. Mothew*, Millett L.J. stated:

The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary.³

In *Neil*, Binnie J. observed that “One of the roots of the word fiduciary is *fides*, or loyalty, and loyalty is often cited as one of the defining characteristics of a fiduciary.”⁴

The practice of approaching issues of fiduciary responsibility in terms of “relations” or “relationships” has been regarded by some commentators as “unhelpful,” if “largely benign.”⁵ Nevertheless, in the Commonwealth it is universally acknowledged that a solicitor-client relationship is a fiduciary one.⁶ Not only is it a proposition that is not in

² [1988] A.C. 1013 at 1059 (H.L.(E.)).

³ [1998] Ch. 1 at 18 (C.A.) [*Mothew*].

⁴ *Neil*, *supra* note 1 at 643; see also John McGhee, ed., *Snell's Equity*, 31st ed. (London: Sweet & Maxwell, 2005) at 150; *Clark Boyce v. Mouat*, [1994] 1 A.C. 428 (P.C.) at 436 [*Clark Boyce*].

⁵ See e.g. Robert Flannigan, “The Boundaries of Fiduciary Accountability” (2004) 83 Can. Bar Rev. 35 at 48-49 [Flannigan, “Boundaries”].

⁶ *Neil*, *supra* note 1 at 643; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 7 W.W.R. 381 at 408 [*Strother*]; *Brown v. Inland Revenue Commissioners*, [1965] A.C. 244 (H.L.) at 256; *Farrington v. Rowe McBride & Partners*, [1985] 1 N.Z.L.R. 83; *Maguire v. Makaronis* (1997), 188 C.L.R. 449 [*Maguire*].

doubt⁷ but it is widely regarded as incontrovertible.⁸ The Supreme Court of Canada has long recognized this principle.⁹ Indeed, a solicitor has been considered to be the fiduciary of his or her client since at least the eighteenth century.¹⁰

In such circumstances it is not usually necessary for courts to become embroiled in the conceptually confusing question of whether a particular relationship is a fiduciary one or whether the relationship in question gives rise to some, if not all, fiduciary duties.¹¹ The problems caused by “question-begging concepts” and “magisterial assertions,” however, cannot be avoided completely merely because it is well-settled that a solicitor-client relationship gives rise to fiduciary duties.¹² One such problem is the precise meaning of the term “loyalty.”

The meaning of loyalty is not just a question of semantics. In this area of the law, the words used are powerful drivers of analysis. Indeed, as Professor Flannigan has aptly observed, “semantics are a main source of confusion in the fiduciary jurisprudence.”¹³ It is proposed to begin by trying to ascertain how the word “loyalty” came to be used to describe the core obligation of a fiduciary.

For a term that has become so prominent, its origins as a legal term of art in the Commonwealth are somewhat obscure. In *Neil*,¹⁴ Binnie J. quoted a passage from the speech of Henry Brougham defending Queen Caroline against a charge of adultery on which a Bill of Pains and Penalties to dissolve her marriage to George IV was based. After the second reading of the bill, there was, in effect, a trial at the bar of the House of Lords. Brougham, who was a noted reformer and scourge of the House of Lords, gave notice that he intended to prove that the King had secretly married Maria Fitzherbert before his marriage to Queen Caroline. The King’s involvement with Mrs. Fitzherbert was hardly a secret, but it was thought that if the existence of the previous marriage was established, the monarchy might be brought down. It was in this

⁷ *Clark Boyce*, *supra* note 4 at 437.

⁸ *Maguire*, *supra* note 6 at 495.

⁹ See *Read v. Cole* (1915), 52 S.C.R. 176, 9 W.W.R. 1137 at 178 S.C.R.; *Halsbury’s Laws of Canada*, HLP-180.

¹⁰ *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.) at 952.

¹¹ See e.g. *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 at 643 *et seq.*[*Lac Minerals* cited to S.C.R.]; Robert Flannigan “Boundaries,” *supra* note 5 at 60; Robert Flannigan “The Adulteration of Fiduciary Doctrine in Corporate Law” (2006), 122 *Law Q. Rev.* 449 at 449, 460.

¹² Flannigan, “Boundaries,” *supra* note 5 at 76.

¹³ *Ibid.* at 86.

¹⁴ *Neil*, *supra* note 1.

context that Brougham uttered the words quoted by Binnie J. in *Neil*.¹⁵ Brougham's words were concerned with the obligation of a lawyer to represent his client fearlessly and not with a wider notion of loyalty.

Binnie J. then said that while the words used were "far removed in time and place from the legal world" of the present day, the "defining principle – the duty of loyalty – is with us still."¹⁶ Brougham did not use the word loyalty, but its absence is no surprise. In the early nineteenth century even the word "fiduciary" was "uncommon."¹⁷ The words typically used to describe what we know as fiduciary relationships were relations of "trust" or "confidence."¹⁸ Subsequently, when fiduciary terminology became established, the courts would not seek to identify some overarching concept such as loyalty but would proceed directly to the exposition and application of the particular rule relevant to the case at hand.¹⁹

Stray references to loyalty as a duty can be found in the arguments of counsel in the 1950s.²⁰ There are also references in the early cases to an employee's duty of loyalty or fidelity to his employer.²¹ It seems, however, that the first significant use in the Commonwealth of loyalty terminology in the context of fiduciary obligations was in 1968.²² Interestingly there is very little discussion in that article of how, if at all, the duty of loyalty differed from the traditional proscriptive rules governing the conduct of a fiduciary. One has a similar experience with Professor McClean's article "The Theoretical Basis of the Trustee's Duty

¹⁵ *Ibid.* at 641. The passage read as follows:

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

¹⁶ *Ibid.*

¹⁷ L.S. Sealy, "Fiduciary Relationships" (1962) Cambridge L.J. 69 at 72, footnote 11; see also Paul D. Finn, *Fiduciary Obligations* (Sydney: Law Book Co., 1977) at 1 [Finn, *Fiduciary*]; Robert Flannigan, "The [Fiduciary] Duty of Fidelity" (2008) 124 Law Q. Rev. 274 at 275 [Flannigan, "Duty of Fidelity"].

¹⁸ Flannigan, "Duty of Fidelity," *ibid.* at 275.

¹⁹ See e.g. L.S. Sealy, "Some Principles of Fiduciary Obligation" (1963) Cambridge L.J. 119.

²⁰ See e.g. *Re Neilson*, [1953] O.R. 153, [1953] 1 D.L.R. 674 (Ont. H.C.) at 154.

²¹ See e.g. *Tombill Gold Mines Limited v. Hamilton*, [1954] O.R. 871, [1955] 1 D.L.R. 101 (Ont. H.C.) at 882.

²² Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968), 84 Law Q. Rev. 472.

of Loyalty”²³ published in 1969. The article’s short abstract says that “[t]he law imposes a high duty of loyalty on a trustee.” McClean begins, however, not with a description of the duty of loyalty, but with Lord Herschell’s well-known statement of the “inflexible rule of the Court of Equity” in *Bray v. Ford* that

a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.²⁴

In what follows there is no discussion of a duty of loyalty, merely an entirely conventional discussion of the two separate rules set out in *Bray*.

In 1973 Laskin J. in his much-celebrated judgment for the Supreme Court of Canada in *Canadian Aero Service Limited v. O’Malley*,²⁵ referred to a fiduciary relationship as one which “in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest.”²⁶ Shortly after the *Canaero* case, Professor Waters in the first edition of *Law of Trusts in Canada* spoke of the term “fiduciary” as an abstract term “describing in general terms the duty of loyalty.”²⁷

Three years later came Professor Finn’s influential monograph *Fiduciary Obligations*.²⁸ The word “loyalty” appears in a heading,²⁹ in a quotation from an American case³⁰ and in the opening sentence of Chapter 22 which deals with the so-called double employment rule. That sentence reads as follows:

To ensure a loyalty which is undivided the courts have prohibited a fiduciary from serving “two masters” at the same time in the same matter or transaction unless he has first obtained the informed consent of both “masters” to his so acting.

The duty of loyalty became a central theme of J.C. Shepherd’s book *The Law of Fiduciaries*.³¹ Anticipating *Mothew* and *Neil*, he observed that the “duty of loyalty is, of course, the essence of the fiduciary

²³ (1969) 7 Alta. L. Rev. 218.

²⁴ [1896] A.C. 44 (H.L.) at 51 [*Bray*].

²⁵ [1974] S.C.R. 592, 40 D.L.R. (3d) 371 (S.C.C.) [*Canaero*].

²⁶ *Ibid.* at 606.

²⁷ Donovan W.M. Waters, *Law of Trusts in Canada* (Toronto: Carswell, 1974) at

33.

²⁸ Finn *Fiduciary*, *supra* note 17.

²⁹ *Ibid.* at 3.

³⁰ *Ibid.* at 204.

³¹ J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981).

relationship.”³² In *Guerin v. The Queen*,³³ Dickson J. also adopted the language of loyalty when he described the fiduciary’s duty as one of “utmost loyalty to his principal.”³⁴

At the end of the 1980s Finn returned to the fray.³⁵ He described a hierarchy of standards of protective responsibility. Those standards in “ascending order of intensity” were the “unconscionability standard,” the “good faith standard” and the “fiduciary standard.”³⁶ According to Finn, the fiduciary standard enjoined “one party to act in the interest of the other – to act selflessly and with undivided loyalty.”³⁷ In *Lac Minerals*,³⁸ La Forest J. considered that the fiduciary obligation could be “compendiously” described as the “fiduciary duty of loyalty.”³⁹

It would appear, then, that by 1990 the duty of loyalty had become the expression of choice. A prime example of this tendency is Peter Maddaugh’s paper “Definition of Fiduciary Duty” where, after a review of some of the leading cases, he states:

Thus, by gaining clarity as to the essential purpose underlying the fiduciary concept – namely, to maintain the integrity of trust and trust-like relationships – we are able to identify with some precision the particular duty that is owed by one who occupies a fiduciary position: it is the duty of loyalty. In fine, the protection of the beneficiary’s interest is best obtained by demanding the absolute fidelity of the fiduciary.⁴⁰

What is fascinating about most of these statements is that authority is hardly ever cited directly. The proposition that the principal obligation of a fiduciary is loyalty is treated as an axiom. It did not, however, spring full grown from the brow of Jones in 1968. Where did this expression come from? The answer seems to be the United States. The articles tend to refer to the same American case, *Meinhard v. Salmon*, where Cardozo J. stated:

³² *Ibid.* at 48.

³³ [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481.

³⁴ *Ibid.* at 389; see also *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599, 133 D.L.R. (3d) 647 at 602 O.R. [*Davey*].

³⁵ Paul D. Finn, “The Fiduciary Principle,” in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at 1.

³⁶ *Ibid.* at 3.

³⁷ *Ibid.* at 4.

³⁸ *Supra* note 11.

³⁹ *Ibid.* at 646.

⁴⁰ (1990) Spec. Lect. L.S.U.C. 15 at 26-29.

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of Equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions ... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.⁴¹

In the important case of *Spincode Pty Ltd. v. Look Software Pty Ltd.*,⁴² Brooking J.A. observed that "duty of loyalty" is a "phrase used in recent years by judges and others in discussing whether a solicitor who acts or has acted for one client may be prevented from acting for another."⁴³ Brooking J.A. also traced the phrase back to Cardozo J.'s judgment in *Meinhard*.⁴⁴

In a 1956 article, the following illuminating passage appears:

Though the rule of "undivided loyalty" is ancient, *it has not been known by that particular name very long. Counsel in the Cleveland litigation tried to pass it off as a new catch phrase coined in 1926 by Judge Cardozo in* *Wendt v. Fischer*, 243 N. Y. 439, 444. If Cardozo had immortalized the rule under the label "*duty of disinterested judgment*," he might have rendered even greater service in bringing it from the cloistered chamber down to the arena where not only the practitioner but the fiduciary could readily comprehend it.⁴⁵

Waters also considered that "loyalty" terminology had an American source. He observed that the term "fiduciary" is "an abstract one

⁴¹ 249 N.Y. 458 (1928) at 463-64 [*Meinhard*]; see also Jones, *supra* note 22 at 478; Finn, *Fiduciary*, *supra* note 17 at 204. Cardozo J. had used the term "loyalty" two years earlier in the case of *Wendt v. Fischer*, 243 N.Y. 439 (1926), at 444. Richard A. Posner, writing extrajudicially in *Cardozo: A Study in Reputation* (Chicago: Chicago University Press, 1990) called *Meinhard* the "most famous of Cardozo's moralistic opinions;" see John H. Langbein "Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?" (2005) 114 Yale L.J. 929 at 932, footnote 11.

⁴² [2001] VSCA 248 [*Spincode*].

⁴³ *Ibid.* at para. 42; see also Flannigan, "Duty of Fidelity," *supra* note 17 at 281.

⁴⁴ *Meinhard*, *supra* note 42.

⁴⁵ Earl R. Hoover, "Basic Principles Underlying Duty of Loyalty" (1956) 5 Clev.-Mar. L. Rev. 7 at 10 [emphasis added].

describing in general terms the duty of loyalty, as it has become known in the United States.⁴⁶ In *Cowan v. Scargill*, Megarry V.-C. stated:

[T]he trustees of a pension fund are subject to the overriding duty to do the best that they can for the beneficiaries, the duty that in the United States is known as “the duty of undivided loyalty to the beneficiaries.”⁴⁷

It is clear from the foregoing that the expression “duty of loyalty” is American in origin. Not that there is anything wrong with that, to borrow a saying from a well-known American comedian. The question arises, however, whether the use of loyalty terminology improves the quality of the analyses of conflicts of interest issues. In order to answer that question we must now turn to the cases.

2. *The Scope of the Duty of Loyalty*

The duty of loyalty as described by Binnie J. in *Neil* comprises at least three aspects:

- (i) the duty to avoid conflicting interests. ...
- (ii) a duty of commitment to the client’s cause (sometimes referred to as “zealous representation”) from the time counsel is retained not just at trial, i.e. ensuring that a divided loyalty does not cause the lawyer to “soft peddle” his or her defence of a client out of concern for another client; and
- (iii) a duty of candour with the client on matters relevant to the retainer ... If a conflict emerges, the client should be among the first to hear about it.⁴⁸

The duty to avoid conflicting interests is more stringent than merely avoiding actual conflicts. It is more properly described as a duty on the part of the fiduciary not to “place himself *in a position* where his duty and his interest *may* conflict.”⁴⁹ One of the clearest and most direct statements of the rule is found in the speech of Lord Cranworth L.C. in *Aberdeen Railway Co. v. Blaikie Bros.*⁵⁰ where he stated:

⁴⁶ Donovan W.M. Waters, ed., *Waters’ Law of Trusts in Canada*, 3rd ed., (Toronto: Thomson Carswell, 2005) at 40.

⁴⁷ [1985] Ch. 270 at 292.

⁴⁸ *Supra* note 1 at 645-46; *Strother*, *supra* note 6 at 409.

⁴⁹ *Mothew*, *supra* note 3 at 18 [emphasis added]; see also *Bray*, *supra* note 24 at 51; *Marks & Spencer plc v. Freshfields Bruckhaus Deringer*, [2004] 1 W.L.R. 2331 (Ch. D.) at 2334 [*Marks & Spencer*].

⁵⁰ (1854), 1 Macq. 461; *Newgate Stud Co. v. Penfold*, [2008] 1 B.C.L.C. 46, [2004] EWHC 2993 (Ch.) at para. 219.

it is a rule of universal application, that no one, having [fiduciary] duties to discharge, shall be allowed to enter engagements in which he has, or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.⁵¹

While the rule is of “universal application” and “inflexible,”⁵² it is not absolute. There is “no general rule of law to the effect that a solicitor should never act” where there is a conflict of interest. He may act provided he has obtained the informed consent of those to whom he owes fiduciary duties.⁵³ The discussion which follows, however, will proceed on the basis that no informed consent has been given by the client.

The classic case of conflict of interest is presented by situations in which there is a conflict between the fiduciary’s duty and his or her personal interest.⁵⁴ Indeed, the original expression of the rule dealt with this situation. There is, however, the more recently-recognized “double employment” rule which “prohibits a fiduciary from acting in a situation where there is a conflict between the duties which he owes to more than one principal.”⁵⁵ Although this rule developed “out of the rule regarding conflicts between duty and interest,” it has “developed into a separate doctrine.”⁵⁶ The nature of the double employment rule is well-described in *Commonwealth Bank of Australia v. Smith* where Davis J. stated:

Not only must the fiduciary avoid, without informed consent, placing himself in a position of conflict between duty and personal interest, but he must eschew conflicting engagements. The reason is that by reason of the multiple engagements, the fiduciary may be unable to discharge adequately the one without conflicting with his obligation in the other.⁵⁷

Since the Supreme Court’s decision in *Neil*, it has been clear that “there are now two legal regimes for conflicts – one to cover ‘current clients’ of the firm and one to cover ‘former clients.’”⁵⁸ It is now proposed to discuss each of these two regimes in turn.

⁵¹ *Ibid.* at 471; see also *Bhullar v. Bhullar*, [2003] EWCA Civ. 424, [2003] 2 B.C.L.C. 241 at para. 19 [*Bhullar*]; McGhee, *supra* note 4 at 154.

⁵² *Bray*, *supra* note 24 at 51.

⁵³ *Clark Boyce*, *supra* note 4 at 435.

⁵⁴ *Ibid.* at 437.

⁵⁵ McGhee, *supra* note 4 at 151; *Mothew*, *supra* note 3 at 18-19.

⁵⁶ McGhee, *ibid.*

⁵⁷ (1991), 102 A.L.R. 453 at para. 81.

⁵⁸ Allen C. Hutchinson “Who Are ‘Clients’ (And Why It Matters)” (2005) 84 Can. Bar Rev. 411 at 421.

A) *Current Clients*

The discussion above reveals that the Supreme Court in *Neil* did not create the duty of loyalty; it is not new. What, then, is behind the outpouring of concern about *Neil*? One explanation may be found in the rather obscure treatment of the concept in the various codes of professional responsibility. While ethical rules and fiduciary duties are not completely congruent, one would expect that a core obligation or defining characteristic would have a place of honour in the profession's ethical rules. In *Stewart v. Canadian Broadcasting Corp.*,⁵⁹ however, J. Macdonald J. agreed with Gavin MacKenzie that "the precise scope of the lawyer's duty of loyalty is not made clear by the rules."⁶⁰ The first mention of a fiduciary relationship in the Nova Scotia Barristers' Society's *Handbook on Legal Ethics and Professional Conduct* is found in Commentary 5.4 to the Rule on Confidentiality.⁶¹ In the Canadian Bar Association (CBA)'s *Code of Professional Conduct*, the only explicit reference to a fiduciary relationship is found in the seventh commentary in Chapter XI, the Chapter which deals with fees. The duty of loyalty receives, if anything, even less attention. A recent article noted:

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 [in] 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 references to loyalty and a series of extensive but piecemeal and ad hoc sets of provisions that deal with various aspects of the problems of conflicts of interest.⁶²

In contrast to the more modern ethical Codes, the CBA's 1974 *Code of Professional Conduct*, its first since the 1920 *Canons of Legal Ethics*, explicitly mentioned a lawyer's loyalty to his client. Chapter V entitled "Impartiality and Conflict of Interest" began with the following Rule:

The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, he should not act or continue to act in a matter when there is or there is likely to be conflicting interest. A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of *or his loyalty to a client*

⁵⁹ (1997), 150 D.L.R. (4th) 24, 32 O.T.C. 321 (Ont. Gen. Div.) [*Stewart*].

⁶⁰ *Ibid.* at para. 225.

⁶¹ *Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia* (Halifax: Nova Scotia Barrister's Society, 1990) at 20.

⁶² Richard Devlin and Victoria Rees, "Beyond Conflicts of Interest to the Duty of Loyalty: From *Martin v. Gray* to *R. v. Neil*" (2005) 84 Can. Bar Rev. 433.

or prospective client or which the lawyer might be prompted to prefer to the interests of a client or prospective client.⁶³

The second Commentary expands, ever so slightly, the description of a conflicting interest:

Conflicting interests include but are not limited to the financial interest of the lawyer or an associate of the lawyer and the duties and *loyalties* of the lawyer to any other client, including the obligation to communicate information.⁶⁴

The 1974 Code, however, shares the same infirmity as the modern statements of ethical standards: there is no explanation of what the duty of loyalty comprises. While in both the 1974 and 2006 Codes there is guidance on how to deal with certain situations, which may indeed relate to a duty of loyalty, there is no discussion of an overarching duty of loyalty.

With this obscurity in the Codes, it is perhaps not surprising that some may have been taken unawares by the Supreme Court's emphasis on the duty of loyalty in *Neil* (notwithstanding the Supreme Court had much earlier adverted to the concept).

In *Neil*, a lawyer was charged with fabricating divorce documents and with defrauding a trust company when he was a paralegal. A law firm – though in some respects the finding that the lawyers involved constituted a firm was a stretch – had a solicitor-client relation with Neil; the firm was not defending Neil but was offering legal advice. At the same time, the firm was representing persons whose interests were adverse to those of Neil, namely a co-accused in the fraud case and one of the parties to the impugned divorce proceedings. After he was convicted, Neil sought to have his conviction set aside on the ground that the law firm was in conflict. The Supreme Court agreed that the law firm was in conflict but refused to set aside the conviction because in the circumstances there was no abuse of process.

The Supreme Court's judgment was delivered by Binnie J., who began his analysis with a general discussion of the lawyer's fiduciary duty of loyalty. He noted that the duty of loyalty has endured as a defining principle governing the lawyer-client relationship because it is "essential to the integrity of the administration of justice and it is of high public importance that public confidence in the integrity be

⁶³ CBA, *Code of Professional Conduct* (Ottawa: CBA, 1974) [emphasis added].

⁶⁴ *Ibid.* [emphasis added].

maintained.”⁶⁵ Binnie J. offered this explanation of why loyalty was essential to 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 may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies ...

Although the courts are “most often preoccupied” with abuses of confidential information where considering whether to disqualify a lawyer, Binnie J. was careful to observe that the duty of loyalty comprehended “a much broader principle of avoidance of conflicts of interest in which confidential information may or may not play a role.”⁶⁶ The broader principle of loyalty requires a law firm to “focus on the interest” of the client “without being distracted by other interests.” It also includes “putting the client’s business ahead of the lawyer’s business.”⁶⁷ A lawyer’s wish to “hang onto a piece of litigation” will be given short shrift.⁶⁸ As Binnie J. put it, “Business development strategies have to adapt to legal principles rather than the other way around.”⁶⁹

It was recognized that a key attribute of the duty of loyalty was its requirement of undivided loyalty. Binnie J. referred to *Davey v. Woolley, Hames, Dale & Dingwall* where Wilson J.A. stated:

The underlying premise ... is that, 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.⁷⁰

Binnie J. then quoted⁷¹ with apparent approval Lord Millett’s statement in *Bolkiah v. KPMG*⁷² that “a fiduciary cannot act at the same time both for and against the same client.” There was thus a “general prohibition” against acting at the time both for and against the same client.⁷³

⁶⁵ *Supra* note 1 at 641.

⁶⁶ *Ibid.* at 644.

⁶⁷ See also *Strother*, *supra* note 6 at 409.

⁶⁸ *Neil*, *supra* note 1 at 647.

⁶⁹ *Ibid.* at 643.

⁷⁰ *Davey*, *supra* note 34 at 648.

⁷¹ *Neil*, *supra* note 1 at 648.

⁷² [1999] 2 A.C. 222 (H.L.(E.)) [*Bolkiah*].

⁷³ *Ibid.* at 649.

The fact that this general prohibition constituted a “major inconvenience to large law partnerships and especially to national law firms with their proliferating offices in major centres across Canada” was of little moment. In Binnie J.’s view a “bright line” was 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.⁷⁴

It should be noted that in England, the position is very different. Indeed in *Marks & Spencer plc v. Freshfields Bruckhaus Deringer*,⁷⁵ Lawrence Collins J. accepted that before the double employment rule applied there had to be “some reasonable relationship between the two matters.”⁷⁶ Pill L.J. when denying permission to appeal from Lawrence Collins J.’s judgment agreed that “there must be a degree of relationship between the two transactions.”⁷⁷ Thus, the “bright line” rule in *Neil* would not be applied at all in England.⁷⁸ Indeed it has been suggested at a recent conference of law firm general counsel that the “bright line” rule is applied only in Canada and the United States.⁷⁹

Much of the fuss that *Neil* has generated relates to the above-quoted passage. The attention of commentators has focused particularly on the fact that the general prohibition against acting for two current clients whose interests are directly adverse applies even where the mandates are unrelated. Rather less attention has been paid to the latter part of the passage which deals with the circumstances where the general prohibition does not apply. A law firm may act for two clients whose interests are adverse if both clients consent after receiving full disclosure. But, as Binnie J. noted, informed consent is not enough; the lawyer must reasonably believe that he or she is able to represent each client equally well.

⁷⁴ *Ibid.* [emphasis added].

⁷⁵ *Marks & Spencer*, *supra* note 49.

⁷⁶ *Ibid.* at 2335.

⁷⁷ [2004] EWCA Civ 741, [2004] P.N.L.R. 4, 2004 WL 1174253 at para. 10.

⁷⁸ See also *Conway v. Ratiu*, [2006] 1 All E.R. 571, [2005] EWCA Civ 1302, at para. 89 *et seq.* For the situation in Australia, see Sandro Goubran, “Conflicts of Duty: the Perennial Lawyers’ Tale – A Comparative Study of the Law in England and Australia” (2006) 30 *Melb. U.L. Rev.* 88.

⁷⁹ Information provided by Malcolm Mercer, McCarthy Tétrault’s General

This exception may, however, be more apparent than real; lawyers are not always able to even ask the question because many potential retainers cannot be disclosed. This requirement of “reasonable belief” helps to shed light on the danger against which the general prohibition is designed to protect. Where a law firm tries to represent two clients whose interests are adverse, one or both clients may harbour suspicions that he is not receiving the zealous representation to which he is entitled from his fiduciary.⁸⁰

Another aspect of Binnie J.’s decision in *Neil* requires mention. A client is owed fiduciary duties not just by an individual lawyer but by the firm as well.⁸¹ “One lawyer’s client is considered to be the client of all the firm’s lawyers and, therefore, will be entitled to the same duties and obligations as the circumstances allow ...”⁸² Consequently, “if a lawyer has a conflict of interest, every other lawyer in his or her firm has a conflict of interest too.”⁸³

If there were any hopes that the Supreme Court would moderate the rigour of the bright line rule in *Neil*, they were dashed in *Strother*. There Binnie J., who delivered the judgment for the majority, reaffirmed that it was a “general rule of long standing” that a solicitor who has conflicting fiduciary duties to two clients “may not prefer one to another [and] the fact that he [the lawyer] has chosen to put himself in an impossible position does not exonerate him from liability.”⁸⁴ More importantly, Binnie J. reiterated the bright line rule, saying that it is “the product of the balancing of interests not the gateway to further internal balancing.”⁸⁵ Binnie J. further confirmed his allegiance to the bright line rule when he stated:

While the duty of loyalty is focussed on the lawyer’s ability to provide proper client representation, it is not fully exhausted by the obligation to avoid conflicts of interest with other concurrent clients. ...

Counsel.

⁸⁰ See *Neil*, *supra* note 1 at paras. 3 and 19; *R. v. Brissett* (2005), 74 O.R. (3d) 248 (Ont. Sup. Ct.) at para. 25; Devlin and Rees, *supra* note 62 at 443; Charles Hollander and Simon Salzedo, *Conflicts of Interest & Chinese Walls*, 2nd ed. (London: Sweet and Maxwell, 2004) at 24.

⁸¹ *Neil*, *supra* note 1 at 649.

⁸² Hutchinson, *supra* note 58 at 419.

⁸³ Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, looseleaf (Scarborough: Carswell, 2005), quoted in Devlin and Rees, *supra* note 62 at 437.

⁸⁴ *Strother*, *supra* note 6 at 414, citing *Hilton v. Barker Booth and Eastwood*, [2005] 1 W.L.R. 567, [2005] 1 All E.R. 651 (H.L.).

⁸⁵ *Strother*, *ibid.* at 414.

Exceptional cases should not obscure the primary function of the “bright line” rule, however, which has to do with the lawyer’s duty to avoid conflicts that impair the respective representation of the interest of his or her concurrent clients whether in litigation or in other matters ...⁸⁶

While the bright line rule was unequivocally reaffirmed in *Strother*, Binnie J. did provide some clarification on just when the interests of clients would be considered to be directly adverse. Here a discussion of the facts of *Strother* would be in order. Strother was a prominent tax lawyer with the firm of Davis & Company (Davis). His practice in large part consisted of advising the marketers of tax sheltered investments, particularly in the film production industry. Strother’s biggest client was Monarch Entertainment Corporation. From 1993-1997 Monarch devised and sold investments called TAPSFs (tax-assisted production services funding). The advantage of these investments was that expenditures for film production were treated as deductible from other income in the year the expenditures were incurred. In November 1996 the federal Minister of Finance announced the government’s intention to introduce legislation to defeat the TAPSF tax shelters by means of rules that would require a matching of expenditures to film revenues (MER). Strother told Monarch that “he did not have a ‘fix’ to avoid the effect” of these rules.

By the end of 1997, however, when Monarch’s TAPSF business had been wound down, Strother had learned of a possible way around the MER by using a statutory exemption. He was also aware that Revenue Canada had not foreclosed the possibility that it would issue a favourable tax ruling for a modified TAPSF transaction as long as the transaction complied with the new rules. By early 1998 Strother, in conjunction with Paul Darc, a former executive of Monarch, had come up with a new tax credit scheme, for which a favourable tax ruling was issued on October 6, 1998.

At the same time Strother was working with Darc to develop this new scheme, he was meeting with Monarch. Between January and September, 1998 Strother met with Monarch executives, who testified that the purpose of the meetings was to discuss whether there was any way around the new rules. No mention was made of the way around those rules that Darc and Strother had discovered.

In August, 1998 Strother advised Davis’s managing partner that he had an *option* to acquire shares in Sentinel Hill Entertainment Corporation, the corporate vehicle for the tax scheme, and that he was concerned about a possible conflict of interest with respect to acting

⁸⁶ *Ibid.* at 417.

simultaneously for Monarch and Sentinel. The managing partner told Strother that he would not be permitted to own any interest in Sentinel.

Seven months later Strother resigned from Davis and joined Darc as a 50 percent shareholder in Sentinel. By the time Parliament amended the *Income Tax Act* to finally bring an end to the modified TAPSF tax shelters, Darc and Strother had together made profits in excess of \$64 million.

Monarch learned of the favourable tax ruling in February, 1999. Neither Strother nor anyone else at Davis had drawn the ruling to Monarch's attention. Monarch subsequently brought an action against both Davis and Strother for breach of their fiduciary duties, a claim that was ultimately sustained in the Supreme Court of Canada but in such a way that Strother was able to retain most of the profits earned through his association with Sentinel.

Binnie J. began his analysis by pointing out that while the scope of the client's retainer of a lawyer is governed by contract, the solicitor-client relationship created by contract is "overlaid with certain fiduciary responsibilities, which are imposed as a matter of law."⁸⁷

As the content of Strother's fiduciary duties (and those of Davis) was relatively clear after *Neil*, the critical issues in *Strother* were whether Monarch could be considered a current client and, if so, what the terms of the retainer were. As Binnie J. observed, the focus should be on the 1998 retainer,⁸⁸ though there was no written retainer agreement. Binnie J. was not willing, however, to "strain to resolve the ambiguities in favour of the lawyer over the client:"

The subject matter of the retainer here was, as it had been for years, "tax-assisted business opportunities." It was not to sell an office building, draft an informatics contract or perform other legal services unrelated to the subject matter of the earlier advice.⁸⁹

Because Strother was retained in 1998 to provide advice on tax-assisted business opportunities, he had a duty to alert Monarch to the possibility that something could be salvaged from the ruins of its previous TAPSF business:

⁸⁷ *Ibid.* at 408.

⁸⁸ *Ibid.* at 409.

⁸⁹ *Ibid.* at 410.

Monarch's tax business was in a jam. Strother was still its tax lawyer. There was a continuing "relationship of trust and confidence." Monarch was dealing with professional advisors, not used car salesmen or pawnbrokers whom the public may expect to operate on the basis of "didn't ask, didn't tell," and who collectively suffer a corresponding deficit in trust and confidence. Therein lies one of the differences between a profession and some businesses.

In my view, subject to confidentiality considerations for other clients, if Strother knew there was still a way to continue to syndicate U.S. studio film production expenses to Canadian investors on a tax-efficient basis, the 1998 retainer entitled Monarch to be told that Strother's previous negative advice was now subject to reconsideration.⁹⁰

Binnie J. contrasted this obligation with the principle that generally "a lawyer does not have a duty to alter a past opinion in light of a subsequent change of circumstances."⁹¹ The "issue here was not so much a duty to alter a past opinion as it was Strother's duty to provide candid advice on all matters relevant to the 1998 retainer."⁹²

One might think that, having found that Strother (and therefore Davis) had breached their duty under the retainer to provide candid advice, any discussion of conflicting interest would be superfluous. It was necessary for Monarch, however, to pursue the breach of fiduciary duty claim for the simple reason that merely establishing a breach of the retainer contract would not allow it to recover damages; the trial judge found, and the Supreme Court accepted, that Monarch had not proved that any damage flowed from the breach. In order to recover compensation, Monarch had to rely on the equitable remedy of disgorgement, requiring them to show that Strother breached his fiduciary duty.

One of Strother's fiduciary duties, at least as formulated in *Neil*, was a duty of candour. Once that duty was shown to have been breached it should have been unnecessary for the Supreme Court to embark on a consideration of whether there was also a conflict of interest. Strother's conflicting interest merely explained why he breached his duty of candour to Monarch.⁹³

⁹⁰ *Ibid.* at 411.

⁹¹ *Ibid.* at 412.

⁹² *Ibid.*

⁹³ Nevertheless it could be equally argued that the duty of candour was breached by the failure to disclose the conflicting interest.

The true role of conflict of interest principles is in dealing with situations where the client cannot point to a particular breach of duty. In those circumstances it is enough to show that the lawyer, his fiduciary, was in a position where his duty *could* conflict with his interest. As stated in *Snell's Equity* the “rule is a general rule, based on generalised considerations of risk, rather than one which requires an assessment of whether the fiduciary has actually succumbed to temptation ...”⁹⁴ This equitable rule has its foundation not in the actual commission of a breach of a fiduciary duty but “in that hallowed orison ‘lead us not into temptation.’”⁹⁵

In light of the conclusion that Strother had breached his fiduciary duties, it was not difficult for the Court to find that Strother had allowed his personal interest to conflict with his duty to Monarch. Strother had a personal financial interest in Sentinel, “whose interest he then preferred over” Monarch. In this regard, Binnie J. stated:

By acquiring a substantial and direct financial interest in one client (Sentinel) seeking to enter a very restricted market related to film production services in which another client (Monarch) previously had a major presence, Strother put his personal financial interest into conflict with his duty to Monarch. The conflict compromised Strother’s duty to “zealously” represent Monarch’s interest ... a delinquency compounded by his lack of “candour” with Monarch “on matters relevant to the retainer” i.e. his own competing financial interest.⁹⁶

Binnie J. then described Strother’s transgressions in terms of the duty of loyalty:

It is therefore my view that Strother’s failure to revisit his 1997 advice in 1998 at a time when he had a personal, undisclosed financial interest in Sentinel Hill breached his duty of loyalty to Monarch. The duty was further breached when he did not advise Monarch of the successful tax ruling when it became public on October 6, 1998. Why would a rainmaker like Strother not make rain with as many clients (or potential clients) as possible when the opportunity presented itself (whether or not existing retainers required him to do so)? The unfortunate inference is that Strother did not tell Monarch because he did not think it was in his personal financial interest to do so.⁹⁷

⁹⁴ McGhee, *supra* note 4 at 155.

⁹⁵ *In re Drexel Burnham Lambert Pension Plan*, [1995] 1 W.L.R. 32 (Ch.D.) at 39, citing Paul V. Baker and Peter St. J. Langan, *Snell's Equity*, 29th ed., (London: Sweet & Maxwell, 1990) at 245 (now in the 31st ed.; see *supra* note 4 at 151).

⁹⁶ *Strother*, *supra* note 6 at 409.

⁹⁷ *Ibid.* at 421.

The nature of Strother's personal financial interest was pithily described by Binnie J.:

As we have seen, the tax-assisted film production services business was very competitive. Monarch's TAPSF market share had been cut by 80 percent when Grosvenor and other competitors entered the field. If his "fix" worked, Strother had every incentive to distance Monarch as a potential competitor to Sentinel. The bigger Sentinel's market share, the more business it did, the more assured would be the initial \$2 million profit and the faster Strother would pocket it.⁹⁸

What should Strother have done? As the foregoing discussion has demonstrated, he could not have discharged his duty to Monarch by sharing confidential information that he had obtained while acting for Sentinel, but Strother could have:

advised Monarch that his earlier view was too emphatic, that there may yet be life in a modified form of syndicating film production services expenses for tax benefits, but that because his change of view was based at least in part on information confidential to another client on a transaction unrelated to Monarch, he could not advise further except to suggest that Monarch consult another law firm. Moreover, there is no excuse at all for Strother not advising Monarch of the successful tax ruling when it was made public in October 1998.⁹⁹

Later Binnie J. observed that Strother could have managed his (and the firm's) relationship with Monarch and Sentinel "as other specialist practitioners do, by being candid with their legal advice while protecting from disclosure the confidential details of the other client's business." It is interesting to contrast Binnie J.'s expression of confidence in a law firm's ability to deal successfully with issues of confidentiality in *Strother*¹⁰⁰ with Sopinka J.'s somewhat more pessimistic view in *MacDonald Estate v. Martin*.¹⁰¹

It is to be noted that not all situations can be dealt with in that way. In some cases it may not be possible to give candid legal advice to one client and at the same time protect the confidential details of another client such as where the legal advice and the confidential details are "inextricably bound together." In such a case where it is impossible to give proper legal advice without disclosing the confidential details, then the "duty to respect confidentiality prevails," but Strother could not take

⁹⁸ *Ibid.* at 420.

⁹⁹ *Ibid.* at 413.

¹⁰⁰ *Ibid.* at 419.

¹⁰¹ [1990] 3 S.C.R. 1235, [1991] 1 W.W.R. 705 [*MacDonald Estate*] at 1262.

advantage of this “exception.” There was nothing in Binnie J.’s view to “justify Strother’s artful silence.”¹⁰²

The *Strother* case proceeded on the basis that the “confidential details” were not inextricably bound up with the legal advice that Strother should have given; but Binnie J. did not explain fully how the duty to “respect confidentiality” of one client can be squared with the duty to be candid to the other. There may be a distinction to be made between knowledge of how to analyze a problem in a particular way in order to arrive at a solution and the precise mechanisms of how the client proposes to use that solution. The former may be considered know-how and thus not subject to any confidentiality obligation. The latter would probably constitute confidential detail.

This reasoning is supported by the decision of the British Columbia Court of Appeal in *Greater Vancouver (Regional District) v. Melville*.¹⁰³ There the respondent Melville provided an opinion to the Regional District on the validity of certain expropriations. Later, when Melville was retained to represent plaintiffs who were challenging the validity of expropriations of the kind on which Melville had commented in his opinion, the Regional District applied to have Melville disqualified. In the course of her judgment affirming the dismissal of the application, Levine J.A. stated:

The legal analysis and conclusions the respondent drew, by applying statutory provisions to a particular set of facts, became part of his legal knowledge, his “know-how.” That is not confidential information provided by the appellants. It is similar to documents created in one transaction being used by lawyers as precedents in other transactions for other clients. In *Strother*, the majority held that as long as confidential information was not used, lawyers are not prohibited from using such precedents.¹⁰⁴

What if a client approaches the lawyer on the basis that what he does and learns will be for that client’s exclusive benefit? As a tentative conclusion, I would suggest that in such a case the lawyer would be obliged to respect the exclusivity requirement and advise that other client to seek advice from another firm. In that case, the lawyer could not adequately represent both clients. Since he cannot subordinate the interests of the one to those of the other, he must advise the other client to seek other counsel. In this context it will be vital to determine whether the agreed exclusivity applies to a particular lawyer or the firm.

¹⁰² *Strother*, *supra* note 6 at 419.

¹⁰³ 2007 BCCA 410, (2007), 71 B.C.L.R. (4th) 29 (B.C. C.A.) [*Melville*].

¹⁰⁴ *Ibid.* at para. 29; see also *British American Tobacco Australia Services Ltd. v.*

This discussion has foreshadowed what may be *Strother's* silver lining. The Supreme Court held that a law firm's representation of two clients who were competitors did not necessarily mean that the firm was in a conflict. It will be recalled that in *Neil*, Binnie J. drew a bright line: 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." In *Strother*, the Supreme Court held that Sentinel's interests were not directly adverse to those of Monarch:

A Sentinel ruling that revived the TAPSF business even in modified form would indirectly help any firm whose tax syndication business had been ruined by the ITA amendments, including Monarch. Representation of Sentinel was thus not "directly adverse" to representation of Monarch by Davis/Strother even though both mandates related to tax-assisted business opportunities in the film production services field.¹⁰⁵

The Court accepted that conflict of interest principles apply where there is a *legal* dispute between two clients. Those principles do not "generally preclude a law firm or lawyer from acting concurrently for different clients who are in the same line of business, or who compete with each other for business."¹⁰⁶ The duty of loyalty protects a client's interests that "have to do with the practice of law, not commercial prosperity."

Commercial interests may at times be relevant, however. Binnie J. referred to the example given in the *Restatement (Third) of the Law Governing Lawyers*¹⁰⁷ of two competitors "who seek to retain a single law firm in respect of competing applications for a single broadcast license, i.e. a unique opportunity."¹⁰⁸ In such a case there would be a conflict because the "lawyer's ability to provide even-handed representation is put in issue."¹⁰⁹

Commercial conflicts between clients "that do *not* impair a lawyer's ability to properly represent the legal interests of both clients will not generally present a conflict problem." The existence of a "real risk of impairment will be a question of fact" (assuming that the bright line rule does not apply). Binnie J. was prepared to accept that no real risk of impairment would have been present in the *Strother* case had "the

Blanch, [2004] NSWSC 70 at para. 86 [*Blanch*].

¹⁰⁵ *Strother*, *supra* note 6 at 415.

¹⁰⁶ *Ibid.* at 416.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

necessary even-handed representation ... not been skewed by Strother's personal undisclosed financial interest." As he observed:

Condominium lawyers act with undiminished vigour for numerous entrepreneurs competing in the same housing market; oil and gas lawyers advise without hesitation exploration firms competing in the oil patch, provided, of course, that information confidential to a particular client is kept confidential. There is no reason in general why a tax practitioner such as Strother should not take on different clients syndicating tax schemes to the same investor community, notwithstanding the restricted market for these services in a business in which Sentinel and Monarch competed.¹¹⁰

There is no doubt that the duty of loyalty is an onerous one and it is unlikely that its rigour will be relaxed by the courts any time soon. As Binnie J. said in *Neil*, lawyers "are the servants of the system" and "sensible and necessary rules imposed for client protection" are the "price paid for professionalism."¹¹¹

The CBA Task Force on Conflicts of Interest, whose final report was adopted by the CBA in August 2008, has said that the bright line rule as stated by Binnie J. in *Neil* was "clearly *obiter dicta*" that was to be regarded more like a "helpful/persuasive" comment from the court rather than a binding pronouncement.¹¹² The source of the bright line rule as it relates to unrelated matter conflicts was traced by the Task Force to Rule 1.7(a)(1) of the *Model Rules of Professional Conduct* of the American Bar Association.¹¹³

The Task Force in its final report distinguishes between what is called the "Unrelated Matter Rule" and the "Substantial Risk Principle." The former is the part of the *Neil* bright line rule that provides that a lawyer may not act in a matter which is "directly adverse to the immediate interests of a current client even if the two mandates are unrelated."¹¹⁴ The Substantial Risk Principle corresponds to that part of the *Neil* test which would permit a lawyer to act for two clients whose interests are adverse with their informed consent provided that the lawyer believes that he or she is able to represent each client appropriately. This principle, as used by Task Force, is taken from the *Restatement (Third) of*

¹¹⁰ *Ibid.*

¹¹¹ *Neil*, *supra* note 1 at para. 15.

¹¹² Canadian Bar Association Task Force on Conflicts of Interest (CBA Task Force), *Final Report: Conflicts of interest, Recommendations & Tool Kit* (Ottawa: CBA, August 2008) at 61.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.* at 58.

the Law Governing Lawyers which prohibits a lawyer from acting where there is 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 person¹¹⁵

After pointing out that the Unrelated Matter Rule "was not, prior to *Neil*, part of the law of Canada and is not now the law of England, Australia or New Zealand," the Task Force suggests that the application of the Unrelated Matter Rule should not be broader than what is required by the Substantial Risk Principle¹¹⁶ and that the two precepts are "reconcilable."¹¹⁷ The Task Force then concludes:

that the appropriate interpretation of *Neil* and *Strother* (which also reconciles the minority reasons in *Strother*) is that, absent proper consent, a lawyer may not act directly adverse to the immediate interests of a current client unless the lawyer is able to demonstrate that there is no substantial risk that the lawyer's representation of the current client would be materially and adversely affected by the new unrelated matter.¹¹⁸

One of the principal recommendations of the Task Force was that the *CBA Code of Professional Conduct* be amended to

provide that a lawyer may act in a matter which is adverse to the interests of a current client provided that

- a. the matter is unrelated to any matter in which the lawyer is acting for the current client; and
- b. no conflicting interest is present.

It was also recommended that the Code be amended to define "conflicting interest" to mean "an interest that gives rise to a substantial risk of material and adverse effect on representation."¹¹⁹

These recommendations are based on the hope that the practical difficulties caused by the Supreme Court's decision can be ameliorated by changes to codes of professional responsibility. The validity of that

¹¹⁵ Quoted in *ibid.* at 65.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* at 67.

¹¹⁸ *Ibid.* at 68.

¹¹⁹ *Ibid.* at 7.

assumption may be questionable. While a court should consider an “expression of a professional standard in a code of ethics relating to a matter before the court,” it is not bound by that expression. Reference should be made to Sopinka J.’s judgment in *MacDonald Estate*:

The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction.¹²⁰

The courts have traditionally followed the ethical rules promulgated by provincial law societies. They typically have done so, however, where those rules identify the existence of a conflict of interest or other breach of duty. Where the rule is at least to some degree contrary to a principle recognized and reaffirmed by the Supreme Court of Canada, the courts may not be quite so favourably disposed to apply it. Consequently, if the courts perceive a new ethical rule based on the Task Force’s recommendations to unreasonably diminish the rigor of judicially-created rules governing conflicts of interest, they may choose to ignore it and apply instead the principles outlined by the Supreme Court.

B) Former Clients

Loyalty has a certain instinctive attraction when describing the basis of the double employment rule; the required undivided loyalty cannot exist where a lawyer has two current clients whose legal interests are adverse. When the conflict is not between two current clients but between a former client and a current client, however, loyalty’s attraction is less strong. In particular it sits uncomfortably with the fact that there is no rule of law that absolutely prohibits a lawyer from ever acting against a former client. The rule that a lawyer may, in some circumstances, act against a former client is long-established. Jessel M.R. in *Little v. Kingswood Collieries Company*¹²¹ observed that “a solicitor may be at liberty to act for an opponent of his former client.”

In *Rakusen v. Ellis, Munday & Clarke*,¹²² Fletcher Moulton L.J. said that Jessel M.R.’s dictum was “the law with regard to all confidential employment, and it applies therefore to confidential employment of a

¹²⁰ *Supra* note 101 at 1245.

¹²¹ (1882), 20 Ch. D. 733 (C.A.) at 742 [*Little*].

¹²² [1912] 1 Ch. 831 (C.A.) [*Rakusen*].

solicitor by a client.”¹²³ Buckley L.J. in the same case was even clearer: “There is no general rule that a solicitor who has acted in a particular matter for one party shall not under any circumstances subsequently act in that matter for his opponent.”¹²⁴ The situation is no different in Canada.¹²⁵

The general rule or, more accurately the lack of a general rule, is subject to the overriding duty that a solicitor is not “at liberty to disclose his former client’s secrets to his opponent.”¹²⁶ A solicitor will be restrained by the court from communicating his former client’s confidential information.¹²⁷ In Canada, the rule is now more severe. “A lawyer who has relevant confidential information cannot act against” his former client.¹²⁸ Although Sopinka J. in *MacDonald Estate* was concerned solely with protecting the confidences of the former client and did not discuss the concept of loyalty, Binnie J. in *Strother* said that the “issue of loyalty to a former client was dealt with in *MacDonald Estate v. Martin* (not *Neil*).”¹²⁹

Is there a duty of loyalty to a former client that comprehends something more than the protection of confidential information? A number of courts in Canada and Australia have certainly said so. Do the authorities justify such a position?

The CBA’s 1974 *Code of Professional Conduct* distinguished between “the same or related matter” and a “fresh and independent matter.” Commentary 11 in Chapter V stated:

A lawyer who has acted for a client in a matter should not thereafter act against him (or against persons who were involved in or associated with him in that matter) in the same or any related matter, or place himself in a position where he might be tempted or appear to be tempted to breach the Rule relating to Confidential Information. It is not, however, improper for the lawyer to act against a former client

¹²³ *Ibid.* at 840.

¹²⁴ *Ibid.* at 842; see also *Bolkiah*, *supra* note 72 at 234-35; *Gus Consulting GmbH v. Leboeuf Lamb Greene & Macrae*, [2006] EWCA Civ. 683 at para. 26; *Winters v. Mishcon De Reya*, [2008] EWHC 2419 (Ch.) at para. 88.

¹²⁵ Mark M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright, 1957) at 99; Orkin expressed the rule in almost exactly the same terms as did Buckley L.J. in *Rakusen*, *supra* note 122 at 842.

¹²⁶ *Little*, *supra* note 121 at 742.

¹²⁷ *Rakusen*, *supra* note 122 at 835, *per* Cozens-Hardy, M.R., at 840, *per* Fletcher Moulton, L.J. and at 842, *per* Buckley, L.J.

¹²⁸ *MacDonald Estate*, *supra* note 101 at 1261.

¹²⁹ *Strother*, *supra* note 6 at 416; see also Hutchinson, *supra* note 58 at 421.

in a fresh and independent matter wholly unrelated to any work he has previously done for that person.

This Commentary is not restricted to confidential information. Can it be said, therefore, that this Commentary supports the notion of a duty of loyalty to former clients broader than an obligation to protect that client's confidences? Two cases cited in support of the principle do not mention confidentiality but they do not provide satisfactory support for a broad duty of loyalty to a former client. The first case cited, *Sheppard v. Frind*,¹³⁰ involved a claim by the respondent against the appellant, his former solicitor, for maintenance. The former solicitor was found to have incited the respondent's wife to bring an action for alimony against the respondent. The appellant succeeded in the Supreme Court on the ground that the respondent had not suffered legal damage. The conduct of the former solicitor caused the Supreme Court to deny him his costs¹³¹ but there was no discussion of loyalty or any other ethical duties.

The second case was *Banque Provinciale du Canada v. Adjutor Levesque Roofing Ltd.*¹³² There all three members of the Appeal Division disparaged the conduct of the bank's counsel at first instance. He had previously advised the defendant in connection with a mortgage on which the bank was suing. Bridges C.J.N.B. stated:

During the trial there was an admission by counsel for the bank that Adjutor Levesque had consulted him before signing the mortgage and that he had told Levesque the mortgage would help him financially because he would be paying only \$3,000 a year, which he could easily do. It would appear from the evidence that counsel was at the time acting as solicitor for Levesque. Under such circumstances, he should not, of course, have acted for the bank as solicitor in bringing the actions and as counsel at the trial thereof.¹³³

Limerick J.A. went further, saying that solicitors "should not so conduct themselves even with the knowledge and consent of all parties" and that the client "who first retains a solicitor has the right to his exclusive loyalty."¹³⁴ Neither of these two propositions is supported by authority.

Both the *Sheppard* and *Banque Provinciale* cases suffer from the same infirmity. They contain no citation of authority and are essentially

¹³⁰ [1941] S.C.R. 531, [1941] 4 D.L.R. 497 (S.C.C.) [*Sheppard*].

¹³¹ *Ibid.* at 535, *per* Davis, J. and 536, *per* Taschereau, J.

¹³² (1968), 68 D.L.R. (2d) 340 (N.B.S.C.(A.D.)) [*Banque Provinciale*].

¹³³ *Ibid.* at 342.

¹³⁴ *Ibid.* at 345.

benefit of reasoning. They are examples of the Potter Stewart J. school of analysis.¹³⁵ They know impropriety when they see it. Nothing else is required. That being so, *Sheppard* and *Banque Provinciale* cannot be regarded as providing satisfactory support for the proposition that even if there is no question of confidential information, a solicitor can be prevented from acting against a former client. That does not mean such support does not exist, however – it does.

When one looks at the cases, it is striking how small an impact this particular Commentary has had. It has been quoted and referred to, but usually only as a kind of preface to an analysis of the authorities. Consequently, it is to the authorities we must now turn. Before doing so it is useful to bear in mind an observation of Lord Mustill:

With many subjects of the common law, it is usually sufficient to seek out and apply the law as it is, without too much introspection about its intellectual ancestry, but on occasion when it is necessary to move the law a significant step forward it may be wise to begin by tracing the trajectory backward.¹³⁶

When seeking to understand the basis for the rule that a lawyer should not act against a former client in the same or related matter, some introspection about its intellectual ancestry is not only desirable but necessary.

The case that is usually found at the top of the family tree of this rule is *Earl Cholmondeley v. Lord Clinton*.¹³⁷ It seems to be accepted that this case is the first case to address “former client conflicts.”¹³⁸ In that case Lord Clinton was the defendant in a suit brought by the Marquis of Cholmondeley with respect to the title to certain property. Lord Clinton sought an injunction to prevent Lord Cholmondeley from employing a Mr. Montriou as his solicitor in the suit on the basis that before he was employed by Lord Cholmondeley, Montriou had been retained by Lord Clinton in respect of the same matter. Montriou was found to have discharged himself from Lord Clinton’s retainer and later to have been retained by Lord Cholmondeley as his solicitor in the suit against Lord Clinton.

¹³⁵ In *Jacobellis v. Ohio*, 378 U.S. 184, (1964) at 197 Potter Stewart J., in an obscenity case, said that he would not attempt further to define the material embraced within the shorthand description “hard core pornography” adding “I know it when I see it.”

¹³⁶ “*The Golden Victory – Some Reflections*” (2008) 124 L.Q.R. 569 at 572.

¹³⁷ (1815), 19 Ves. Jr. 262, 34 E.R. 515 [*Cholmondeley*].

¹³⁸ Goubran, *supra* note 78 at 114-15.

The “naked question” presented by the case was whether “a person, having been for a considerable time employed in a cause for the Plaintiff, can, after discharging himself ... from the relation of attorney for the Plaintiff in that cause, become attorney for the Defendant.” This question was regarded as one of some novelty. Counsel for Lord Clinton said that the application, while “certainly new,” was made on “general principles.”¹³⁹ Counsel for Lord Cholmondeley was more strident, saying that the application was “utterly unsupported by precedent.”¹⁴⁰ Lord Eldon L.C. for his part did not “recollect, either in my own experience, or from information in the memory of any one, any such instance” of such a fact “having actually occurred.”¹⁴¹ In the later case of *Bricheno v. Thorp*,¹⁴² Lord Eldon L.C. said that because the application in *Cholmondeley* was “the first of the kind,” he “took the opinion of the Judges upon it.”¹⁴³

Noting that he would decide the case “upon the dry question whether this Plaintiff has a legal right to employ Mr. Montriou and whether he has a legal right to accept that employment,” Lord Eldon L.C. expressly disavowed any intention to communicate his opinion on the subjects of “propriety or delicacy of conduct.” The answer to that dry question depended on “a principle applying, to cases both in this Court [i.e. Chancery] and at law.”¹⁴⁴ In order to ascertain the existence of the principle applying in the common law courts, Lord Eldon L.C. consulted the judges, and in giving judgment related that “all the Judges and the Barons of the Exchequer, the Master of the Rolls and the Vice Chancellor” agreed with his opinion that

an attorney or solicitor is not at liberty to act in the manner proposed by Mr. Montriou; and that having thus left the cause, he is not in the situation of a solicitor discharged by the client; and therefore cannot become the solicitor for the other party in the same cause.¹⁴⁵

Brooking J.A., whose judgment in *Spincode*¹⁴⁶ contained a scholarly analysis of the issue, suggested that the basis of the *Cholmondeley* was not clear.¹⁴⁷ He considered that *Cholmondeley* supported the view that “a solicitor, as an officer of the court, may be prevented from acting against

¹³⁹ *Cholmondeley*, *supra* note 137 at 516.

¹⁴⁰ *Ibid.* at 517.

¹⁴¹ *Ibid.* at 519.

¹⁴² (1821), Jac. 300, 37 E.R. 864 [*Bricheno*].

¹⁴³ *Ibid.* at 865.

¹⁴⁴ *Cholmondeley*, *supra* note 137 at 519.

¹⁴⁵ *Ibid.* at 520.

¹⁴⁶ *Spincode*, *supra* note 42.

¹⁴⁷ *Ibid.* at para. 26.

a former client even though the likelihood of danger of misuse of confidential information is not shown.”¹⁴⁸ Brooking J.A. placed considerable emphasis on the fact that in *Cholmondeley* Lord Eldon L.C.’s “brief reasons say nothing about confidential information.”¹⁴⁹ That is true, but when one looks at the way the case was argued, it is plain that confidential information lay at the heart of Lord Eldon’s judgment.

The report of the case begins with a description of the affidavits filed by both parties. All of the deponents of affidavits filed in support of Lord Clinton’s motion stated that

Montriu, as such clerk and partner, acquired such information touching the titles, estates and affairs of Lord Clinton, and his defence, &c., as would in their judgment and belief render his being concerned in the management of this suit as solicitor for the Plaintiff highly prejudicial and injurious to Lord Clinton, and they could point out particulars, did they not believe, that they should thereby produce great part of the mischief, which the application to the Court is intended to avert.¹⁵⁰

Montriu’s affidavit had a decidedly modern ring to it. He deposed that all of the information touching the matter with Lord Cholmondeley was communicated solely to his partner Seymour and that “no such papers, nor cases and opinions of Counsel” were ever communicated to him.

In the course of argument counsel for Lord Clinton is reported as saying that the rule that an “attorney at law is not at liberty to reject his client and withdraw from his suit ... stands upon a different principle for the benefit of the client, to prevent the communication of his secrets.”¹⁵¹ Lord Clinton’s counsel then referred to solicitor-client privilege and asked rhetorically if “the Plaintiff could not compel Mr. Montriu to appear, and disclose his information, as a witness, can he obtain, and make use of, that information by employing him in the far more important situation of Solicitor?” Concluding his argument counsel stated:

Whatever his intention may be, it is not possible for him in his new situation to divest [sic] himself of the knowledge he has acquired in the Defendant’s service,

¹⁴⁸ *Ibid.* at para. 38.

¹⁴⁹ *Ibid.* at para. 26.

¹⁵⁰ *Cholmondeley*, *supra* note 137 at 515.

¹⁵¹ *Ibid.* at 516.

and bound himself by his oath as a Solicitor to use for his benefit; which therefore disables him from performing his duty to his new client.¹⁵²

Here Lord Eldon L.C. interjected:

The case might easily be put, that a most honest man, so changing his situation, might communicate a fact, appearing to him to have no connection with the case, and yet the whole title of his former client might depend on it ... I take it to be clear, that no Court would permit him to give such evidence [i.e., of his client's secrets]; or would have any difficulty, if a Solicitor, voluntarily changing his situation, was in his new character proceeding to communicate a material fact. A short way of preventing him would be striking him off the Roll.¹⁵³

Lord Cholmondeley's counsel also focused on confidential information, though in his view the key consideration was the fact that Montriou did not have access to Lord Clinton's confidential information:

Suppose Mr. Montriou during the whole progress of this cause had been out of the kingdom, and could not possibly have had any communication upon it: an extreme case certainly, but not going beyond the actual fact, that he is an entire stranger to all the confidential communications between his partner and the Defendant, and to every part of the title except what was public upon the face of the pleadings. The nature of this cause, a mere question of Law, upon the construction of deeds, involving no secrets, confirms Montriou's assertion, that he has no information, the disclosure of which can prejudice the Defendant.¹⁵⁴

When referring to *Cholmondeley v. Clinton* in a subsequent case, Lord Eldon L.C. did not mention that the reason for disqualification was the danger of misuse of confidential information.¹⁵⁵ In *Bricheno*,¹⁵⁶ however, Lord Eldon L.C. made it abundantly clear that the protection of confidential information was the basis for his judgment in the *Cholmondeley* case. In the first of his two opinions in *Bricheno*, he began by stating:

The case of *Cholmondeley v. Clinton* was not more than this. A gentleman discharged himself from being solicitor for Lord Clinton, and the question was, whether the Court would permit him to turn his back on his client, and to go into the service of the person against whom he had been employed.

¹⁵² *Ibid.* at 517.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* at 518.

¹⁵⁵ *Beer v. Ward* (1821), Jac. 77, 37 E.R. 779.

¹⁵⁶ *Bricheno*, *supra* note 142.

There being no reference to confidential information one could be forgiven for supposing that perhaps a wider principle was intended to be stated. Lord Eldon then said, however:

Here the case stands thus: Mr. Day was clerk to a gentleman who was solicitor for the Plaintiff in this cause; the time of his service expires: he becomes a solicitor on his own account, and then the Defendants employ him. There may be cases where the mischief which the case of *Cholmondeley v. Clinton* was intended to counteract, may equally occur in the case of a clerk. On the other hand, the cause may be of such a nature, that though the clerk may be retained for the opposite party, it may be impossible for any information he possesses to do any mischief.

But if he is to carry important secrets out of the office, and employ them in the service of others, though I feel that it may operate to the detriment of young gentlemen setting up in business, yet I think that ought not to be permitted.¹⁵⁷

Five months later, after being informed of the nature of the suit in which the former client sought to restrain the solicitor from acting, Lord Eldon L.C. observed that the motion was based on the premise that the solicitor while a clerk to the plaintiff's solicitor had or may have had material information as to the interests of the plaintiffs and that if he communicated that information or made use of it against the plaintiffs, the plaintiffs may be injured.¹⁵⁸ Responding to the argument that *Cholmondeley* applied, he stated:

There two gentlemen had been in partnership, and had been the solicitors of Lord Clinton in the cause; and it is now known, that in that case at some time or other, the secrets of the title had been communicated to the adversary. One of these gentlemen [I do not mean to intimate that it was he who gave the information] quitted the partnership, and thus voluntarily quitted the employment of Lord Clinton.

It was, therefore, his fault, if it was a fault; at all events it was by his own act that he was not employed by Lord Clinton, and he then transferred himself to the other side in that cause, *in which, no doubt, there was much important information that might be communicated*. The application that was made being the first of the kind, I took the opinion of the Judges upon it. There could not, I think, be much difficulty about that case. If Lord Clinton had discharged the gentleman, and would not continue to employ him, on such a case no opinion was given. But it being by his own act that he ceased to be employed, the Judges were of opinion that *he could not*

¹⁵⁷ *Ibid.* at 865.

¹⁵⁸ *Ibid.*

*carry over to the other side the information acquired in the service from which he had discharged himself.*¹⁵⁹

In light of these comments, as well as the way the case was argued on both sides, it is surely difficult to contend that *Cholmondeley* proceeded on a footing other than that of possible misuse of confidential information.

The issue of former client conflicts was considered again in *Davies v. Clough*.¹⁶⁰ Shadwell V.-C. considered it to be a flagrant breach of a solicitor's duty to his former client to carry on "a negotiation for the benefit of that party" and then later attempt to destroy the completed transaction while acting for a new client. It is noteworthy that the solicitor's conduct was found to be offensive because he was using "his own personal knowledge of the transaction" for the benefit of his new client to the detriment of his former client.

In *Boulton v. Don and Danforth Road Company*,¹⁶¹ a decision of the Upper Canada Court of Chancery, *Cholmondeley* was cited as authority for the rule that "a solicitor cannot, by his own act, put an end to his relation with his client and act for the adverse party in the same suit." What is of interest is that the lawyer who was disqualified was not alleged to have had confidential information which he received from his former client. Mowat V.-C. stated:

Most of the cases turn upon the solicitor's knowledge confidentially acquired while acting for former clients; and in such cases the rule is, that when a solicitor has such knowledge, or where there is reason to apprehend that he has, and the communication of it might be prejudicial to the client, he is not at liberty to act for an adverse party, even in another suit, if it relate to matters in which the knowledge he has acquired would be available; and for this purpose it makes no difference whether his professional relation to his former clients had been put an end to by the client ... or by the solicitor himself, ... But the rule is more stringent in reference to a solicitor's acting for the adverse party in the same suit ...¹⁶²

The import of the last sentence, for which *Cholmondeley* is cited as authority, is obscure. Does it mean that confidential information is not a factor when a solicitor acts for the adverse party in the same case? Such a conclusion would be problematic for two reasons. First, one of the cases cited in the immediately preceding sentence was *Bricheno* where Lord

¹⁵⁹ *Ibid.* [emphasis added].

¹⁶⁰ (1837), 8 Sim. 262, 59 E.R. 105 [*Davies*].

¹⁶¹ (1867), 1 Chy. Chrs. 329 (U.C. Ct. Ch.).

¹⁶² *Ibid.* at 331-32.

Eldon L.C. made it clear that his opinion in *Cholmondeley* was concerned with the misuse of confidential information. Secondly, the actual result in the case was based on a finding that the solicitor (and his present firm) sought to be disqualified was still the solicitor for the “former” client, the plaintiffs. In this regard Mowat, V.-C. stated:

Mr. Boulton [one of the plaintiffs] opposes the motion, and objects that no order for changing the plaintiff’s solicitors had been made; and that Mr. Brough’s former firm being the solicitors for the plaintiffs in the cause, his present firm cannot act for the defendants, the Company, especially on an application to set aside an order obtained by the former firm. I think this view is correct. *I think Mr. Brough must be regarded by me as still solicitor for all the plaintiffs.*¹⁶³

Later in the case of *In re Attorney*¹⁶⁴ Harrison C.J., held, citing *Cholmondeley*, that an “attorney has no right voluntarily to withdraw from one side of a cause and communicate what he has acquired in the character of attorney for his former client.”¹⁶⁵ Harrison C.J. (citing, *inter alia*, *Davies*) continued:

[W]here an attorney has been employed in a cause and is afterwards discharged by his client (not on the ground of misconduct) he may act for the opposite party unless it clearly and distinctly appear that he has obtained information in his former character which it be prejudicial to the cause of his former client to communicate.¹⁶⁶

The next case of significance is *Little*.¹⁶⁷ There at first instance Hall V.-C. issued an injunction to prevent a company from employing as its solicitor a Mr. Dyer who had formerly represented the plaintiff in a related matter, stating:

[W]here the second transaction flows out of the first, and from the nature of the dispute, is so connected with it as I consider this to be, the new client ought not to employ that particular solicitor in the transaction, and the solicitor ought not to accept the employment, and the case is then one in which at the instance of the former client the solicitor ought upon general principles of equity to be restrained from so acting.¹⁶⁸

¹⁶³ *Ibid.* at 331 [emphasis added].

¹⁶⁴ (1876), 39 U.C.Q.B. 171.

¹⁶⁵ *Ibid.* at 182.

¹⁶⁶ *Ibid.* at 182-83.

¹⁶⁷ *Little*, supra note 121.

¹⁶⁸ *Ibid.* at 740.

Although this principle is certainly expressed in wide terms that do not refer to confidential information, it is necessary to be mindful of what Hall V.-C. said a little earlier in his judgment:

It therefore seems to me reasonably plain that Mr. Dyer may, and I might almost say must, have means of giving information to the company bearing upon the matter in dispute between them and the Plaintiff. Whether or not he would consider himself justified in giving such information I do not say; but if the company employ him as their solicitor he will be in a false position, and one which a solicitor ought not to occupy with reference to a former employer.¹⁶⁹

On appeal the Court of Appeal suggested “an arrangement between the parties, which was agreed to by their counsel” which resulted in the discharge of Hall V.-C.’s order. In the course of the argument Jessel M.R. said that he “thought the form of the injunction by which not only Mr. Dyer was restrained from acting for the company, but the company were restrained from employing Mr. Dyer, was erroneous” because there was “no special equity against the company.”¹⁷⁰ Notwithstanding this blow to the authority of Hall V.-C.’s statement of the governing rule, it is striking how close Hall, V.-C.’s approach is to that adopted by Sopinka J. in *MacDonald Estate*.

This brings us to the case that, until *MacDonald Estate*, was the leading case on whether a lawyer should be enjoined from acting against a former client, namely *Rakusen*.¹⁷¹ It will be recalled that in *Rakusen*, the Court of Appeal applied the now discredited “probability of real mischief” test. The concern here, however, is not with that test but with the Court of Appeal’s consideration of the true basis of *Cholmondeley*. Cozens-Hardy M.R. was of the view that in *Cholmondeley* Lord Eldon L.C. proceeded on the footing that the solicitor who had discharged himself could not deprive the client of the contractual right to the services of that solicitor.¹⁷² Such a confined interpretation of Lord Eldon L.C.’s opinion was not shared by the other two members of the Court of Appeal. Fletcher Moulton L.J. referred at length to the obligation in all cases of confidential employment including solicitors to not disclose or put at the service of the new client the secrets belonging to his former client. He then observed that the decision in *Cholmondeley* “must be read with the authoritative explanations of it which were given by the Lord Chancellor

¹⁶⁹ *Ibid.* at 739.

¹⁷⁰ *Ibid.* at 742.

¹⁷¹ *Rakusen*, *supra* note 122.

¹⁷² *Ibid.* at 837.

in *Beer v. Ward* and *Bricheno v. Thorp ...*¹⁷³ As noted above, those “authoritative explanations” indicated that the *Cholmondeley* case was based on the misuse of confidential information.

Buckley L.J. began his judgment by stating the general principle “applicable not to solicitors only but to confidential agents of all kinds” that

confidential information shall not be used against the principal from whom, or for whom, and in whose employment, it has been obtained. There is no general rule that a solicitor who has acted in a particular matter for one party shall not under any circumstances subsequently act in that matter for his opponent. Whether he will be restrained from so acting or not depends on the particular circumstances.

Buckley L.J. rejected counsel’s argument that even when there was no danger that confidential information would be communicated, the solicitor would still be restrained from acting.¹⁷⁴ Counsel had submitted that this proposition was “the result of the cases” and cited, *inter alia*, *Cholmondeley*. Buckley L.J. disagreed, stating:

When *Earl Cholmondeley v. Lord Clinton* is carefully read it will be found that Lord Eldon and the judges whom he consulted were all basing themselves upon this as being in their opinion the one cardinal feature of that case, that the solicitor had discharged himself; and *they, I think, drew the inference that having discharged himself he was going into the employment of the new client with the result, or the possible result, or the anticipated result, that there would be a breach of the confidential duties which he owed to his former client.* Of course he owes his former client the duty not to disclose that which he has learned confidentially, but there is no duty in the solicitor to abstain from serving another client in that matter if there is no breach of that confidence.¹⁷⁵

Two of the three judges in *Rakusen* considered *Cholmondeley* to be based on the need to protect confidential information. All three judges were, however, unanimous that the sole duty owed by a solicitor to a former client was to not misuse the confidential information obtained under the previous retainer.

Although the different formulations of the applicable test in *Rakusen* have troubled judges in some later cases,¹⁷⁶ *Rakusen* was regarded as the leading authority in Canada for well over sixty years. The “probability of

¹⁷³ *Ibid.* at 842.

¹⁷⁴ *Ibid.* at 842.

¹⁷⁵ *Ibid.* at 844 [emphasis added].

¹⁷⁶ See e.g. *In re A Firm of Solicitors*, [1992] Q.B. 959 at 967-68.

mischief” test began to be doubted in the 1970s when some courts began to phrase the test in terms not of “probability” but “possibility.”¹⁷⁷ Other courts continued to follow *Rakusen*’s probability of mischief test.¹⁷⁸

It is important to note that even those courts that were minded to depart from the probability of mischief test did not generally move away from the premise that the court should intervene only to protect against the misuse of the former client’s confidential information.¹⁷⁹ Indeed in *MacDonald Estate* where the *Rakusen* probability of mischief test received its quietus, the mischief against which the new test would guard was said by Sopinka J. to be the “misuse of confidential information by a lawyer against a former client.”¹⁸⁰

The governing test established in *MacDonald Estate* requires two questions to be answered:

- (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?
- (2) Is there a risk that it will be used to the prejudice of the client?¹⁸¹

From these thirty-four words has come a mountain of grief for law firms. The Supreme Court of Canada, in elaborating on the content of these two questions, has stacked the deck against law firms.

With respect to the first question, Sopinka J. stated:

In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court’s degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged

¹⁷⁷ See e.g. *Steed & Evans Ltd. v. MacTavish* (1976), 12 O.R. (2d) 236, 68 D.L.R. (3d) 420 at 238 O.R.; *Canada Southern Railway Co. v. Kingsmill, Jennings* (1978), 8 C.P.C. 117 at 122.

¹⁷⁸ See e.g. *Mercator Enterprises Ltd. v. Mainland Investments Ltd.* (1978), 29 N.S.R. (2d) 703 at 708.

¹⁷⁹ See Sopinka, J.’s review of the cases in *MacDonald Estate*, *supra* note 101 at 1253 *et seq.*

¹⁸⁰ *Ibid.* at 1246.

¹⁸¹ *Ibid.* at 1260.

communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.¹⁸²

While Sopinka J. rejected the American approach which calls for the application of an irrebuttable presumption, which he said was too rigid, he created a presumption which would be extraordinarily difficult to rebut. Surely it would not have done too much violence to the preservation of the public interest to require the former client to provide some evidence as to the nature of the confidential information that he contends was supplied to the lawyer.

Dealing with the second question, the misuse of confidential information, Sopinka J. distinguished between the lawyer who is presumed to have relevant confidential information and that lawyer's partners and associates. The lawyer who has the confidential information is automatically disqualified: he "cannot act against his ... former client." Protests of ignorance of any confidential information will be futile. Sopinka J. stated:

No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.¹⁸³

Because the lawyer cannot "compartmentalize his mind," he must be removed to avoid the risk that he would breach his duty to maintain confidential the information received from the former client.

Sopinka J. was prepared to be more lenient with respect to the lawyer's partners and associates. He rejected as "overkill" the American doctrine of imputed knowledge which "assumes that the knowledge of one member of the firm is the knowledge of all" and which holds that if "one lawyer cannot act, no member of the firm can act."¹⁸⁴

The leniency offered, however, was rather circumscribed. Partners and associates could continue to represent the new client *only* if

¹⁸² *Ibid.* at 1260-61.

¹⁸³ *Ibid.* at 1261.

¹⁸⁴ *Ibid.*

institutional efforts had been made to protect against the disclosure of confidential information. Sopinka J. stated:

Moreover, I am not convinced that a reasonable member of the public would necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it. There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no discourse will occur by the “tainted” lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence.¹⁸⁵

In 1990 Chinese walls and cones of silence were not “familiar to Canadian courts” and had not been adopted by the various bodies governing the legal profession in Canada. Nevertheless Sopinka J. invited those bodies to make rules governing the use of protective devices like Chinese walls. The governing bodies accepted this invitation. The Federation of Law Societies drafted a model rule whose basic tenets have been adopted by most Canadian jurisdictions.¹⁸⁶

If the proper institutional arrangements are not in place, however, the strong inference that lawyers share confidences will prevent all of the firm’s lawyers from acting against a former client. In that case the confidences of the former client will be treated as having been shared among all members of the firm. A Chinese wall will not be effective for the simple reason that a Chinese wall would have to be in place around each lawyer in some fashion to protect each client. Such fortifications would defeat one of the principal benefits of a law firm, the ability to work together on many different matters. In practice a Chinese wall is most relevant in situations where a new lawyer joins a firm which represents a client adverse in interest to the new lawyer’s former client; Chinese walls are effective to protect the former client’s confidential information. But what if the former client is the former client of the firm which the new lawyer joins? Can he act against a former client of the firm? While a Chinese wall may be effective in such a situation, it will be much more difficult to erect. Unless the new lawyer joins the firm at the same time as other lawyers who may be able to assist him or her, the new lawyer would have to be treated as a virtual pariah until the conclusion of the retainer. That is something which may not be particularly palatable for either the new lawyer or the firm that he or she joined.

¹⁸⁵ *Ibid.* at 1262.

¹⁸⁶ Devlin and Rees, *supra* note 62 at 438, footnote 19.

In cases where a Chinese wall does not provide acceptable protection, the battle will be fought over the nature of the two retainers. The question will be “Is the previous retainer sufficiently related to the ‘new retainer’?” Unfortunately, there is nothing in *MacDonald Estate* that provides authoritative guidance on that issue, though help may be at hand in *Strother*. If a firm can represent competitors at the same time because the law is concerned with legal as opposed to commercial conflicts, can it be said that the relationship between the two retainers in a former client situation must be legal as opposed to commercial? It is submitted that no such distinction can safely be made. What was confidential commercial information could easily be misused in a subsequent case or transaction when representing a client against a former client. It seems that there is no easy way to avoid a careful examination of the circumstances of the two retainers to determine if there is a real prospect that confidential information could possibly be misused.

The Supreme Court did not say that such misuse was the only ground on which the courts should intervene, but if the Court’s intervention was predicated on some other ground, would Sopinka J. have felt the need to create a difficult to rebut inference that confidential information was imparted to the lawyer? It will be recalled that the inference does not spring from the nature of the communications between the former client and the lawyer but from the existence of a sufficient relationship between the former and the current retainers. The fact that it was thought necessary to presume the existence of confidential information from the relationship between two matters, something which by itself tells us nothing about the nature of the information passing between client and lawyer, surely tells us that the existence of confidential information was regarded as the necessary prerequisite for judicial intervention. If the court could intervene for some other, perhaps less substantial, reason there would simply have been no reason to create the presumption.

This view is powerfully supported by Millett L.J.’s emphatic statement in *Bolkiah* that:

*The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.*¹⁸⁷

This conclusion was dictated by the nature of fiduciary responsibility:

¹⁸⁷ *Bolkiah*, *supra* note 72 at 235 [emphasis added].

The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client.¹⁸⁸

This statement is consistent with the recognized principle that “[f]iduciary duties are dependent upon the *continued* existence of an *underlying relationship of duty*.”¹⁸⁹ In *Attorney-General v. Blake*, the Court of Appeal stated:

We do not recognise the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it. Equity does not demand a duty of undivided loyalty from a former employee to his former employer ...¹⁹⁰

If the law does not recognize a fiduciary obligation which continues notwithstanding the termination of the fiduciary relationship that gives rise to it, is the duty of confidentiality owed by a solicitor to a former client properly regarded as a fiduciary duty? It is “generally accepted that the use or disclosure of confidential information *by a fiduciary* is a breach of *fiduciary* duty,”¹⁹¹ but it would “appear counter-intuitive for fiduciaries to retain accountability beyond the active component of that interaction.”¹⁹²

Does the termination of the relationship work a transformation of the duty of confidentiality from something that is fiduciary to something that is not fiduciary? Does the fiduciary duty of confidence become a “mere” equitable duty of confidence of the kind discussed in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*?¹⁹³ Does the label matter because both duties are creatures of equity? It is suggested that the duty of confidentiality to a former client remains a fiduciary duty. There is strong authority, notwithstanding Millett L.J.’s view to the contrary, that fiduciary duties do survive the termination of the underlying fiduciary relationship and that authority is of respectably ancient vintage. In *Ex parte James*,¹⁹⁴ the solicitor to the assignees of a bankrupt purchased a piece of property that

¹⁸⁸ *Ibid.*

¹⁸⁹ McGhee, *supra* note 4 at 153 [emphasis added].

¹⁹⁰ [1998] Ch. 439 (C.A.) at 453; see also *Bhullar*, *supra* note 51 at para 19.

¹⁹¹ Flannigan, “Duty of Fidelity,” *supra* note 17 at 275 and 284, footnote 50; Flannigan, “Boundaries,” *supra* note 5, at 87-88; Hollander and Salzedo, *supra* note 80 at 15.

¹⁹² Leonard I. Rotman, *Fiduciary Law* (Toronto: Carswell, 2005) at 395; see also Flannigan, “Boundaries,” *ibid.* at 44-45.

¹⁹³ [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577.

¹⁹⁴ (1803), 8 Ves. Jr. 337, 32 E.R. 385.

was sold by the assignees. That sale was set aside and the solicitor proposed to resign as solicitor so that he could bid on the resale. Lord Eldon refused to give his permission stating:

With respect to the question, now put, whether I will permit Jones to give up the office of solicitor, and to bid, I cannot give that permission. If the principle is right, that the solicitor cannot buy, it would lead to all the mischief of acting up to the point of the sale, getting all the information, that may be useful to him, then discharging himself from the character of solicitor, and buying the property. Infinite mischief would be the consequence in a number of cases.¹⁹⁵

A more recent and authoritative (at least for Canadians) case is *Canaero*.¹⁹⁶ There the Supreme Court accepted that the fiduciary obligations of directors and officers of a company could persist after their resignations. Laskin J. noted that “the rigorous standard of behaviour enforced against directors and executives may survive their tenure of such offices was indicated as early as *Ex p. James* ...”¹⁹⁷ The way Laskin J. formulated the principle, however, suggests that the duty continues only to foil a desire to evade one’s fiduciary duties. He said that the strict fiduciary ethic precluded a director or senior officer from diverting a maturing business opportunity “even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company ...”¹⁹⁸

Hutchison J. seemed to attach the same importance to the fiduciary’s intent to evade his obligations in the case of *Island Export Finance Ltd. v. Umunna*:

It seems to me that counsel’s bold submission [that the law of England did not recognize any fiduciary duty after termination] cannot be right, amounting as it does to the contention that a director, provided he does nothing contrary to his employer’s interests while employed may with impunity conceive the idea of resigning so that he may exploit some opportunity of the employers and, having resigned, proceed to exploit it for himself. Such a suggestion has only to be stated to be seen to be unsustainable, and in my judgment counsel for the plaintiff is right when he says that it conflicts with the dictum in one of the earliest cases in his line of authority, cited and relied on in the *Canaero* case, namely *Ex p James*.¹⁹⁹

¹⁹⁵ *Ibid.* at 352, 390-91 Ves Jr.

¹⁹⁶ *Supra* note 25.

¹⁹⁷ *Ibid.* at 613.

¹⁹⁸ *Ibid.* at 607.

¹⁹⁹ [1986] B.C.L.C. 460 at 480; see also *CMS Dolphin Ltd. v. Simonet*, [2001] 2 B.C.L.C. 704 at 733.

An intention to avoid fiduciary obligations plays no part in the persistence of a lawyer's duty of confidentiality to a former client. Where the issue is one of corporate opportunity, the nature and scope of the fiduciary duties owed by a director or senior officer "must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively."²⁰⁰ Such flexibility in the determination of whether duty exists at all has no place where a lawyer's duty to protect his former client's confidences are concerned. The lawyer's obligation is absolutely clear. "The duty of confidentiality survives the professional relationship and continues indefinitely."²⁰¹

While the duty to protect the confidences of a former client is properly regarded as a fiduciary one, that does not necessarily mean that other fiduciary duties also survive the termination of the solicitor-client relationship. As indicated above there is authority for the proposition that it is not just the duty of confidentiality that continues after the end of the retainer. There are essentially three lines of cases. In the first the courts merely add another proscriptive injunction: a lawyer shall not act against a former client in a case which involves the consideration of a document or transaction on which he or she had advised the former client. In *Jans v. G.H. Coulter Co.*, Jackson J.A. stated:

With one explainable exception we can find no case where a law firm, having previously prepared documents while representing both parties to the transaction, was allowed to represent one of the parties in litigation arising out of those documents.²⁰²

Then after referring to a number of cases where the court restrained the lawyer from acting in such circumstances against the former client, Jackson J.A. continued:

We agree that the [MacDonald Estate] case has replaced the courts' preoccupation with the old tests, i.e., possibility or probability of mischief, but we do not accept counsel's contention that the [MacDonald Estate] case requires a finding that there is a risk of a breach of confidentiality before a court will restrain a law firm from acting in this type of case. Although the cases referred to above cite no central reason for ordering that a law firm cannot act for a particular client where the firm has represented both parties, none of the above cases turned on a question relating to breach of confidentiality. Rather, each case points to some aspect of perceived prejudice to the litigants or to the process.²⁰³

²⁰⁰ *Canaero*, *supra* note 25 at 620.

²⁰¹ *Halsbury's Laws of Canada*, HLP-175.

²⁰² (1992), 105 Sask. R. 7, 32 W.A.C. 7 (Sask. C.A.) at 9 [*Jans* cited to Sask. R.].

²⁰³ *Ibid.* at 10.

There is no doubt that the precise basis of the conclusions reached in these cases is sometimes obscure. However, to say that none “turned on a question relating to breach of confidentiality” is an exaggeration. In one of the earliest of the cases cited, *R. v. Burkinshaw*,²⁰⁴ the defendants sought to enjoin the law firm acting for the plaintiffs in an action seeking the enforcement of guarantees allegedly given by the defendants. The affidavits filed by the defendants asserted that the law firm had confidential information regarding the underlying transaction, knowledge of at least one of the defendants’ personal affairs, and had advised the defendants in relation to the guarantees in question. As neither the plaintiff nor the law firm filed affidavits in reply or even cross-examined the defendants on their affidavits, Allen J.A. said that he was bound “to assume that the allegations therein contained are correct.”²⁰⁵

Significantly, the legal principles governing the conduct of a solicitor in acting for a party in opposition to his former client were said by Allen J.A. to be “fully set out in the judgments of the English Court of Appeal in *Rakusen*”²⁰⁶ After quoting passages from all three judgments in *Rakusen*, Allen J.A. stated:

Here there are uncontroverted allegations indicating a probability of a conflict of interest arising from the fact that the solicitor in question acted for the defendants in connection with the giving of the guarantees sued upon, liability upon which is now denied, and the same firm of solicitors is now seeking to enforce these guarantees on behalf of the plaintiff in these actions. The probability of such a conflict, in my opinion, raises such a “probability of mischief” that this Court, ... must, having regard to its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, interfere and enjoin the solicitors in question from acting any further for the plaintiffs in this action.²⁰⁷

Given that the “uncontroverted allegations” which indicated a “probability of conflict” included allegations that the law firm had confidential information, it cannot be said that the Court’s decision in *Burkinshaw* did not turn on the duty of confidentiality.

MTS International Services Inc. v. Warnat Corporation Ltd.,²⁰⁸ another case cited in *Jans*, is a bit of a muddle. There Montgomery J. quoted extracts from a number of cases including *Rakusen* and

²⁰⁴ (1967), 60 D.L.R. (2d) 748 (Alta S.C.).

²⁰⁵ *Ibid.* at 750.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.* at 751.

²⁰⁸ (1980), 31 O.R. (2d) 221, 18 C.P.C. 212 (Ont. Sup. Ct.).

Burkinshaw as well as certain rules and commentaries found in the Law Society of Upper Canada's *Rules of Conduct*. Some quotations referred to the obligation of confidentiality while others did not. The sum total of Montgomery J.'s own reasoning is found in the following two sentences:

Parties to a concluded lawsuit should feel that they have been fairly dealt with. How can they have that confidence in a just result when their former solicitor acts for the other side where he advised both parties?²⁰⁹

The absence of analysis makes it difficult to extract any principle from this case, let alone a principle that confidentiality is not a necessary element of an application to restrain a lawyer from acting against a former client.

The *Jans* case was applied in *Montreal Trust Company of Canada v. Basinview Village Limited*.²¹⁰ There an associate of the lawyer acting for Montreal Trust attended to the preparation and execution of mortgages in connection with the refinancing of Basinview. Later when Montreal Trust sought to foreclose on the mortgages the lawyer sought to act for Basinview. The Nova Scotia Court of Appeal held that the lawyer should be prohibited from acting for Basinview in the foreclosure proceedings.

Bateman J.A. considered that *MacDonald Estate* (which she referred to as *Martin v. Gray*) did not occupy the field with respect to conflicts of interest. As she put it the "law on conflicts, as regards the factual situation presented here, pre-dates the pronouncement by the Supreme Court of Canada nor is it altered by that case."²¹¹ Even though the case could have been resolved within the principles "established by *Martin v. Gray*" it was deemed unnecessary to resort to that case because the law was well-established.²¹²

Two of the cases relied on by Bateman J.A. as giving rise to that well-established law were *Fisher v. Fisher*²¹³ and *McCallum v. McCallum Estate*.²¹⁴ The latter case involved a dispute over the consequences of a particular clause in a will stating that the testator had intentionally not made any provision in the will for her husband or the children of her husband's first marriage. The will was drafted by a lawyer (Hubley) who was in the same firm as the lawyer who was now acting

²⁰⁹ *Ibid.* at para. 6.

²¹⁰ (1995), 142 N.S.R. (2d) 337, 126 D.L.R. (4th) 61 (C.A.) [*Basinview*].

²¹¹ *Ibid.* at 343.

²¹² *Ibid.*

²¹³ (1986), 76 N.S.R. (2d) 326, 14 C.P.C. (2d) 263 (C.A.) [*Fisher*].

²¹⁴ (1981), 47 N.S.R. (2d) 530, 90 A.P.R. 530 (S.C.(T.D.)) [*McCallum Estate*].

for the plaintiffs (MacLeod) in an action against the testator's estate. The court held that the lawyer could not act for the plaintiffs. The application was based on three grounds:

Number one, Mr. MacLeod's associate had advised the testatrix with respect to the wording of the will, the effect of which the plaintiff now seeks to challenge; number two, Mr. MacLeod's associate, as a result of drawing that will, is likely in possession of confidential information relating to the testatrix; and number three, Mr. MacLeod's associate (Mr. Hubley, the draftsman of the will) is likely to be a witness in the proceedings).²¹⁵

Of the three grounds, it was the third – that the draftsman of the will would be called as a witness – that was regarded by McLellan Co. Ct. J. as the most important consideration. Not only would it be “most unseemly” that the draftsman “take the stand and be cross-examined by an associate of his”, but counsel for the estate would be entitled to explore the will with the draftsman as a witness the factual basis for the assertions set out in the challenged clause of the will.²¹⁶

In *Fisher*, a wife involved in a matrimonial dispute contacted a lawyer seeking advice. The lawyer, who because of previous commitments could not meet with her, arranged for her to meet with one of his associates. The wife met with the associate and gave him “full and complete information regarding her custody case and sought his advice regarding regaining custody of her child.”²¹⁷ Later the lawyer was retained to act as counsel by the husband's solicitor. The wife sought to have the lawyer disqualified from acting as counsel for the husband. At first instance the judge “found that the associate had been provided by Mrs. Fisher with confidential information and that it would therefore be inappropriate for the barrister to continue to act in the matter.”²¹⁸ The judge also ordered that the wife pay costs on a solicitor-client basis because she failed to object in a timely fashion.

The wife appealed the award of costs which was the only issue that was before the Court of Appeal. In the course of his oral judgment for the Court allowing the appeal, Macdonald J.A. stated:

In our opinion, it is no excuse for the barrister to say that, since he was not aware of what Mrs. Fisher told his associate, he should be allowed to continue to act against her. *The knowledge of the associate surely must be deemed to be also the knowledge*

²¹⁵ *Ibid.* at 535.

²¹⁶ *Ibid.*

²¹⁷ *Fisher*, *supra* note 213 at 327.

²¹⁸ *Ibid.* at 329.

of the barrister. In any event, once he was made aware that Mrs. Fisher had been advised by his associate on the child custody issue, the barrister should have immediately withdrawn from the case.

In our view, the barrister had no other choice. There is no possible justification we can see in the circumstances here present that would permit him to act against Mrs. Fisher on the matter of child custody or any related issue when he knew that she had been previously advised on those very matters by his associate.²¹⁹

It is clear that both *McCallum Estate* and *Fisher* were based on the possible misuse of confidential information. Neither case, therefore, supports the proposition that a disqualifying conflict of interest does not depend upon the imputation of confidential information. The other case relied upon was *Jans*.²²⁰ Bateman J.A., after quoting a lengthy extract from Jackson J.A.'s judgment, referred to the possibility that the lawyer who prepared the mortgage document would be witness with respect to the validity of the mortgages and said that it would be untenable if the defendants' lawyer examined "his former associate on the quality of his work in placing the security which services were rendered at a time" when they were both members of the same firm.²²¹

The hallmark of most of the judgments comprising the second line of authority is broad judicial language referring to perceptions about the integrity of the administration of justice. No one can deny or diminish the importance of having a system of justice that exhibits high standards of integrity. The trouble with this kind of analysis is that it can easily become a mantra employed as a substitute for rigorous analysis. Tests which have perceptions as their central tenet tend to be subjective and encourage statements by claimants that they feel "betrayed." The same feelings of betrayal or unfairness expressed by the former client could arise in unrelated matters. Neither the statements of the courts nor the profession's ethical rules, however, have countenanced the disqualification of lawyers when acting against former clients in unrelated matters. The real danger to the justice system is not the existence of injured feelings on the part of the former client but the lawyer's use of what he knows about the client and his or her affairs to the detriment of the client.

This second line of cases is based on what some judges have considered to be well-established principles that pre-date *MacDonald Estate*. For the most part the concept of loyalty has not been a factor in

²¹⁹ *Ibid.* at 330 [emphasis added].

²²⁰ *Jans*, *supra* note 202.

²²¹ *Ibid.* at 347.

the analysis. There is, however, a third line of cases where the courts have explicitly recognized that a lawyer owes a duty of loyalty to a former client.

The line seems to begin with *Re Regina and Speid*.²²² Although this is a criminal case, the comments of Dubin J.A. have proved to be influential in civil cases. Speid was charged with second degree murder of a child. Nugent, the child's mother, was to be the Crown's chief witness; she was originally charged with the murder. She retained Lockyer to defend her. The retainer was of a very short duration but during that time Nugent met with Lockyer and his partner, Pinkovsky, to discuss the conduct of her defence. Nugent then changed solicitors and pleaded guilty to manslaughter. The Court inferred that as a result of the information supplied by Nugent, Speid was charged with the murder. Pinkovsky was then retained to act for Speid. Nugent's solicitor, when he learned that Pinkovsky was prepared to take an adversarial position against Nugent, objected to his acting for Speid.

In the course of the preliminary hearing, Speid's right to be represented by Pinkovsky was challenged. During the proceedings Lockyer testified that Nugent had not told him the truth when she instructed. As Dubin J.A. pointed out, the disclosure by Lockyer of "what was said to him while he was receiving instructions" was a "fundamental breach of his duty" to Nugent.²²³ Dubin J.A. then stated:

It was fundamental to her rights that her solicitor respect her confidences and that he exhibit loyalty to her. A client has every right to be confident that the solicitor retained will not subsequently take an adversarial position against the client with respect to the same subject-matter that he was retained on. That fiduciary duty, as I have noted, is not terminated when the services rendered have been completed.²²⁴

No authority was cited for the proposition that a solicitor's loyalty to his client extends beyond the completion of the retainer. Nevertheless the Court's decision, that Pinkovsky could not properly represent Speid, was completely justifiable on the ground that Nugent's confidences had to be protected.

The notion of a continuing duty of loyalty was central to the reasoning of J. Macdonald J. in *Stewart*.²²⁵ The plaintiff, a former client of Edward Greenspan, claimed that the latter's involvement in the

²²² (1983), 43 O.R. (2d) 596, 37 C.R. (3d) 220 (Ont.C.A.) [*Speid* cited to O.R.].

²²³ *Ibid.* at 599-600.

²²⁴ *Ibid.* at 600.

²²⁵ *Stewart*, *supra* note 59.

production and presentation of a television program which featured his case amounted to a breach of fiduciary duty. It was held that, while Greenspan breached no contractual duty in doing so, he did breach the fiduciary obligation he owed to Stewart.

The way this fiduciary duty was constructed is highly unusual. Reference was made to a number of cases²²⁶ said by J. Macdonald J. to stand for the proposition that the “fiduciary duty is not terminated when the services rendered have been completed.”²²⁷ It was the general principles set out in *Lac Minerals*,²²⁸ *Hodgkinson v. Simms*,²²⁹ and *Frame v. Smith*²³⁰ that formed the basis of J. Macdonald J.’s conclusion that Greenspan had a fiduciary obligation to Stewart in 1991.

What is especially striking is how J. Macdonald J. came to recognize that there was a relationship of any kind between Greenspan and Stewart. He acknowledged that between January 1981 when the retainer ended until April, 1991, Greenspan and Stewart “had led independent lives” – “As of 1991, they hadn’t spoken in years.” Nevertheless because Greenspan “for his own purposes, involved himself again in the *public aspects* of Mr. Stewart’s crime, trial and punishment” there was “a relationship, for present purposes.”²³¹ Because Greenspan caused their lives to “intersect” again “over the subject matter of their counsel and client relationship,” there was a relationship that was capable of having fiduciary attributes. Later J. Macdonald J. stated:

It was when he acted as Mr. Stewart’s counsel that a fiduciary duty attached to Mr. Greenspan in respect of Mr. Stewart and his case. *That duty was alive but inoperative through the years that Mr. Greenspan and Mr. Stewart were independent of each other.* Mr. Greenspan brought himself within the sphere of that duty when, in 1991, he chose to involve himself again in the public aspects of Mr. Stewart’s case. Involving himself again in the subject matter of his concluded retainer triggered the fiduciary obligation of loyalty. Mr. Greenspan’s duty was to be loyal to Mr. Stewart to the extent of firstly, not taking advantage of him, and the information and issues which had been the subject of his professional services and secondly, to the extent of not undoing the benefits and protections provided by those professional services.²³²

²²⁶ Primarily *McMaster v. Byrne*, [1952] 3 D.L.R. 337, [1952] 1 All E.R. 1362 (Ont. P.C.); *Allison v. Clayhills* (1907), 97 L.T. 709; and *Speid*, *supra* note 222.

²²⁷ *Stewart*, *supra* note 59 at para. 289.

²²⁸ *Supra* note 11.

²²⁹ [1994] 3 S.C.R. 377.

²³⁰ (1987), 42 D.L.R. (4th) 81 (S.C.C.).

²³¹ *Stewart*, *supra* note 59 at para. 274.

²³² *Ibid.* at para. 327 [emphasis added].

This is simply extraordinary reasoning. To say that the fiduciary duty was “alive but inoperative” when the lawyer and the former client were “independent of each other” suggests that a current fiduciary relationship is utterly unnecessary. Ten years after the relationship terminated, a dormant fiduciary duty sprung back to life. It would seem to follow that if an individual had been a fiduciary once he or she would always be a fiduciary. On this reasoning, anyone who caused his life to “intersect” with another could be said to have a relationship with that other person, a relationship that could conceivably become a fiduciary one.

Stewart was followed by the Ontario Securities Commission in *Re Credit Suisse First Boston Canada Inc.*²³³ The Commission stated that *MacDonald Estate, Neil, Bolkiah and Chapters Inc. v. Davies, Ward & Beck LLP*²³⁴ were “focused on the more typical case where confidential information” was in issue, and therefore they did not foreclose “a duty of loyalty to a former client in appropriate in appropriate circumstances.”²³⁵ The Commission then concluded that “*Speid, Stewart* and [*Chiefs of Ontario v. Ontario* (2003), 63 O.R. (3d) 335] all provide support for the view that the law in Canada provides for a subsisting duty of loyalty to a former client.”²³⁶

In *Strother*, Binnie J. stated that the “issue of loyalty to a former client was dealt with in *MacDonald Estate v. Martin* (not *Neil*).”²³⁷ Sopinka J. in *MacDonald Estate* plainly did not, however, consider the case as one involving a breach of a duty of loyalty. Three cases were mentioned in *Strother* as involving claims where “a former client alleges breach of the duty of loyalty.”²³⁸ While Binnie J. seemed to accept the existence of such a duty he did not comment on the correctness of the analysis undertaken in each of those cases.

Most courts today are content to assert that a lawyer has a duty of loyalty to a former client. They do not explain how this fiduciary duty can exist when there is, in fact, no present relationship between the lawyer and the former client. Some courts, however, seem to accept this principle without enthusiasm. For example, in *Melville*²³⁹ Levine J.A. observed that it was “well-settled that a lawyer may owe a former client

²³³ (2004), 2 B.L.R. (4th) 109, 28 O.S.C.B. 1571 [*Credit Suisse*].

²³⁴ (2001), 52 O.R. (3d) 566, 10 B.L.R. (3d) 104 (Ont. C.A.)

²³⁵ *Credit Suisse*, *supra* note 233 at 133.

²³⁶ *Ibid.* at 135.

²³⁷ *Strother*, *supra* note 6 at 416.

²³⁸ *Stewart*, *supra* note 59; *Credit Suisse*, *supra* note 233; and *Chiefs of Ontario v. Ontario* (2003), 63 O.R. (3d) 335 (Sup. Ct.) [*Chiefs of Ontario*]; see *Strother*, *ibid.* at 416.

²³⁹ *Melville*, *supra* note 103.

a continuing duty of loyalty.”²⁴⁰ She then noted that in the three cases cited in *Strother – Stewart*, *Credit Suisse*, and *Chiefs of Ontario* – “lawyers whose retainers for former clients had ended when they undertook to act contrary to those client’s interests” were found either liable in damages for breach of the fiduciary duty of loyalty or disqualified from acting for the new client. Levine J.A. was unwilling to accept that the decisions in these three cases laid down any general principle – they were “fact-specific.” She stated:

Some of the language used in these cases is general enough to support the appellants’ position that when a lawyer acts against a former client on the very issue for which the solicitor was retained by that client, the confidence of the public in the administration of justice and the integrity of the legal profession cannot be maintained. On closer reading, however, it is apparent that both the extent of the continuing fiduciary duty of loyalty, and whether it has been breached, turn on the particular facts of the case, in which one of the factors considered is the use of relevant confidential information received from the former client.²⁴¹

As the three cases turned on their own facts, Levine J.A. was able to distinguish them. The case before the Court was “more typical;” it therefore followed that the “appropriate inquiry” was the one set out in *MacDonald Estate*.²⁴²

The Nova Scotia Court of Appeal accepted that a lawyer owes a duty of loyalty to a former client in *Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd.*²⁴³ In effect, the Court considered that the ethical rule prohibiting a lawyer from acting against a former client in the same or related case, found in Commentary 12 to Chapter V of the CBA *Code of Professional Conduct*, applies “whether or not confidential information is at risk.”²⁴⁴ According to Cromwell J.A., a matter was “‘related’ for this purpose if the new retainer involves the lawyer taking an adversarial position against the former client with respect to the legal work which the lawyer performed for the former client or a matter central to the earlier retainer.”²⁴⁵

This conclusion was, in Cromwell J.A.’s view, compelled by the existence of binding authority that a lawyer has a duty not to act against a former client in the same or related matter. That authority was, of

²⁴⁰ *Ibid.* at para. 17.

²⁴¹ *Ibid.* at para. 18.

²⁴² *Ibid.* at para. 24.

²⁴³ 2008 NSCA 22, 52 C.P.C. (6th) 67 (N.S. C.A.) [*Brookville Carriers*].

²⁴⁴ *Ibid.* at para. 17.

²⁴⁵ *Ibid.*

course, *Basinview*.²⁴⁶ This proposition was also said to be supported by *Jans*,²⁴⁷ *Speid*,²⁴⁸ *Stewart*,²⁴⁹ *Chiefs of Ontario*,²⁵⁰ *Credit Suisse*²⁵¹ as well as *Strother*. While Cromwell J.A. referred many times to the duty of loyalty which is owed to a former client, it is perhaps significant that there was no attempt to state in a comprehensive fashion what obligations loyalty comprises. There was moreover no explanation of why loyalty provided the justification for the principle.

Earlier in this article, I suggested that the ethical rule against acting against a former client in the same or related matter, which has now become a rule of law, was based on the need to protect confidential information. Now some courts, such as the Nova Scotia Court of Appeal in *Brookville Carriers*, assert that there exists a broader duty of loyalty that continues after the termination of the retainer, a duty of loyalty that is “based on the need to protect and promote public confidence in the legal profession and the administration of justice.”²⁵² The decision of Cromwell J.A. was clearly right, but as has been suggested above the true purpose of the rule is to protect the use of the client’s information. The lawyer’s duty is not merely to refrain from disclosing confidential documents received from the former client in connection with the retainer. It covers (and protects against) the use of the insight gained by the lawyer, no doubt at the former client’s expense, against the former client.

In *Brookville Carriers* the disqualified lawyer was seeking to use information that was not confidential as between the former clients and the current client but it was the former client’s information. The lawyer was not at liberty to use that information about the client or his affairs against him.

Nevertheless the broader and continuing duty has obviously exerted a considerable attraction for Canadian courts. Before returning to a consideration of whether the recognition of such a duty is a good thing, it is proposed to look at how the courts of Australia deal with this issue. This is done for two reasons. First, there are a significant number of cases in which these questions are explored. Secondly, issues of conflict of interest have been, and continue to be vigorously and rigorously debated

²⁴⁶ *Basinview*, *supra* note 210 at para. 24.

²⁴⁷ *Supra* note 202.

²⁴⁸ *Supra* note 222.

²⁴⁹ *Supra* note 59.

²⁵⁰ *Supra* note 238.

²⁵¹ *Supra* note 233.

²⁵² *Brookville Carriers*, *supra* note 243 at para. 51.

at all levels of courts and in all jurisdictions save that of the High Court. Although some courts, primarily those in Victoria, have accepted the proposition of a persistent duty of loyalty, others have rejected such a notion.

In *Spincode*,²⁵³ to which reference was made earlier, Brooking J.A. considered that there was “a good deal of authority for the view that a solicitor ... may be prevented from acting against a former client even though a likelihood of danger of misuse of confidential is not shown.”²⁵⁴ After a thorough review of case law and academic writing, Brooking J.A. answered the question “How, then, do matters stand?”:

I think it must be accepted that Australian law has diverged from that of England and that the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client. That danger can and usually will warrant intervention, but it is not the only ground.²⁵⁵

Brooking J.A. who was in no doubt that fiduciary duties could survive the termination of the fiduciary relationship, rejected the authority of *Bolkiah*²⁵⁶ and held that a lawyer did owe a duty of loyalty to some extent to a former client. It may be, however, that Brooking J.A.’s zeal for the cause of loyalty to a former client blinded him to the fact that many of the cases he cited could be justified on the ground of uncontroversial equitable principle. As we have seen, equity has always been alert to intervene to prevent the avoidance of equitable obligations. One of the rules the courts of equity have adopted to “prevent the emasculation of fiduciary duties” is the rule that a “fiduciary may not resign his fiduciary position in order to do that which fiduciary doctrine would otherwise bar him from doing ...”²⁵⁷

On the other side of the debate is the Equity Division of the New South Wales Supreme Court. In *Belan v. Casey*, Young C.J. observed that *Bolkiah* had been “followed on almost every occasion when the present situation has arisen, except in Victoria” and continued:

In my view, the overwhelming weight of authority is to the effect that where the applicant to restrain a solicitor is a former client, the sole consideration is whether

²⁵³ *Spincode*, *supra* note 42.

²⁵⁴ *Ibid.* at para. 38.

²⁵⁵ *Ibid.* at para. 52.

²⁵⁶ *Supra* note 72.

²⁵⁷ McGhee, *supra* note 4 at 153.

there is a real risk of disclosure of confidential information and one does not delve into matters of conflict of interest or conflict of duty.²⁵⁸

Asked by counsel in *Blanch* to re-examine the view he expressed in *Belan*, Young C.J. refused stating:

It may be that there are some exceptional cases where equity will give relief in favour of a former client where there is no confidential information present. However, almost every judge who has recently given a judgment on the matter has recognized that there is still no rule forbidding a lawyer acting against a former client. As Chernov J.A. points out in *Spincode*, such a rule would come into play if one adopted a too liberal view as to the basis of the jurisdiction.²⁵⁹

The law in Australia has yet to be settled by the High Court. Nevertheless the vigorous analytical debate of the Australian courts has much to commend it.²⁶⁰

Is it a good thing to refer to a lawyer's continuing duty to a former client as a duty of loyalty? Does it help guide clients, lawyers and courts along "right pathways"? The short answer is "No." The problem arises because "loyalty" is essentially a word used to describe fiduciary accountability.²⁶¹ Fiduciary accountability, however, comprises a number of proscriptive rules. It is generally accepted that the duty of loyalty owed to a former client is less onerous than the duty of loyalty owed to a current client, but there is little guidance as to how much less onerous that duty is. Is it confined to a duty not to attack the work done or position taken on behalf of the former client?

The word itself does not provide an answer to that question. Peter Birks observed²⁶² that using "loyalty" to speak of fiduciary obligation seemed "less than useful." It failed to "hit the nail on the head" because it conveyed "no idea of the way in which or the purposes for which a trustee is to be relied upon." Because of its lack of precision loyalty was not the right paraphrase of the fiduciary obligation.²⁶³ Andrew Mitchell and Tania Voon, in a book review,²⁶⁴ state:

²⁵⁸ [2002] NSWSC 58, 2002 WL 221890 [*Belan*] at para. 18.

²⁵⁹ *Blanch*, *supra* note 104 at para. 105; see also *Styles v. O'Brien*, [2007] TASSC 67, 2007 WL 2422884; *Ismail-Zai v. State of Western Australia*, [2007] WASCA 150 [*Ismail-Zai*].

²⁶⁰ Goubran, *supra* note 78.

²⁶¹ Flannigan, "Duty of Fidelity," *supra* note 17 at 281.

²⁶² "The Content of Fiduciary Obligation" (2000) 34 *Isr. L. R.* 3.

²⁶³ *Ibid.* at 12; see also Flannigan, "Duty of Fidelity," *supra* note 17 at 281, footnote 37.

²⁶⁴ Of Hollander and Salzedo, *supra* note 80.

[A] fiduciary's obligation consists of four facets, each of which may be at issue to a greater or lesser degree in a particular case: no conflict, no profit, undivided loyalty, and confidentiality. Of these facets, *the content of the duty of loyalty is the most uncertain*. As noted by Glover, judges sometimes use this phrase as "a rationale of judicial intervention [rather] than an independent rule governing when it will occur." The authors have had only slightly more success in clarifying this duty than the judges – it should be done away with.²⁶⁵

Even if "loyalty" is banished as a legal term of art, what will replace it? It is suggested that it would be beneficial if the courts and the profession returned to a more traditional approach where the focus is on what conduct is proscribed. Fortunately the CBA Task Force has adopted such an approach with respect to the duties owed to a former client.²⁶⁶

The CBA Task Force concluded that four duties survive the termination of the retainer: the duty to maintain confidentiality; the duty not to undermine prior work; the duty not to take improper benefit from the relationship; and the duty of candour. The basis of the duty of confidentiality is not in doubt. The other three, however, based as they are on cases whose analysis is suspect, are more problematic.

For example, it is said that the duty not to take improper benefit from the relationship is different from the obligation to avoid conflicting personal interests. The Task Force states:

While these findings are expressed in terms of conflicting personal interest, this cannot be a proper basis for a surviving duty as the duty to avoid conflicts supports the duty of performance which ends with the retainer.²⁶⁷

Leaving aside the issue of whether the rule against conflicting interests can be so confined, new proscriptive rules are seen to be necessary perhaps because of a failure to fully appreciate the breadth of the duty of confidentiality. That duty is not confined to the disclosure of the information which the client has confided to the lawyer. It also encompasses its use. In *Sinclair v. Ridout*,²⁶⁸ McRuer C.J.H.C. adopted a statement on the duty of a solicitor found in *Bowstead on Agency*:

It is the duty of a solicitor – ...

²⁶⁵ (2002) 26 Melb. U.L. Rev. 241 at 243 [emphasis added].

²⁶⁶ CBA Task Force, *supra* note 112 at 52 *et seq.*

²⁶⁷ *Ibid.* at 80.

²⁶⁸ [1955] O.R. 167, [1955] 4 D.L.R. 468 (Ont. H.C.) at 183 O.R..

(7) to keep secret all confidential communications made to him, and *all information and knowledge of his client's affairs acquired by him*, in the course of his employment as solicitor;

(8) *not to act for the opponent of his client, or of a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue advantage*. An injunction will be granted to restrain a solicitor from communicating to the opponent of a former client confidential communications made to him, or documents or facts coming to his knowledge, as the solicitor of the former client; and when there is a chance of his using any such communications or knowledge to the detriment of the former client, from acting as solicitor for the opponent. In the application of this principle it is quite immaterial whether the solicitor was discharged by his former client, or ceased to act for him voluntarily²⁶⁹

It was this passage which Dubin J.A. in *Speid* prefaced with the comment:

We would have thought that the fundamental principles governing the professional conduct of lawyers in this province were well known and need not to be restated, but in view of the submissions made to us by the very senior and able counsel for Mr. Speid, we find it necessary to do so.²⁷⁰

“Knowledge of the client’s affairs” has been generously interpreted. In *Yunghanns v. Elfic Ltd.*, Gillard J. stated:

[T]he relationship between solicitor and client may be such that the solicitor learns a great deal about his client, his strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure or tension, his attitude to litigation and settling cases and his tactics. These are factors which I would call the ‘getting to know you’ factors. The overall opinion formed by a solicitor of his client as a result of his contact may in the circumstances amount to confidential information that should not be disclosed or used against the client.²⁷¹

Young C.J. in Eq. in *Blanch* adopted a similar approach:

It also must be remembered that “confidential information” in this sort of case is not limited to what might be confidential information in a case between ex-employer and ex-employee. As Goldberg J said in *PhotoCure* ..., matters involving a client’s

²⁶⁹ William D. Bowstead, *Bowstead on Agency*, 11th ed., (London: Sweet & Maxwell, 1951) at 600 [emphasis added].

²⁷⁰ *Speid*, *supra* note 222.

²⁷¹ Unreported decision of the Supreme Court of Victoria, July 3, 1998 [*Yunghanns*]; quoted in *Ismail-Zai*, *supra* note 259 at para. 28.

forensic tactics and strategies come under this head. Thus, if it be the case, the fact that a motor vehicle property insurer told its solicitor that it would always accept 75% of its claim for instant cash would come within the category of confidential information.²⁷²

Similar attitudes are found in some Canadian courts. In *Skjerpen v. Johnson*, Smith J. stated:

The law firm does not deny that during those retainers [which involved circumstances similar to the present matter] Mr. Skjerpen revealed an aspect of his character that was relevant to the conduct of that litigation, including his temperament and personality, his attitude toward litigation risk, planning strategy and tactics. These discussions were relatively recent to the commencement of this litigation. In my view, although not directly related to the facts and issues of within action, the disclosure falls within a category of confidential information that might permit the law firm to take advantage of him in the current litigation.²⁷³

The expansion of confidential information beyond the “nuts and bolts” of the dispute to the attitudes and expectations of the former client has been criticized. In *Black v. Taylor*,²⁷⁴ the High Court had adopted a broad definition of confidential information very similar to the one later formulated by Gillard J. in the *Yunghanns* case.²⁷⁵ On appeal Richardson J. spoke of treating “knowledge of a client (as distinct from knowledge of his or her affairs) gained through a professional association as confidential information” as a “somewhat artificial development.”²⁷⁶ Cooke P. adopted the relevant passage from the lower court reasons, but added that whether that kind of “getting to know you” information should be “put exclusively under the hearing of confidential information” was in his view “unimportant.”²⁷⁷

In *Mintel International Group Limited v. Intel (Australia) Pty Ltd.*,²⁷⁸ Heerey J. considered that the “getting to know you” principle could not be “accepted too literally especially in relation to counsel.”²⁷⁹

²⁷² *Blanch*, *supra*, note 104 at para. 113; see also *PhotoCure ASA v. Queen's University at Kingston*, [2002] FCA 905 at para. 25; *Spincode*, *supra* note 45 at para. 58, *per* Brooking J.A., para. 62 *per* Ormiston J.A. and para. 63, *per* Chernov J.A.

²⁷³ 2007 BCSC 1290, [2007] B.C.W.L.D. 6375 (B.C.S.C.) at para. 25; see also *Richmond Taxi Holdings Ltd. v. Robbins*, 2007 BCSC 1680, (2007), 163 A.C.W.S. (3d) 139 (B.C.S.C.) at para. 121 *et seq.*

²⁷⁴ [1993] 3 N.Z.L.R. 403 [*Black*].

²⁷⁵ *Supra* note 271.

²⁷⁶ *Black*, *supra* note 274 at 412.

²⁷⁷ *Ibid.* at 406.

²⁷⁸ [2000] FCA 1410.

²⁷⁹ *Ibid.* at para. 44.

In language somewhat reminiscent of that employed by Binnie J. in *Neil* with respect to “professional litigants,” Heerey J. continued:

There are many bodies such as Commonwealth and State government entities, banks, insurers, media companies and many others which are constantly engaged in litigation. Counsel retained to act on behalf of such bodies inevitably acquire information, not confidential information in the strict sense, but experience as to the corporate culture of the clients, their internal policies, the way they deal with litigation, tactics, the personalities of important decision-makers and so forth. I do not accept that general experience of that kind would impose what presumably on the respondent’s argument would be lifetime restraints on counsel from acting against such a body.²⁸⁰

More recently in *Ismail-Zai v. State of Western Australia*, Steytler P. said:

If these so-called “getting to know you” factors, to the extent that they involve knowledge of the client rather than of anything imparted in confidence by the client concerning his or her affairs, can constitute confidential information (a proposition that seems to me, with respect, to be questionable), they will only rarely do so...²⁸¹

Hollander and Salzedo²⁸² consider that Australian (and by extension the Canadian) courts take a “broader view” of what constitutes confidential information than the courts of England. They also suggest because of that broad view “one can see that an extended acquaintance with the client would easily lead to a claim that there was a risk of misuse even in an unrelated matter.”²⁸³

This argument was said to be mistaken by Goubran, who states:

In *Yunghanns v. Elfic Ltd.*, Gillard J. observed that the earlier matters were “relevant to and essential background to” the matter in which the firm was now seeking to act. His Honour also held that there was a real and sensible risk that the confidential information would be used “contrary to the interests” of the former client. This case reinforces, rather than diminishes, the requirements that: there must be a connection between the two underlying matters (they must be the same or closely related); and that the parties’ interests must be adverse to each other, before a court should exercise its jurisdiction to restrain a lawyer from acting.²⁸⁴

²⁸⁰ *Ibid.*

²⁸¹ *Ismail-Zai*, *supra* note 259 at para. 29.

²⁸² Hollander and Salzedo, *supra* note 80.

²⁸³ *Ibid.* at 30.

²⁸⁴ Goubran, *supra* note 78 at 109.

This exchange of views points up an interesting feature of the Canadian law with respect to a lawyer's duty to a former client. Because of the nearly irrebuttable inference in *MacDonald Estate* that a lawyer received confidential information when retained by the former client, a broad view of confidentiality and even a persistent duty of loyalty would only be relevant in cases at the margins. In *Brookville Carriers*,²⁸⁵ for example, there was a joint retention so it could not be said that the information imparted by one party was confidential in relation to the other party. Consequently, in Canada the "getting to know you" approach or some variant of it would only be invoked where the two matters were not sufficiently related to fall under the rule in *MacDonald Estate* or are there problems with establishing the confidentiality of the information in question.

It may also be said that confidential information is misused when a lawyer attacks the credibility or trustworthiness of a former client. An excellent illustration of how this may occur is found in *Chiefs of Ontario v. Ontario*.²⁸⁶ Campbell J. said that the "breach of loyalty and good faith is obvious from [the law firm's] attack on its former client."²⁸⁷ The real sting, it is submitted, was not in the attack itself, but the "added concern that the allegations would have more force and credibility because they [were] made by the law firm that acted for [the former client] in closely related matters." As a representative of the former client stated in an affidavit, the allegations

may appear to have a degree of validity or credibility that they would not otherwise deserve, simply by reason of the appearance that they are being advanced by lawyers who have earlier acted in MFN's behalf in such closely related matters.²⁸⁸

3. Conclusion

The relationship between a solicitor and client has long been recognized as one giving rise to fiduciary obligations. Those obligations have traditionally comprised a number of well-known proscriptive rules whose application has been acknowledged to be, at times, harsh and inflexible. The fiduciary rule that has been of most concern to lawyers has been the duty to avoid conflicting interests. That duty has come to be seen to comprise two related rules – the duty to avoid conflicts between duty and interest, and the obligation to avoid conflicting duties to different clients, the so-called double employment rule.

²⁸⁵ *Supra* note 243.

²⁸⁶ *Supra* note 238.

²⁸⁷ *Ibid.* at para. 123.

²⁸⁸ Quoted by Campbell J. in *ibid.* at para. 120.

Since the late 1960s legal commentators and the courts have used the term “loyalty” to describe the core obligation of a fiduciary. “Loyalty” as an overarching expression to describe fiduciary accountability was borrowed from the United States where its usage first started in the 1920s. The traditional approach of Commonwealth courts has been to analyze cases on the basis of the traditional fiduciary rules without the need to first identify or apply a central governing concept. As the result of the Supreme Court’s adoption of the term “loyalty” in *Neil* in 2002, however, its use has become far more prevalent in Canada.

The concept of loyalty has a place in the analysis of conflicts of duty between lawyers and their current clients. The concept of loyalty was at the root of the “bright line” rule propounded by Binnie J. in *Neil*. That rule precludes a lawyer from acting for a client whose legal interests are adverse to those of another current client whether the two matters are related or not. This rule, re-affirmed by the Supreme Court in *Strother*, has caused considerable concern to the profession. So much so that the CBA established a Task Force to examine this and other rules with respect to conflicts of interest. The Task Force’s recommendations with respect to the mitigation of the bright line rule were adopted in August 2008.

However useful in the context of current client conflicts, the concept of loyalty is less helpful when seeking to ascertain a lawyer’s duty to a former client. The problem arises because loyalty is, it is now understood, pre-eminently a fiduciary concept and, conventionally at least, fiduciary obligations end with the termination of the fiduciary relationship. It is generally accepted that no rule of law absolutely bars a lawyer from acting against a former client. It is equally well settled, however, that a lawyer must not disclose or use his former client’s confidential information.

The House of Lords said in *Bolkiah*²⁸⁹ that the lawyer’s only obligation to a former client was the duty of confidentiality. This view has been shared by many courts in Australia. In Canada, the courts have recognized a duty of loyalty to a former client and have said that this duty extends beyond merely the duty of confidentiality. Just how far this duty of loyalty extends is unclear. It would appear that the duty is less onerous than the duty of loyalty owed to a current client but how much less is not yet settled. There is considerable support for the view that a lawyer cannot attack or try to undermine the work that he or she performed when acting for the former client.

²⁸⁹ *Supra* note 72.

Most, if not all, of the decisions that recognize the existence of a continuing duty of loyalty to a former client can be supported as applications of the duty of confidentiality. This duty is not merely to not disclose a former client's information, it also extends to its use. Furthermore, the information of the former client protected by the duty of confidentiality is not given a restrictive interpretation. It can include what have been called "getting to know you" factors.

Loyalty is a vague concept. While it is often yoked together with the need to protect the public's confidence in the legal system, it lacks the precision necessary to guide members of the legal profession on the proper way to deal with day-to-day conflicts problems. There is a danger that the concept of loyalty will be used uncritically. Many more situations may be identified as giving rise to conflicts of interest when none exist. Analytical clarity would be enhanced if use of the concept of loyalty was avoided and the traditional approach of equity employed.