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Of Lodestars and Lawyers: Incorporating the Duty of Loyalty into the Model Code of Conduct

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The "conflicts quartet" of cases decided by the Supreme Court of Canada can be understood as part of a long-standing tension in Anglo-Canadian jurisprudence between two competing conceptions of a lawyer's professional identity. In the most recent of these cases, C.N. Railway v. McKercher, *the Supreme Court conclusively preferred the loyalty-centred conception of the practice of law over the entrepreneurial conception. While the Federation of Law Societies of Canada amended its* Model Code of Professional Conduct *in 2014 in response to the Supreme Court's decision in* McKercher, *this article argues that those amendments did not go far enough. The authors propose a more substantial set of modifications to the* Model Code *to better entrench the duty of loyalty as a foundational principle of legal ethics. These amendments, they argue, would better reflect the reasoning in* McKercher *and would provide lawyers with a lodestar to guide their ethical judgement.*

Les quatre arrêts de la Cour suprême du Canada dans des affaires de conflit d'intérêts peuvent être considérés comme s'inscrivant dans la tension qui existe depuis longtemps dans la jurisprudence anglo-canadienne entre deux conceptions de l'identité professionnelle de l'avocat. Dans le plus récent de ces arrêts, Compagnie des chemins de fer nationaux du Canada c. McKercher LLP, *la Cour suprême a préféré la conception de la pratique du droit axée sur la loyauté à la conception entrepreneuriale. La Fédération des ordres professionnels de juristes du Canada a modifié, en 2014, son* Code type de déontologie professionnelle *en réaction à l'arrêt McKercher, mais les auteurs avancent que ces modifications ne vont pas assez loin. Ils proposent un ensemble plus corsé de modifications au* Code *type pour y intégrer davantage le devoir de loyauté en tant que principe fondamental de l'éthique juridique. Ces modifications, affirment-ils, refléteraient mieux le raisonnement dans l'arrêt* McKercher *et seraient, pour les avocats, une référence qui guiderait leur jugement éthique.*

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Introduction

In 2009, after several years of negotiations with the various Canadian law societies, the Federation of Law Societies of Canada (FLSC) launched its *Model Code of Professional Conduct* (*Code*).[1] This was a major achievement insofar as it presented a unified national vision of the core ethical obligations of Canadian lawyers. The hope was that each provincial and territorial law society would adopt the *Code*.

However, at that time there was one conspicuous omission from the *Code*, the section on conflicts of interest. The reason for this, as others have explained in detail,[2] is because the FLSC was embroiled in a controversy with the Canadian Bar Association (CBA) as to the substance of the conflicts rules. The essence of the disagreement was whether the chapter should be constructed to echo two recent decisions of the

1. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (10 October 2014), online: FLSC <flsc.ca/wp-content/uploads/2014/12/conduct1.pdf>. As of the date of writing every province and territory, with the exceptions of Quebec and the Yukon, has either adopted or agreed to adopt the *Code*.

2. Adam Dodek, "Conflicted Identities: The Battle over the Duty of Loyalty in Canada" (2011) 14:2 Leg Ethics 193.

Supreme Court of Canada (*R. v. Neil*[3] and *Strother v. 346920 Canada Inc*[4]) which had advanced a positive duty of loyalty or whether it should be constructed more narrowly to focus on the negative injunction to avoid conflicts of interest. In December 2011, the FLSC did issue its section on conflicts of interest and in the commentaries referenced the Supreme Court's jurisprudence on the positive duty of loyalty.[5] It did not, however, articulate a free-standing duty of loyalty.

In 2013, the Supreme Court of Canada issued another decision on the ethical obligations of law firms, *Canadian National Railway Co. v. McKercher LLP*,[6] and this time unequivocally endorsed the duty of loyalty as a foundational ethical principle.[7] In response, the FLSC made some minor amendments to the conflicts section of the *Code* in the fall of 2014. In this paper we argue that these amendments did not go far enough to entrench the duty of loyalty in the *Code* and that further modifications are required.

We advance this argument for three reasons. First, while an ethical principle is distinct from a legal rule, it is essential that a code of conduct, at a minimum, should clearly and accurately reflect the basic legal obligations of lawyers. A code of conduct may seek to go beyond basic legal obligations, but it cannot embrace something less than those obligations. Secondly, we believe that if the *Code* were to adopt and clearly articulate a foundational duty of loyalty, it would bring greater analytical coherence to a variety of existing principles and duties already embedded in the *Code*, such as confidentiality, commitment, resolute advocacy, candour and the avoidance of conflicts of interest. Thirdly, we suggest that as a matter of professional identity and ethical decision-making it is important whether a lawyer filters his or her understanding of the obligations to the client through the negative injunction "avoid conflicts of interest" or the positive mandate "be loyal." Decisions about potential conflicts of interest situations can be complex and economic incentives may nudge lawyers towards accepting retainers in moments of doubt. *McKercher* is the star example. If lawyers internalize the positive "duty of loyalty" as a

3. 2002 SCC 70, [2002] 3 SCR 631 [*Neil*].
4. 2007 SCC 24, [2007] 2 SCR 177 [*Strother*].
5. Federation of Law Societies of Canada, Standing Committee on the Model Code of Professional Conduct, *Report on Conflicts of Interest*, 21 November 2011, online: FLSC <docs.flsc.ca/Conflicts-of-Interest-Report-Nov-2011.pdf>.
6. 2013 SCC 39, [2013] 2 SCR 649 [*McKercher*].
7. Alain Roussy, "Conflicts of Interest in Canada: The *McKercher* Decision" (2014) 17:2 Leg Ethics 306.

norm—rather than the negative "avoid conflicts"—this might help offset the economic pressures lawyers (and their firms) often encounter.

To advance our argument, the paper will proceed in three stages. First, in Part I, we suggest that ambivalence about, or even resistance to, the idea that there is a freestanding duty of loyalty has a long history in Anglo-Canadian jurisprudence. Specifically, we will argue that the case law demonstrates an historic tension between two competing conceptions of a lawyer's professional identity: a loyalty-centred conception and an entrepreneurial conception. The loyalty-centred approach emphasizes that a lawyer is a professional who is in a trust-like relationship with his or her client, and therefore must subordinate her interests (economic and otherwise) to those of the client. The entrepreneurialist approach is more mercantilist in orientation in that it conceives of the practice of law as essentially a business enterprise, although one that is burdened with some particular constraints because of potential inequalities between the lawyer and the client. In Part II, we provide a concise overview of the "conflicts quartet" that emerged from the Supreme Court of Canada between 1990 and 2013 to argue that while the tension between the entrepreneurial and loyalty-centred conceptions remain, the court has conclusively endorsed the latter.[8] In Part III we argue that despite the recent amendments in 2014,

8. There has been a large literature assessing the strengths, weaknesses and potential ramifications of this quartet. Helpful texts include the following: Ian Binnie, "Sondage après sondage…quelques réflexions sur les conflits d'intérets" ("Poll After Poll: A Few Thoughts about Conflicts of Interest"), edited version of a speech given at Les Journées Strasbourgeoises, Strasbourg, France, 4 July 2008; French version published in l'Institut canadien d'études juridiques, *Droits de la personne: éthique et droit: nouveaux défis: actes des Journées strasbourgeoises de l'Institut canadien d'études juridiques supérieures 2008* (Éditions Yvon Blais, 2009); Michael Brooker, "*R v Neil*: A New Benchmark for the Duty of Loyalty?" (2004) 22:1 The Society Record 16; Matthew Certosimo, "A Conflict Is a Conflict Is a Conflict: Fiduciary Duty and Lawyer-Client Sexual Relations" (1993) 16:2 Dal LJ 448; Simon Chester, "Conflicts of Interest" in Adam M Dodek & Jeffrey G Hoskins, eds, *Canadian Legal Practice: A Guide for the 21st Century* (Markham, ON: LexisNexis, 2009), § 4.170; Simon Chester, *The Conflicts Revolution: Martin v Gray and Fifteen Years of Change* (Toronto: Heenan Blaikie LLP, 2006); Richard F Devlin, "Guest Editorial: Governance, Regulation and Legitimacy: Conflicts of Interest and the Duty of Loyalty" (2011) 14:2 Leg Ethics iii; Richard F Devlin & Victoria Rees, "Beyond Conflicts of Interest to the Duty of Loyalty: From *Martin v Grey* to *R v Neil*" (2005) 84:3 Can Bar Rev 433; Dodek, *supra* note 2; Anthony J Duggan, "Contracts, Fiduciaries and the Primacy of the Deal" in Elise Bant & Matthew Harding, eds, *Exploring Private Law* (Cambridge, UK: Cambridge University Press, 2010) 275; Anthony Duggan, "Solicitors' Conflict of Interest and the Wider Fiduciary Question" (2007) 45:3 Can Bus LJ 414; Randal Graham, *Legal Ethics: Theories, Cases, and Professional Regulation*, 3rd ed (Toronto: Emond Montgomery, 2014) ch 6 at 313; Gavin HG Hume, "Acting for and against a Client: When is it Permissible" (2009) 67:3 Advocate 341; Gavin Hume, "Current Client Conflicts: Finally Resolved? *Canadian National Railway Co v McKercher LLP*" (2014) 72:3 Advocate 349; Allan C Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed (Toronto: Irwin Law, 2006) ch 8 at 134; Kimberly J Jakeman & Shanti M Davies, "The Bright Line: the Decision of *R v Neil* and its Impact on the Business of Law in Canada" (2003) 61:5 Advocate 715; Gavin MacKenzie, "Coping with Conflicts of Interest in the Wake of MacDonald Estate, Neil and Strother," paper presented at the Ontario Bar Association Continuing Legal Education Conference,

the FLSC has not adequately responded to the principles articulated by the Supreme Court and it has not gone far enough to distance itself from entrepreneurialism, or to embrace the demands of the duty of loyalty. Specifically, we indicate how the duty of loyalty can be clearly articulated, where it can be located in the *Code* as a first principle, and how the FLSC should modify the *Code* to support the principle and enhance its unifying potential for other dimensions of the *Code*.

One final preliminary comment. In advocating for the incorporation of a clear principle of loyalty in the *Code*, we are not suggesting that this will resolve every ethical dilemma vis-à-vis loyalty that a lawyer might have. Codes of conduct, in their essence, invoke general propositions; they are incapable of addressing the variety of practice contexts and fact specific situations that Canada's 100,000 lawyers encounter.[9] Lawyerly discretion is inevitable, and in fact, highly desirable. However, a code can provide lawyers with an orientation, an ethical lodestar, to provide guidance in moments when judgment must be exercised. We suggest that the duty of loyalty can (and should) be this lodestar, and that Canadian lawyers would be better served if it was firmly entrenched and more clearly articulated in the FLSC's *Code* and adopted by Canada's law societies.[10]

"Privilege, Confidentiality and Conflicts of Interest: Traversing Tricky Terrain," 23 October 2008 (Ontario Bar Association, 2008) 80; Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 5th ed (Toronto: Thomson Carswell, 2009), ch 5; M Deborah McNair, *Conflicts of Interest: Principles for the Legal Profession* (Aurora, ON: Canada Law Book, 2005); Paul B Miller, "Multiple Loyalties and the Conflicted Fiduciary" (2014) 40:1 Queen's LJ 301; Harvey L Morrison, "Conflicts of Interest and the Concept of Loyalty" (2008) 87:3 Can Bar Rev 565; Paul M Perell, *Conflicts of Interest in the Legal Profession* (Toronto: Butterworths, 1995); Paul M Perell, "Defences to the Motion to Disqualify for Conflict of Interest" (1998) 20:4 Adv Q 469; Paul M Perell, "Disqualifying Conflicts of Interest, Reductio Ad Absurdum, and R v Neil" (2003) 27:2 Adv Q 218; Catherine Piche, "Definir, prevenir et sanctionner le conflit d'interets" (2013) 47:3 RJT 497; Archie J Rabinowitz & Neil S Rabinovitch, "More about Imputing Knowledge from One Member of a Firm to Another: MacDonald Estate v Martin" (1991) 13 Adv Q 370; Alain Roussy, *supra* note 7; Amy Salyzyn, "The Judicial Regulation of Lawyers in Canada" (2014) 37:2 Dal LJ 481; Graham Steele, "Imputing Knowledge from One Member of a Firm to Another: Lead Us Not into Temptation" (1990) 12 Adv Q 46; Remus Valsan & Lionel Smith, "The Loyalty of Lawyers: A Comment on *3454920 Canada Inc v Strother*" (2008) 87:1 Can Bar Rev 247; Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham, ON: LexisNexis, 2011) ch 8 at 215; Alice Woolley et al, *Lawyers' Ethics and Professional Regulation*, 2nd ed (Markham, ON: LexisNexis, 2012) ch 5 at 275. The purpose of this paper is not to assess these diverse contributions, but to consider how this quartet has contributed to the evolution of the duty of loyalty.

9. Alice Woolley, "Still Just the Facts: Applying the Bright-Line Rule" (23 April 2015), *ABlawg* (blog) online: <ablawg.ca/2015/04/23/still-just-the-facts-applying-the-bright-line-rule/>.

10. To be clear, we are not arguing that the duty of loyalty is a lawyer's exclusive ethical obligation. Of course, it needs to be calibrated with other ethical obligations such as personal integrity and respect for the administration of justice. See e.g. Woolley et al, *supra* note 8, ch 1.

I. *The historical context*

1. *Overview*

Throughout the development of fiduciary principles, the lawyer-client relationship has sat alongside trustee-beneficiary and guardian-ward as axiomatic examples of the fiduciary relationship.[11] However, when looking closely at the both recent and historical case law related to conflicts of interest, a set of competing narratives can be seen. In one narrative, loyalty is the characteristic that defines the fiduciary relationship between lawyers and clients. Lawyers are fiduciaries—people upon whom the law imposes a high standard of selflessness, honesty, and faithfulness.[12] The rules that govern that relationship are relatively strict and justified by the public interest. In the competing narrative, lawyers are businesspeople acting in the market. The fiduciary nature of the lawyer-client relationship means that lawyers have some special constraints in pursuing their commercial interests, but these constraints are geared toward to the protection of the private interests of their clients. Lawyers cannot be allowed to gain an unfair commercial advantage over their clients by virtue of their influence or their access to confidential information, but holding them to the strict duties which apply to trustees would go too far in binding the hands of lawyers.

In Canada, the story of a lawyer's fiduciary duties is often told beginning in 1990 with the Supreme Court of Canada's decision in *MacDonald Estate v. Martin*, continuing through *Neil*, *Strother*, and *McKercher* perhaps with a reference to the landmark English case of *Nocton v. Lord Ashburton*.[13] The modest goal of this part of the paper is to fill in some of the gaps in this doctrinal history and to show that the tension that can currently be seen

11. See for example, PD Finn, *Fiduciary Obligations* (Sydney: The Law Book Company, 1977) at 1; Ernest Vinter, *A Treatise on the History and Law of Fiduciary Relationship Together with a Collection of Selected Cases* (London: Stevens and Sons, 1932) at ch 2; Edward D Spurgeon & Mary Jane Ciccarello, "The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations" (1994) 62 Fordham L Rev 1357 at 1361. Some of the judges developing fiduciary law also understood the list of protected relationships in this way. In *Hatch v Hatch* (1804), [1803–13] All ER Rep 74, 32 ER 615 (Ch), Lord Eldon said, "This case proves the wisdom of the Court in saying, it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand, purporting to be bounty for the execution of antecedent duty." In what might be the first judicial use of the word "fiduciary" in *Docker v Somes* (1834), 39 ER 1095, a case involving executors of an estate, Lord Chancellor Cranworth names attorneys and guardians as other examples of persons on whom equity imposes fiduciary obligations.

12. Alice Woolley, "The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations" (2015) 65:4 UTLJ 285

13. *MacDonald Estate v Martin*, [1990] 3 SCR 1235, 77 DLR (4th) 249 [*MacDonald Estate*]; *Neil*, *supra* note 3; *Strother*, *supra* note 4; *McKercher*, *supra* note 6; *Nocton v Lord Ashburton*, [1914] AC 932, 83 LJ Ch 784 (HL).

within the decisions of the Supreme Court of Canada and between those decisions and the *Code* echoes a tension that has been felt in the Anglo-Canadian legal profession for centuries. This section traces solicitors' fiduciary obligations as they developed in the U.K. in the 18th and 19th centuries and crystallized in the early 20th century, with a particular focus on cases dealing with conflicts of interest. It picks up the story in Canada as *Nocton v. Lord Ashburton* and some of the earlier cases dealing with the fiduciary obligations of solicitors are embraced by Canadian courts. All of this lays the groundwork for the conflicts quartet and the *Code*. Our hope is that a richer understanding of how courts have historically treated lawyers' conflicts of interest will enable lawyers, professional associations, and courts to think more clearly about lawyers' fiduciary duties and reframe how lawyers are expected to interact with clients.

2. *The early development of fiduciary obligations (1780–1860)*

The term "fiduciary" did not become common in courts of equity until well into the 19th century, and even then perhaps without a precise meaning.[14] However, the twin ideas that solicitors should be held to a high standard of conduct and should be faithful and loyal to their clients are visible in reported decisions from the 1700s. In *Welles v. Middleton*, Lord Chancellor Thurlow compared attorneys to trustees and guardians: people placed in relationships of special intimacy and influence and requiring a high standard of conduct.[15] In setting aside a gift made by a client to an attorney, he said that it was "perfectly well known" that an attorney cannot accept a gift from a current client.[16]

In *Wood v. Downes*, 27 years later, Lord Chancellor Eldon's interpretation of *Welles v. Middleton* provided an articulation of the logic of the loyalty narrative:

> *Wells* [*sic*] *v. Middleton* is an extremely strong case of this kind. It was admitted, that the transaction was liable to no objection as between man and man but it was overturned upon this great principle the danger from the influence of Attorneys or Counsel over their clients, while having the care of their property; and, whatever mischief may arise in particular cases, the Law, with the view to preventing public mischief, says, they shall take no benefit derived in such circumstances.[17]

14. James Edelman, "*Nocton v Lord Ashburton* (1914)" in Charles Mitchell & Paul Mitchell, eds, *Landmark Cases in Equity* (Oxford: Hart, 2012) 473 at 488-489.
15. *Welles v Middleton* (1784), 29 ER 1086.
16. *Ibid.*
17. *Wood v Downes* (1811), 34 ER 263 at 265–266.

While the danger that justifies the rule relates to the potential influence of attorneys over clients and attorneys' power over their clients' property, the rule applies even in cases where no actual harm has been done. In an early articulation of the prophylactic "no profit" rule, Lord Chancellor Eldon's holding requires that attorneys "take no benefit" in order to prevent "public mischief," and not just private harm.

However, the absolute prohibition on lawyers receiving gifts from clients did not apply to business dealings. In the 19th-century cases, solicitors, unlike trustees, were not forbidden from having business dealings with clients. They were, however, held to a high standard in demonstrating that they had fulfilled their duties faithfully. In *Gibson v. Jeyes*, the court set aside the sale of an annuity by a solicitor to his client.[18] In dealing with the conflict of interest, Lord Chancellor Eldon said the following:

> An attorney buying from his client can never support it; unless he can prove, that his diligence to do the best for the vendor has been as great, as if he was only an attorney, dealing for that vendor with a stranger. That must be the rule.
>
> ...The principle, so stated, may bear hard in a particular case: but I must lay down a general principle, that will apply to all cases; and I know none short of that, if the attorney of the vendor is to be admitted to bargain for his own interest; where it is his duty to advise the vendor against himself.[19]

While the rule did not strictly forbid dealing with a client, Lord Chancellor Eldon said that the solicitor ought to have declined to contract with his client entirely, or, supposing that the client insisted, he might have agreed only on the condition that she obtained independent professional advice.[20]

While it seemed that Lord Chancellor Eldon had set a high standard for the solicitors' conduct and articulated a test—perhaps even a bright line test—to discourage lawyers from dealing with their clients, the reported cases show that many solicitors were not dissuaded. In *Montesquieu v. Sandys*,[21] the purchase of a reversionary interest by an attorney from his client was upheld. While a stronger interpretation of the fiduciary obligation, following from *Gibson v. Jeyes*, might have held that the attorney ought to decline to deal with the client or at least encourage the client to obtain independent advice, the court was satisfied on the facts that the attorney had neither abused his client's trust nor taken advantage of his

18. *Gibson v Jeyes* (1801), 31 ER 1044.
19. *Ibid* at 1046.
20. *Ibid* at 1050.
21. (1811), 34 ER 331.

position and that the property purchased was unrelated to the solicitor's mandate.

The reasoning of Sir James Wigram in *Edwards v. Meyrick*[22] provides another useful insight into this more entrepreneurial view of solicitors' obligations. It acknowledges the rule coming out of *Gibson v. Jeyes* that, when a question arises about a transaction between a solicitor and client, the solicitor must be able to show that he provided the client with the same diligent advice as he would have against a third party. However, it limits the rule by relating it to knowledge that the solicitor may have obtained in the course of his engagement or to any influence that the solicitor may have over the client. Accordingly, the proof that the solicitor must provide will depend on the facts of the case and may simply require him to show that his mandate was unrelated to the transaction in question. This entrepreneurial conception is relatively unconcerned with the public mischief that might generally come from lawyers dealing with their clients. Rather it focuses on whether the solicitor, on the facts of the transaction in question, had an unfair advantage in the negotiations.[23] Such a fact-heavy focus tends to obscure the general principle articulated in *Gibson v. Jeyes*, blurring what might have been a bright line drawn by Lord Eldon.

In other cases in the early- and mid-1800s, courts wrestled with situations in which solicitors argued that they should be allowed to deal with former clients. In *Hunter v. Atkins*[24] a gift was upheld because the attorney was found to have done enough to put himself at arm's length from the client, and so the attorney had not taken undue advantage of his influence over the client.

Edwards v. Williams[25] provides an even stronger example of this entrepreneurial view. Edwards had asked Williams, a solicitor, to procure a loan of money for her to meet her present needs. Williams was unable to procure the loan, and instead offered to purchase from his client a portion of an annuity to which she was entitled under a will. He was the only solicitor in the transaction, and was paid for his services out of the proceeds of the sale. In a striking result, at least to contemporary Canadian sensibilities, Knight Bruce L.J. could not "view the case as one strictly between solicitor and client." Although "one of the parties was a solicitor, and the other of them had had no legal advice except from that solicitor," there was no previous relationship from which to infer confidence or

22. (1842), 67 ER 25.
23. On a similar theme, see *Cane v Allen* (1814), 3 ER 869, in which an attorney was granted specific performance of a contract to purchase real estate from a client.
24. (1834), 40 ER 43 at 54.
25. (1863), 32 LJ (Ch) 763.

influence that might be abused.[26] Turner L.J. appeared to see a solicitor-client relationship, but saw no breach of duty in dealing directly with the client, given that their relationship was limited to that single transaction.[27]

On the other hand, the loyalty narrative is visible in *Holman v. Loynes*.[28] The attorney, Loynes, had been engaged in connection with the auction of some real estate owned by Holman; however, only one of nine lots was successfully sold. Sixteen months later—during which time Loynes had not been retained by Holman—Loynes purchased a portion of the remaining lots and debited the client in his books for drawing up the contract of sale. The consideration given by Loynes was composed partially of a previous debt for costs and partially of an annuity for Holman's life. Holman, a man of "intemperate habits," died three years later. His heir-at-law sought to have the sale set aside on the grounds that the amount of the annuity was inadequate consideration given Holman's lifestyle and that the purchase was one by a solicitor from his client. Loynes argued that the proposal for the sale had come from Holman, that he had an experienced agent (though not a solicitor) advising him, and that any relationship of solicitor and client did not apply to the transaction in question. Lord Chancellor Cranworth, looking at Loynes's own books, held that Loynes was the solicitor for Holman, and referred to *Gibson v. Jeyes* in saying that "there is nothing absolutely preventing an attorney purchasing from his client, but then he assumes very heavy responsibilities."[29] The Lord Chancellor did "not attribute anything like personal misconduct" to Loynes, but held the rule from *Gibson v. Jeyes* to strictly apply where a solicitor-client relationship exists.[30] His reasoning does not depend on any actual advantage taken by Loynes, who did not appear to have exerted any undue influence or used any confidential information. The transaction was set aside because Loynes was Holman's solicitor and because, given the state of Holman's health, the annuity for life was too small.[31]

In these early cases, we rarely see courts use the word "fiduciary" or label the situations "conflicts of interest." They do, however, acknowledge that lawyers have a special set of obligations. Moreover, even in the late 18th and early 19th century, courts can be seen struggling to articulate the precise nature of these obligations and the logic that underlies them. This tension between the loyalty-centred and entrepreneurial conceptions

26. *Ibid* at 765.
27. *Ibid.*
28. (1854), 43 ER 501, SC 23 LJ Ch 529.
29. *Ibid* at 511.
30. *Ibid* at 512.
31. *Ibid* at 512-513.

of lawyers' obligations continues as we turn now to the second half of the 19th century.

3. *Fiduciary obligations take shape (1860–1910)*

In the latter half of the 19th century, "fiduciary" had come to be used more regularly; however, the tension between the competing narratives in articulating the lawyer's duties was still visible.[32] One case that illustrates the tension is *Pisani v. Attorney-General for Gibraltar*,[33] in which the Judicial Committee of the Privy Council disapproved of a solicitor's actions in a conflict of interest and duty, but held that the rules did not provide any recourse for the client. The action was to set aside the sale of real estate by a client to her attorney. The court refused to set aside the conveyance, on the commutative logic that the solicitor had paid as high a price as he could have obtained for his client from a third party.

However, the court also affirmed that the standard of conduct expected of solicitors is high.[34] While Pisani had met this onus required by *Gibson v. Jeyes*, the court admonished him as follows:

> Although their Lordships have come to this conclusion, they feel constrained to say that there is much in the transaction which cannot be approved of. They think Mr. Pisani would have better consulted his position as a barrister if he had been less precipitate in taking up the bargain, and if, instead of only suggesting, he had insisted on the intervention of another professional man.[35]

As a result, Pisani was forced to bear his own costs in both the suit and the appeal.

In cases toward the end of the 19th century, some of the parameters of what we now know as the fiduciary obligation—the duty of loyalty, the no-profit rule and the no-conflict rules—were starting to become clearer in the reported cases applying to lawyers. In *McPherson v. Watt*,[36] the House of Lords dealt with Watt, an advocate who advised his client not to advertise a piece of property for sale, saying that he would find a purchaser instead. Nominally, the purchaser was the advocate's brother, Dr. Watt,

32. Edelman, *supra* note 14 at 489 calls *Docker v Somes* (1834), 39 ER 1095, a case involving executors of an estate, one of the first cases to use "fiduciary." In that case, at 1099, Lord Chancellor Cranworth uses attorneys and guardians as other examples of persons on whom equity will impose fiduciary obligations."

33. (1874), 5 LRPC 516, [1874–80] All ER Rep 971.

34. *Ibid* at 535.

35. *Ibid* at 540.

36. (1877), 3 AC 254. Advocate is the Scottish equivalent of an attorney or solicitor. The judges made clear that Scots law on the subject was consistent with English law.

though it was later discovered that the Watt brothers had agreed to split the property equally between them after the purchase.

Lord O'Hagan held that an attorney does not have the same disability to purchase that a trustee does. However, the attorney must be able to demonstrate that he has acted with the utmost faithfulness and advised just as he would in the absence of self-interest:

> But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to shew that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, and that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded.... There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist.[37]

Here, in the language of utmost faithfulness, absence of self-interest, and prohibition of conflicts of interest, the fiduciary character of the lawyer/client relationship—and the duty of loyalty at the centre of that relationship—come into sharper focus.

4. *"The landmark" (1910–1920)*

Nocton v. Lord Ashburton is commonly seen as a landmark case in the development of the rules governing the solicitor-client relationship. While the case does elevate the standard of conduct expected of solicitors, the judges say almost nothing about the duty to avoid conflicts in a case that is full of them. As such, *Nocton v. Lord Ashburton* fits into this story as another in a line of cases that illustrates the tension between the loyalty-centric and entrepreneurial views of that relationship. Nocton, Lord Ashburton's solicitor, convinced Lord Ashburton to release his security over a piece of real estate, a mortgage that had been provided to Ashburton to secure a debt owed to Ashburton by the owners of that piece of land. In giving this advice, Nocton failed to mention (a) the possibility that Lord Ashburton would no longer have adequate security for his debt, (b) that the release of Lord Ashburton's mortgage would mean that Nocton's mortgage would become the first mortgage over that part of the property, and (c) that the release of Lord Ashburton's mortgage directly served Nocton's own commercial interests.

37. *Ibid* at 266.

The trial judge found that Nocton had fallen "far short of the duty which he was under as a solicitor" and would probably have given different advice had he not been personally interested in the result. Still, following *Derry v. Peek*, Nocton could not be held liable because he had no intent to defraud Lord Ashburton.[38]

In the House of Lords, Viscount Haldane distinguished *Derry v. Peek* on the basis that Nocton, as a fiduciary, had a special duty to make "a full and not misleading disclosure of the facts known to him when advising a client."[39] This special duty of candour was now clearly attached to the lawyer-client relationship; however, very little of the Lords' reasoning dealt with other aspects of the fiduciary obligation, such as the duty to avoid conflicts of interest.

A less noted, but more enlightening case for those interested in conflicts of interest was decided three years later. In *Moody v. Cox and Hatt*,[40] the English Court of Appeal dealt with a conflict between competing fiduciary duties. The transaction in question was the purchase by Moody of some trust property. Hatt and Cox were the trustees and also acted as solicitors for both sides of the purchase. Cox had failed to disclose valuations which demonstrated that the property was not worth the price that Moody paid. Discussing *Gibson v. Jeyes*, Lord Cozens-Hardy M.R. rejected undue influence as the basis for the constraints that apply when solicitors deal with their clients. Rather, he held that solicitors have a free-standing duty to disclose "everything that is material, or may be material, to the judgment of his client" when buying or selling from a client.[41]

In dealing with the issue of conflicting duties, the speeches of the judges did not go quite as far as strictly enforcing a prophylactic no-conflict rule on solicitors, but they did hold that solicitors put themselves in positions of conflicting duty at their own peril:

> A solicitor may have a duty on one side and a duty on the other...but if he chooses to put himself in that position it does not lie in his mouth to say to the client "I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side." The answer is that if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties

38. *Nocton v Lord Ashburton*, *supra* note 13 at 944; *Derry v Peek* (1889), 14 AC 337, [1886–90] All ER Rep 1.

39. *Nocton v Lord Ashburton*, *supra* note 13 at 962; Edelman, *supra* note 14 at 483-484 notes that this is the only distinction between the two cases made by Viscount Haldane.

40. [1917] 2 Ch 71 (CA).

41. *Ibid* at 79-80.

> of disclosure or say—which would be much better—"I cannot accept this business."[42]

While the court leaves room for lawyers to exercise judgment in deciding whether to put themselves in situations of either lawyer-client or client-client conflict, it makes clear that lawyers would be wise to avoid these situations altogether. Moreover, a duty to one client will be no excuse for failing to fulfill a duty to another.

5. *Canada in the early 20th century (1910–1950)*

Almost immediately after *Nocton v. Lord Ashburton* was reported, the case began to be cited by Canadian courts.[43] In 1935, the Supreme Court of Canada had to squarely consider the English case law as applied to a conflicted solicitor in *Biggs v. London Loan and Savings Co. of Canada*.[44] The London Loan and Savings Company had made several loans to Mr. and Mrs. Biggs, secured by mortgages. Brickenden had acted as solicitor for both parties in connection with these transactions, and had also personally loaned money to Mr. and Mrs. Biggs, secured by four mortgages, including two mortgages over property that had previously been mortgaged to London Loan and Savings. Justice Crocket held that Brickenden had not met the high standard of "utmost frankness and good faith towards both parties" that would be required in such a conflicted situation.[45] While the court still declined to strictly prohibit solicitors from transacting with clients, the fiduciary language used did not depend on Brickenden's unfair advantage in the marketplace or his influence over his clients. It simply reflected the nature of his role as fiduciary, and the obligations of candour and good faith entailed in that role.[46]

6. *Canada in the mid-20th century (1950–1970)*

In spite of the Supreme Court's use of strong loyalty-centred language in *Biggs*, the entrepreneurial view of the lawyer-client relationship survived. To illustrate the ongoing tension between the two narratives and the

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42. *Ibid* at 81 [Lord Cozens-Hardy MR]. See also similar statements by Warrington LJ (at 84-85) and Scrutton LJ (at 91).

43. *Berge v Mackenzie, Mann & Co* (1914), 7 WWR 866, [1914] AJ No 21; *Brauchle v Lloyd* (1915), 21 DLR 321, [1915] AJ No 75; *Marriott v Martin* (1915), 21 DLR 463, 7 WWR 1291.

44. [1933] SCR 257, aff'd: *Brickenden v London Loan & Savings Co*, [1934] 3 DLR 465, [1934] 2 WWR 545 [*Biggs*]. The Supreme Court split on the question of the remedy but was unanimous regarding the analysis of duties owed in the circumstances.

45. *Biggs v London Loan and Savings Co. of Canada, supra* note 44 at 261 (Crocket and Cannon JJ differed from the majority on the amount recoverable, but not on the breach of the solicitor's duty).

46. While the Supreme Court did not use "fiduciary," both the reference to a requirement of "utmost frankness and good faith" and the reference to *McPherson v Watt, supra,* note 36, suggest the adoption of the concept of fiduciary duty.

prominence of the entrepreneurial view in this era, it is useful to contrast the reasoning of the Manitoba Court of Appeal and the Supreme Court of Canada in *Brock v. Gronbach*.[47] The Gronbachs were an elderly couple who agreed to sell their grocery business to Mr. Petty. Both sides of the transaction were represented by the Petty's solicitor, Brock. Adamson J.A., writing for a unanimous five-member panel of the Manitoba Court of Appeal, was critical of the solicitor, Brock. In his reasons, he highlighted several fundamental flaws in the documents that Brock drafted.[48] He also noted the Gronbachs' lack of independent advice and their dependence on Brock.[49] Moreover, he held that the solicitor's duty in the circumstances was to insist that the Gronbachs receive independent legal advice: "[Brock] should not have acted for [Mrs. Gronbach] or pretended to act for her."[50] In the Court of Appeal's view, Brock ought to have ceased acting for both parties when the Gronbachs first decided they did not wish to carry out the agreement, as this was the point at which their interests diverged.[51] The Manitoba Court of Appeal sought to impose significant legal obligations on the solicitor based on a loyalty-centred view of the lawyer-client relationship.

In a relatively brief set of reasons, the Supreme Court rejected all of the "strictures passed by the Court of Appeal upon the solicitor."[52] They agreed with the trial judge that Brock had not "by himself nor by connivance with Petty, imposed on the Gronbachs the bargain demanded by Petty."[53] In the Supreme Court's view, Brock had not been negligent or breached any duty. The Gronbachs had signed a contract which they fully understood and which was, at the time, satisfactory to them.

The prominence of the entrepreneurial view of lawyers is even clearer in the way that the Privy Council dealt with a conflicted solicitor in *McMaster v. Byrne*.[54] McMaster and two others had promoted Sovereign Potters Ltd., a company in the pottery business. Byrne was the solicitor who acted in the formation of Sovereign and was also its secretary. Three years after Sovereign was formed, McMaster fell out with the others and

47. [1953] 1 SCR 207, [1953] 1 DLR 785 [*Gronbach (SCC)*]; *Gronbach v Brock and Petty*, [1952] 3 DLR 490 [*Gronbach (Man CA)*].
48. *Gronbach (Man CA)*, *ibid* at paras 9-12.
49. *Ibid* at para 13.
50. *Ibid* at para 18.
51. *Ibid* at para 24.
52. *Gronbach (SCC)*, *supra* note 47.
53. *Ibid.*
54. [1952] 1 All ER 1362 [*McMaster (PC)*]; *McMaster v Byrne* (1950), [1951] 1 DLR 593, [1950] OJ No 524 [*McMaster (Ont CA)*]; *McMaster v Byrne*, [1950] 3 DLR 815, [1950] OJ No 153 [*McMaster (Ont HCJ)*].

resigned his position. After the expiration of a non-competition clause, he incorporated a new pottery business, again with the help of Byrne. Byrne also acted as a solicitor for McMaster personally: he gave advice regarding McMaster's estate and drew up and kept custody of McMaster's will. After obtaining an option to buy McMaster's shares in Sovereign, Byrne "played a very active and helpful part in the negotiations" to sell Sovereign.[55] Byrne then exercised his option, purchasing McMaster's shares for $30,000 and sold them less than a month later for $127,000.

The reasons given by the Privy Council afford wide latitude for lawyers to pursue their entrepreneurial interests. Byrne had acted as solicitor for two competing corporations, personally invested in one of them, bought shares from a client, and sold those shares for more than quadruple the price four weeks later. Lord Cohen, delivering reasons on behalf of the Judicial Committee, held that McMaster was no longer a client of Byrne when the option was granted (custody of McMaster's will notwithstanding).[56] Byrne did have a special duty to McMaster as a former client, but that duty seems only to have required that Byrne communicate all material facts within his knowledge. Independent legal advice was not held to be a strict requirement.[57] Lord Cohen made no mention of Byrne's several conflicting duties and interests. The result in the case was that the Privy Council ordered a new trial to determine whether Byrne had discharged his duty and sufficiently informed McMaster and whether, under the circumstances, Byrne ought to have insisted that McMaster seek independent advice or whether "the proper price to ask for the shares was one which McMaster as a business man could well determine for himself if fully informed as to the facts."[58]

7. *Canada in the late 20th century (1970–1990)*

In the 1970s and 1980s, several decisions show the resurgence of the loyalty narrative of lawyer-client relations. In the 1975 case of *McGrath v. Goldman, Kemp, Craig, and Wener*,[59] the British Columbia Supreme Court held solicitors to a high standard, using explicitly fiduciary language. In that case, there were clear conflicts both between the pecuniary interests of the lawyer and his client and between the interests of two clients. The lawyer preferred his own interests and those of one client to the detriment of the other client. In dealing with the breach of fiduciary duty, Bouck J.

55. *McMaster (PC)*, *supra* note 54 at 1366.
56. *Ibid.* This finding will appear strange to contemporary Canadian readers, given that Byrne was still in charge of McMaster's will and named as an executor.
57. *Ibid* at 1369.
58. *Ibid.*
59. (1975), 64 DLR (3d) 305, [1976] 1 WWR 743.

refers to the solicitor's duty to act with "strict fairness and openness" and states (contrary to some of the jurisprudence reviewed above) that "equity has always held that no one should allow their duty to conflict with their interests."[60] The reasons place little reliance on unequal footing, undue influence, or inequality of bargaining power. Rather, they are concerned with the solicitor's oath of office, his duty to act honestly and in good faith, and the "honour reposed upon…the profession by the public."[61]

A different judge of the same court took an even stricter view of solicitor's fiduciary duties in *Jacks v. Davis*.[62] The plaintiff had used the solicitor recommended by his financial advisor in purchasing an apartment building as an investment from Blunden Developments Ltd. of which his financial advisor was both president and a shareholder. In representing both sides of the transaction, the solicitor withheld from Jacks the fact that Blunden had entered into an "interim" agreement to purchase the same building for $60,000 less only 6 weeks earlier. The judge held that a lawyer may represent multiple clients in the same transaction, but only if he is able to adequately represent the interests of each and to make full disclosure to all.[63] Moreover, these restrictions are grounded in the public interest and the lawyer's duty to act with the utmost good faith.

The final notable milestone that predates *MacDonald Estate* is the decision of Wilson J.A. (as she then was) in *Davey v. Woolley, Hames, Dale & Dingwall*.[64] The plaintiff, Davey, and his father had both been major shareholders in a company whose business was managed by the defendant law firm. With the firm acting for him personally, Davey had explored selling his shares, had taken two offers to an advanced stage of negotiation, and very nearly accepted one offer before Davey's father blocked the transaction. After Davey's father died, the firm knew that this offer was still available and might be improved. However, Howe, who was also a client of the firm, approached the plaintiff. Stevens, the partner who had acted for Davey in the previous negotiations, told Howe and Davey to negotiate on their own and come back to him if they agreed. The result was an agreement to sell Davey's shares to a company controlled by Howe. However, Mr. Woolley, a senior partner at the firm, also had a financial interest in the company controlled by Howe.

60. *Ibid* at paras 34-35.
61. *Ibid* at paras 18, 34-36, 60-61, 65. The judge awarded damages of more than $73,000, and costs on a solicitor and client scale.
62. (1980), 12 CCLT 298 (BCSC), aff'd [1983] 1 WWR 327 (BCCA).
63. *Ibid* at para 16.
64. (1982), 35 OR (2d) 599, 133 DLR (3d) 647 (ONCA).

Justice Wilson found the law to be "fairly well settled" that solicitors must avoid situations of actual or potential conflict, and she included both conflicts of duty and self-interest (lawyer-client conflicts) and conflicts of duty to one client and duty to another (client-client conflicts) under this rubric.[65] She accepted that there may not be a "hard and fast" rule against a solicitor acting for both sides in a transaction and acknowledged that it may be common for a solicitor to act for both sides, particularly in real estate transactions in rural areas.[66] However, the lawyer here had breached his duty simply by failing to appreciate and appropriately respond to the conflict:

> Mr. Stevens, in my opinion, was too late in appreciating his conflict of interest position. He failed to take proper stock of the situation when he was first approached by the plaintiff and Howe and as a result undertook to represent the plaintiff when he should have directed him elsewhere. In so doing he breached his fiduciary duty to the plaintiff and a subsequent acknowledgment and consent could not exonerate him from any consequences that flowed from that breach.[67]

Stevens's breach was in agreeing to represent the plaintiff. It did not depend on actual harm done to Davey's private interests or require that he, in fact, favoured his own interests, the firm's interests, or the other client's interests over those of the plaintiff.

8. *Summary*

The foregoing reveals that British and Canadian courts have struggled in their analyses of the nature of lawyers' obligations to their clients. For some, the practice of law is primarily entrepreneurial in nature, subject only to relatively minor fiduciary constraints. For others, the principle of loyalty has priority, requiring absolute candour, and good faith on the part of the lawyer and fully informed consent on the part of the client. With this historical context in mind, we can now turn to the recent Canadian jurisprudence, which favours this latter emphasis on a duty of loyalty.

II. *The quartet*

Over the course of the last quarter century the Supreme Court of Canada has struggled with the idea of the duty of loyalty in a quartet of cases:

65. *Ibid* at para 8.
66. *Ibid* at para 9.
67. *Ibid* at para 14.

MacDonald Estate,[68] *Neil*,[69] *Strother*[70] and *McKercher*.[71] In these cases we, once again, see Canadian judges wrestling with the competing aspirations of client loyalty and entrepreneurialism. While a number of members of the Supreme Court of Canada have, at times, demonstrated a sensitivity to (perhaps even a solicitude for) entrepreneurialism, recently the Court has strongly endorsed a robust conception of loyalty, albeit with an ongoing awareness of the business realities of modern legal practice.

1. MacDonald Estate v. Martin

MacDonald Estate was a transferring lawyer case. A senior and junior lawyer were involved in the representation of a client in estate litigation. The firm dissolved when the senior lawyer was appointed to the bench, and the junior lawyer subsequently joined the law firm that represented the adversary in the estate litigation. The plaintiff sought to disqualify both the transferring lawyer and the new law firm. The Supreme Court of Canada unanimously agreed that both the lawyer and the firm should be disqualified.

The case is significant for several reasons. First, Sopinka J., writing for four judges, explicitly begins his analysis by identifying three potentially competing public policy concerns: respect for the integrity of the administration of justice, the interest of lawyers in reasonable mobility within the legal profession, and the right of clients to choice of counsel.[72] The first and third of these relate to the rights and interests of clients and the general public, the second manifests a sensitivity to the commercial and entrepreneurial interests of lawyers.

Second, having recognized the legitimacy of all three concerns, Sopinka J. then proceeded to argue that respect for the administration of justice was the paramount public policy principle. His primary justification was the concern that there might be a perception of the misuse of confidential information, and that without a high threshold the general public would lose faith in the administration of justice.[73]

Third, although Sopinka J. did not explicitly explore the significance of the duty of loyalty, the overall structure of his analysis leans somewhat on the loyalty centred view of lawyers explored above. For example, he

68. *Supra* note 13.
69. *Supra* note 3.
70. *Supra* note 4.
71. *Supra* note 6.
72. *MacDonald Estate*, *supra* note 13 at 1243.
73. *Ibid* at 1263.

is forceful in his devotion to the integrity of the legal profession and the importance of maintaining public confidence:

> Merger, partial merger and the movement of lawyers from one firm to another are familiar features of the modern practice of law. They bring with them the thorny problem of conflicts of interest. When one of these events is planned, consideration must be given to the consequences which will flow from loss of clients through conflicts of interest. To facilitate this process some would urge a slackening of the standard with respect to what constitutes a conflict of interest. In my view, to do so at the present time would serve the interest of neither the public nor the profession. The legal profession has historically struggled to maintain the respect of the public. This has been so notwithstanding the high standards that, generally, have been maintained. *When the management, size of law firms and many of the practices of the legal profession are indistinguishable from those of business, it is important that the fundamental professional standards be maintained and indeed improved. This is essential if the confidence of the public that the law is a profession is to be preserved and hopefully strengthened.*[74]

A few paragraphs later in support of this analysis he cites the CBA's *Code of Professional Conduct* (1974), which explicitly links conflicts to the duty of loyalty:

> 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 or prospective client or which the lawyer might be prompted to prefer to the interest of a client or prospective client.[75]

Fourth, having made the connections between respect for the administration of justice, the integrity of the profession and loyalty, Sopinka J. then argues that it is important not to allow these ideals to completely overwhelm the two other public policy concerns of lawyer mobility and the client's choice of counsel. Consequently, he finds that while there is a presumption of shared confidences between the lawyer and others in the firm that generates a disqualification of that firm, that presumption can be rebutted if appropriate institutional mechanisms are established. He then invited the legal profession to develop rules that would adequately protect a client's confidential information and make it possible for lawyers and law firms to avoid disqualification in future cases of a similar nature. Because no such institutional mechanisms were in place in this situation, both the lawyer and the firm were disqualified.

74. *Ibid* at 1243-1244 [emphasis added].
75. *Ibid* at 1245 [emphasis added].

Justice Cory, writing for three colleagues, agreed with this result, the emphasis on public confidence in administration of justice and the importance of protecting the client's confidential information. However, he balked at some of the majority's reasoning. He explicitly took issue with Sopinka J.'s entrepreneurialist concerns about mobility in the profession, especially in the context of increasingly large firms:

> Yet, no matter how strong may be the current rage for mergers or how desirous the mega-firms may be to acquire additional lawyers, neither the large firms nor the lawyers who wish to join them or amalgamate with them should dictate the course of legal ethics....[A]lthough the large firms may be the movers and shakers on Bay Street, they do not represent the majority of lawyers soldiering on in the cause of justice.[76]

For Cory J., public confidence in the administration of justice required that the presumption of the transfer of confidential information was irrebuttable and could not be remedied by institutional mechanisms.

The law societies preferred Sopinka J.'s position and, with the co-operation of the CBA, developed extensive, and unprecedentedly detailed, rules to protect confidential information, reduce the risk of its inappropriate disclosure within a law firm via ethical screens and cones of silence, and thereby reduce the consequent risk of disqualification of a lawyer or law firm from representation of a client adverse in interest.[77]

In sum, although there are important differences between Sopinka and Cory JJ. on how far we should go to respond to the entrepreneurial aspirations of the legal profession, both agree that protecting confidentiality—which is a manifestation of the duty of loyalty—is the paramount (although not exclusive) principle of public policy.

Neil picked up this duty of loyalty twelve years later.

2. R. v. Neil

The appellant, David Lloyd Neil, was a paralegal in Edmonton. He was charged with defrauding Canada Trust in relation to a series of mortgages (the Canada Trust mortgage fraud) and with having fabricated court documents in a divorce action (the Doblanko Divorce). For much of the relevant time, Neil was represented by Venkatraman. In response to these charges, Neil claimed that the Venkatraman law firm, in particular Gregory

76. *Ibid* at 1269-1270.

77. Canadian Bar Association Task Force Report, *Conflicts of Interest Disqualification: Martin v Gray and Screening Methods* (Ottawa: Canadian Bar Association, 1993); Federation of Law Societies of Canada, "Model Rule with Respect to Conflicts of Interest Arising as a Result of Transfers between Law Firms" (1994), online: <www.flsc.ca/en/publications/conflictRule.asp>.

Lazin, who was associated with the firm, was in a conflict of interest with respect to these charges.

Neil argued that the firm acted simultaneously for Neil and his business associate, Helen Lambert, in the Canada Trust proceedings at a time when they knew, or ought to have known, that she would also be charged in the Canada Trust criminal proceedings, and that her interests were adverse to his. The trial judge concluded that Lazin attended client interviews with Neil for no purpose except to collect information from the appellant that would be useful to Lazin against Neil in his defence of Lambert in the anticipated criminal proceedings. Neil was advised only after the fact that the Venkatraman law firm would not act for him in the Canada Trust criminal case because of its involvement with Lambert.

In relation to the second set of indictments, Neil claimed that Lazin, having learned (though through non-confidential means) that Neil had fabricated divorce documents, guided Darren Doblanko (of the Doblanko Divorce) to report the forged documents to the same police officer who was dealing with the other indictments against Neil. This, Neil argued, was done to strengthen the case against Neil and to assist in Lazin's defence of Lambert in the Canada Trust case.

On the two matters, the Supreme Court of Canada reached many of the same conclusions as the trial judge. The Court noted that Lazin's behaviour in relation to the Canada Trust matter was outrageously disloyal to Neil, and that the whole firm, not just Lazin, owed a duty of loyalty to Neil. The Court concluded that the firm should not have represented the parties on the Canada Trust matter, especially where Neil and Lambert had such obviously adverse interests, where loyalty to one of the parties would almost assuredly lead to disloyalty to the other. It was also clear to the Court that the duty of loyalty applied to both matters, though the source of information contrary to Neil's interests in the Doblanko matter had come to Lazin through means that were non-confidential vis-à-vis Neil. Accordingly, Lazin should have refused the Doblanko retainer. While the Doblanko mandate was factually and legally unrelated to the Canada Trust matter, it was adverse to Neil's interest. The law firm was representing Doblanko, an alleged victim of Neil's behaviour in the civil matter, at the same time that it was representing Neil in the criminal matter. The Court held that the law firm cannot serve two masters at one time and that there was a breach of the duty of loyalty.

Five key points emerge from *Neil*. First, this is a unanimous decision of the Supreme Court of Canada and its content and tone are designed to send a very clear message that loyalty is a *sine qua non* of legal professionalism. Binnie J. finds loyalty to be "intertwined" with the fiduciary nature of the

lawyer-client relationship,[78] dovetails it with the virtues of an independent bar and the adversarial system,[79] proclaims it to be "essential to the integrity of the administration of justice" and the maintenance of public confidence,[80] and characterizes it as "unassailable."[81] In other words, loyalty has both private benefits (individual clients should not be betrayed) and benefits to the community, which needs to be assured that the truth-seeking function of the adversarial system, and the lawyer's role as loyal agent of the client in the fulfilment of that function, remains intact. In short, the duty of loyalty is "*the defining principle*."[82]

Second, Binnie J. emphasizes the core proposition, a bright-line rule, that there is a general prohibition against representing a client whose interests are adverse to those of a *current* client of the firm, even in fresh and independent matters wholly unrelated to any matter, even if there is no relevant confidential information capable of being compromised.[83] The only exception is where: (a) both clients have given informed consent and (b) the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.[84]

Third, Binnie J. articulates an expansive conception of loyalty, specifying in addition to confidentiality three key dimensions: a duty to avoid conflicting interests; a duty of commitment to the client's cause; and a duty of candour with the client on matters relevant to the retainer.[85] This is a strong endorsement of the suggestion that loyalty is a governing regulative ideal.

Fourth, Binnie J. makes it clear that "[l]oyalty includes putting the client's business ahead of the lawyer's business"[86] and that a client is "entitled to a level of commitment from his lawyer that whatever could be properly done on his behalf would be done as surely as it would have been done if the [client] had had the skills and training to do the job personally."[87] A lawyer's desire to "hang onto a piece of litigation"[88] is insufficient justification. As a result, retainers might have to be declined. Moreover, "Chinese walls" and "cones of silence" do not apply in the

78. *Neil*, *supra* note 3 at para 16.
79. *Ibid* at para 13.
80. *Ibid* at para 12.
81. *Ibid* at para 18.
82. *Ibid* at para 12 [emphasis added].
83. *Ibid* at paras 17, 29.
84. *Ibid* at para 29.
85. *Ibid* at para 19.
86. *Ibid* at para 24.
87. *Ibid.*
88. *Ibid.*

context of a breach of loyalty because their concern is confidentiality, not loyalty.[89]

Fifth, and finally, while *Neil* does not overrule *MacDonald Estate*, there may be a tension between Sopinka J.'s (somewhat entrepreneurialist) view of ethical priorities in *MacDonald Estate* and Binnie J.'s view in *Neil*. Justice Sopinka, as we have seen, justified the rebuttable presumption approach in part on the basis that "lawyer mobility" between firms is desirable.[90] But Binnie J. emphasized that the profession's interest in mobility was circumscribed by the duty of loyalty:

> Lawyers are the servants of the system...and to the extent their mobility is inhibited by sensible and necessary rules imposed for client protection, it is a price paid for professionalism. Business development strategies have to adapt to legal principles rather than the other way around.[91]

Justice Binnie (echoing Cory J. in *MacDonald Estate*) explicitly acknowledged that "undoubtedly" his conception of the loyalty principle will be a major inconvenience especially to "national law firms with their proliferating offices in major centres across Canada,"[92] but (perhaps channeling Lord Chancellor Eldon in *Gibson v. Jeyes*) he continued:

> Nevertheless it is the firm, not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client—*even if the two mandates are unrelated*—unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.[93]

In sum, *Neil* stands as a fundamental articulation of what was inchoate, or circumscribed, in many of the previous decisions: that professional ethics is not just a series of ad hoc rules (e.g., avoid conflicts, preserve confidentiality) but rather a regime of fundamental principles that can provide an orientation for ethical decision-making by lawyers.

However, despite the seeming clarity of the Court's position, not everyone was persuaded. In particular, the CBA raised concerns as to whether the Court had gone too far and openly resisted the embrace of

89. *Ibid* at 18; see also Jakeman & Davies, *supra* note 8 at 721.
90. *MacDonald Estate, supra* note 13 at para 51.
91. *Neil, supra* note 3 at para 15.
92. *Ibid* at para 29.
93. *Ibid* at para 29 [emphasis in original].

a duty of loyalty.[94] A few years later the Supreme Court of Canada was presented with the opportunity to reconsider *Neil*, first in *Strother* and then in *McKercher*. In *Strother* it prevaricated, but in *McKercher* it reconfirmed the foundational status of the duty of loyalty.

3. Strother v. 3464920 Canada Inc.

Strother was a five-four decision, with Binnie J. writing for the majority and McLachlin C.J. writing for the minority. While there were significant differences between the two positions, both took the opportunity to reflect on the relationship between fiduciary duties, the duty of loyalty, the bright line test from *Neil*, and the entrepreneurial aspirations of contemporary legal practice.

Monarch Entertainment Corporation (later renamed 3464920 Canada Inc.), an erstswhile client of Strother, sued Strother and his law firm, Davis and Company, for an alleged breach of Strother's fiduciary duty. Strother had represented Monarch for a number of years with respect to extensive financing of Hollywood films made in Canada which generated attractive tax benefits for investors in the production of these films.[95] When the tax benefits appeared to have been closed off through amendments to the tax laws of Canada,[96] Monarch wound down its business but continued to use Strother's and the firm's services.[97] At about this time, Strother, in concert with Darc (a former Monarch employee) applied for an advance tax ruling[98] in the hope that a portion of the generous tax treatment of these film financing investments might still be available. Strother and Darc secretly intended to start up their own film financing business if they received a positive ruling.[99] Upon receiving that favourable ruling, Strother and Darc launched their own business, a venture that proved to be highly successful.[100] Strother never disclosed to Monarch (or to his firm) that he had made an application for an advance tax ruling or that, if a favourable ruling was obtained, he planned to leave the law firm and, with Darc, launch a business in competition with Monarch. When Monarch learned, some months later, of what had occurred, it sued Strother and his firm for breach of fiduciary obligations owed to Monarch.

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94. See further Dodek, *supra* note 2.
95. *Strother*, *supra* note 4 at para 3.
96. *Ibid* at para 8.
97. *Ibid* at paras 9, 16.
98. *Ibid* at para 13. Advance tax rulings are decisions sought from the Canada Revenue Agency that enable citizens to know in advance that, if they organize their financial affairs in a certain way, their affairs will be given a pre-determined tax treatment.
99. *Ibid.*
100. *Ibid* at para 19.

Justice Binnie used the opportunity of *Strother* to reiterate the importance of the duty of loyalty and to elaborate upon (and clarify) some of its constitutive elements. First, he emphasized that it is the fundamental duty of a lawyer to act in the best interests of her client to the exclusion of all other adverse interests and that this duty is based on the need to protect the integrity of the administration of justice.[101]

Second, he held that while the scope of the retainer is governed by contract, the lawyer-client relationship is overlaid with certain fiduciary obligations, such as the duty of loyalty, the duty of candour and the duty to avoid conflicts of interest. These obligations are imposed as a matter of law.[102]

Third, Binnie J. attempted to clarify what he meant by "interests that are directly adverse" in the bright line test of *Neil*, and in doing so was sensitive to the entrepreneurial aspirations of contemporary legal practice.

> The clients' respective "interests" that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity. Here the alleged "adversity" between concurrent clients related to business matters....[C]ommercial 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. Whether or not a real risk of impairment exists will be a question of fact....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. In fact, in the case of some areas of high specialization, or in small communities or other situations of scarce legal resources, clients may be taken to have consented to a degree of overlapping representation inherent in such law practices, depending on the evidence: ...The more sophisticated the client, the more readily the inference of implied consent may be drawn. The thing the lawyer must *not* do is keep the client in the dark about matters he or she knows to be relevant to the retainer.[103]

Fourth, Binnie J. emphasized that part of the problem was that Strother had failed in his duty of candour, a crucial dimension of the duty of loyalty.[104]

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101. *Ibid* at para 1.
102. *Ibid* at para 34.
103. *Ibid* at para 55 [emphasis in original].
104. *Ibid.*

Fifth, and finally, Binnie J. asserted that Strother had allowed his entrepreneurial zeal to get the better of him, thereby creating the fatal lawyer-client conflict.

> The difficulty is not that Sentinel and Monarch were potential competitors. The difficulty is that Strother aligned his personal financial interest with the former's success…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…Strother was "the competition."[105]

In sum Binnie J.'s decision in *Strother* was both a reaffirmation of the significance of the duty of loyalty as a first principle of legal ethics, and a modest recasting to acknowledge the pragmatic realities of the modern practice of law.

Chief Justice McLachlin's dissent is reminiscent of Sopinka J.'s reasons for the majority in *MacDonald Estate* insofar as she began her analysis with reference to the commercial reality of the practice of law.[106] For the purpose of this paper it is only necessary to highlight one key point on which she agreed with Binnie J., and one key point on which she disagreed.

First, she agreed with Binnie J. that "lawyers and law firms are permitted to act for multiple clients in the same line of business" even if they are commercial competitors, so long as there are no legal conflicts.[107] Thus, there is unanimity in the case that the duty of loyalty is not absolute, that it primarily (but not exclusively) relates to legal conflicts.

Chief Justice McLachlin disagreed with Binnie J., however, on how to conceptualize the content and scope of the duty of loyalty. For her, the content of the duty of loyalty is molded by the retainer contract: it is not a duty in the air; it is not free floating.[108] Proceeding on this basis she interpreted the retainer contract as being completed when Strother provided advice that the tax shelter was no longer available. From the perspective of the minority, Strother was not obliged to inform Monarch of the subsequently developing possibility that part of the tax shelter loophole might still be available. Hence, there was no conflict of interest because

105. *Ibid* at paras 67-69.
106. *Ibid* at para 118.
107. *Ibid* at para 117.
108. *Ibid* at para 136.

Monarch was no longer a client under the terms of the retainer. Therefore, Strother could provide legal advice to Sentinel.

In sum, *Strother* sent mixed messages. On the one hand it strongly endorsed the duty of loyalty. On the other hand, it tended to confound lawyers' understanding of the pedigree, content, and duration of the duty of loyalty. This state of confusion has been significantly alleviated by the most recent pronouncement of the Supreme Court, *McKercher*.

4. CN Railway v. McKercher

In late 2008, the McKercher firm commenced a class action on behalf of a farmer, Wallace, against the Canadian National Railway (CN) and others, alleging that they had systematically overcharged farmers in relation to grain transportation charges over the previous 25 years, and sought $1.75 billion in damages.[109] The plaintiff alleged various forms of reprehensible behaviour on the part of the defendants, including CN. McKercher had, from time to time, been one of a number of law firms providing legal services to CN in Saskatchewan.[110] In the previous five years McKercher had billed CN approximately $70,000 in legal fees, slightly less than 1/3 of the total legal fees paid by CN to Saskatchewan firms over that time.[111] At the time of the commencement of the Wallace class action, McKercher was representing CN on four matters, none of which were related to the Wallace litigation. McKercher had gained information about CN's "approach to litigation, its business practices and its risk perspective and tolerance," but was not privy to specific confidential information related to the Wallace matter.[112] CN did not generally give consent to its law firms to act against its interests, but had not shared this policy with McKercher.[113] In this context, CN brought an application to disqualify McKercher from representing Wallace in the class action against it.

Given these facts, there is an explicit tension between the duty of loyalty owed to a client and the entrepreneurial interests of lawyers and law firms.

The decision of the Supreme Court is notable in a number of respects. First, like *Neil* but unlike *MacDonald Estate* and *Strother*, it is a unanimous and unequivocal decision. Second, it is authored by the Chief Justice,

109. *Wallace v Canadian National Railway*, 2009 SKQB 369 at paras 13-16, [2009] 12 WWR 157 [*Wallace* SKQB].
110. *Ibid* at para 10.
111. *Wallace v Canadian National Railway*, 2011 SKCA 108 at para 7, [2012] 1 WWR 251 [*Wallace* SKCA].
112. *Wallace* SKQB, *supra* note 109 at paras 47, 81 ("The sensitivity of CN") Popesul J (as he was then).
113. *Ibid* at paras 20-21.

who, it will be remembered, was the author of the dissenting opinion in *Strother*. Third, McLachlin C.J. was clear in her analytical approach. She began by outlining the governing principles—i.e., the duty of loyalty to clients—and then highlighted its "three salient dimensions: (1) a duty to avoid conflicting interests, (2) a duty of commitment to the client's cause, and (3) a duty of candour."[114] She then proceeded to unpack the specifics of each of these three dimensions, particularly emphasizing the centrality of the bright-line rule, but also identifying some significant limitations.[115] She then applied each of the three dimensions of the duty of loyalty to the facts of the case and, without qualification, found that McKercher had crossed the bright line, violated its commitment to its client's cause, and breached its duty of candour.[116]

Fourth, and more particularly, the Chief Justice revisited and endorsed the bright-line rule articulated by Binnie J. in *Neil*. For her, it was a "clear prohibition."[117]

> The rule expressly applies to both related *and* unrelated matters. It is possible to argue that a blanket prohibition against concurrent representation is not warranted with respect to unrelated matters, where the concrete duties owed by the lawyer to each client may not actually enter into conflict. However, the rule provides a number of advantages. It is clear. It recognizes that it is difficult—often impossible—for a lawyer or law firm to neatly compartmentalize the interests of different clients when those interests are fundamentally adverse. Finally, it reflects the fact that the lawyer-client relationship is a relationship based on trust.[118]

In short, for McLachlin C.J., the bright-line rule "reflects the essence of the fiduciary's duty of loyalty."[119]

Fifth, having clearly embraced the duty of loyalty, the Chief Justice then proceeded to point out that while it is fundamental, it is not absolute. She then articulated four circumstances in which the bright-line rule does not apply.

The first is where the interests of the parties are either not immediate or not directly adverse.[120] This is itself a restatement—with emphasis—of one part of the bright-line rule in *Neil*. The second circumstance in which the bright-line rule does not apply is if the interests at stake are not "*legal*"

114. *McKercher*, *supra* note 6 at para 19, citing *Neil*, *supra* note 3.
115. *Ibid* at paras 20-47.
116. *Ibid* at paras 48-59.
117. *Ibid* at para 26.
118. *Ibid* at para 28 [emphasis in original].
119. *Ibid* at para 31.
120. *Ibid* at para 33.

interests.[121] The italics are those of the Chief Justice. She cited both *Neil* (where one aspect of the conflict was a strategic interest) and *Strother* (a commercial or business interest) as examples in which the bright-line rule was not applicable.[122] This is a nod to the legitimate entrepreneurial dimensions of modern legal practice. The third qualification is where a party has engaged in tactical abuse of the bright-line rule, essentially using it to seek, illegitimately, to impose burdens on the party adverse in interest and/or to delay proceedings.[123]

The fourth limitation arises in the circumstances where it would be unreasonable for a client to expect that its law firm will not act against it in unrelated matters.[124] This, in our opinion, is a subtle but important revision of the previously articulated "professional litigant" exception first mentioned in *Neil*. Noting that these cases will be the exception, the court has nevertheless articulated a more stable, less arbitrary, client-determined basis (through the granting or withholding of consent) for the application of the previously described "professional litigant" exception.[125] Once again, this client unreasonableness test might allow some scope for the accommodation of legitimate entrepreneurial pursuits by lawyers and law firms.

If any of these four situations is triggered the bright-line rule is inapplicable and the appropriate test is "substantial risk of impaired representation."[126]

Sixth, and finally, although most of *McKercher* focuses on the duty to avoid conflicts of interest, the Supreme Court also engages with, and emphasizes the importance of, two other aspects of the duty of loyalty—the duty of commitment to the clients' cause and the duty of candour.[127] In particular, the latter obligation is given an expansive interpretation: it "requires the law firm to disclose *any* factors relevant to the lawyer's ability to provide effective representation."[128] The problem, however, is how to reconcile this obligation with the co-existent obligation of loyalty and commitment to the new client. The Chief Justice is unequivocal:

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121. *Ibid* at para 35.
122. *Ibid.*
123. *Ibid* at para 36.
124. *Ibid* at para 37.
125. In light of the criteria set out by the Chief Justice in relation to an assessment of the reasonableness or unreasonableness of the client's objection to its lawyers acting adversely to its interests, it seems likely that describing such a client as a "professional litigant" is less suitable and that such shorthand will fall out of use.
126. *McKercher*, *supra* note 6 at para 32.
127. *Ibid* at paras 43-47.
128. *Ibid* at para 45 [emphasis added].

> I add this. The lawyer's duty of candour towards the existing client must be reconciled with the lawyer's obligation of confidentiality towards his new client. In order to provide full disclosure to the existing client, the lawyer must first obtain the consent of the new client to disclose the existence, nature and scope of the new retainer. If the new client refuses to grant this consent, the lawyer will be unable to fulfill his duty of candour and, consequently, must decline to act for the new client.[129]

In sum, *McKercher* in all of its aspects is a resounding endorsement of the duty of loyalty. There are some exceptions which recognize the legitimate business aspects of the practice of law, but the Court embeds them in the larger fiduciary relationship. In rearticulating the bright-line rule, the Court has taken the high road in orienting the profession's ethical compass toward a multifaceted and demanding duty of loyalty to clients. At the same time the Court has succinctly identified and consolidated several pragmatic qualifications to the principled standard. These qualifications are driven, at least in part, by an understanding of the legitimate entrepreneurial aspirations of lawyers.[130]

III. *Incorporating the duty of loyalty into the* Code

For nearly a century, the principles that articulate Canadian lawyers' duties in the performance of their professional tasks have been captured in codes of professional conduct.[131] These codes have become increasingly important as ethical standards for lawyers, as guidance in the imposition of discipline on lawyers, and as policy guidance for courts in their consideration of legal norms applicable to lawyers.[132] As well, codes of professional conduct have grown in size, detail, and complexity. However, to the credit of the Canadian legal profession and the governing bodies of Canadian law societies, significant efforts have been made to rationalize disparate

129. *Ibid* at para 47.

130. In *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7, Cromwell J (writing for LeBel, Abella, Karakatsanis and Wagner JJ) drew heavily on both *Neil* and *McKercher* to emphasize the importance of both the duty of loyalty and commitment to a client's cause, as grounds upon which to reject the application of money laundering legislation to lawyers.

131. The first Canadian Code, Canons of Ethics, was adopted by the Canadian Bar Association in 1920, It was amended from time to time and eventually renamed the Code of Professional Conduct. For most of the next 65 years, until the 1980s, it was the main source of ethical guidance for Canadian lawyers, and was substantially adopted by Law Societies across Canada as their governing code of conduct for lawyers. For a discussion of the motivations behind the establishment of Canons of Ethics see James A Smith, "'Artificial Conscience': Professional Ethics and Professional Discipline from 1920 to 1950" (1994) 32 Osgoode Hall LJ 65 at 82-84.

132. See, for example, the comments of McLachlin CJ in *McKercher, supra* note 6 at para 16, where she adopts previous statements of the Supreme Court to the effect that "an expression of a professional standard in a code of ethics…should be considered an important statement of public policy" (quoting *MacDonald Estate, supra* note 13 at 1246).

provincial codes and to focus lawyers' duties and obligations around a series of key organizing principles.[133] Examples of these principles are the lawyer's duty of integrity, the lawyer's various duties to clients, the lawyer's duties as an officer of the court, and the lawyer's duty to the public interest.

In the previous sections we argued that one of the overarching principles that shapes the lawyer's duties is that of loyalty. We have noted its consistent and growing place as *the* guiding principle in relation to many, perhaps most, of the lawyer's duties owed to clients. In this section we note that, despite the foundational nature of the duty of loyalty, existing codes of professional conduct in Canadian jurisdictions make limited reference to this duty of loyalty.[134] "Loyalty" appears in three different contexts in the FLSC's *Code*: (1) in the definition of "conflict of interest" and in Commentaries to the Rules on Conflicts of Interest,[135] (2) in the Commentary on Confidentiality and the Future Harm/Public Safety exception,[136] and (3) in a Commentary to the Rule governing lawyers and Incriminating Physical Evidence.[137] While one aspect of these statements is related to the relationship between loyalty and confidentiality (the Future Harm/Public Safety reference and the Incrimination Physical Evidence Commentaries) the dominant reference to loyalty is in relation to conflicts of interest. This is a troubling limitation given the much greater significance of the duty of loyalty in the modern Canadian jurisprudence. Equally significant, nowhere is it articulated as a "defining principle"[138]—a lodestar—for the guidance of lawyers in relation to their duties to clients.

In this section we propose a series of specific amendments to the provisions of the *Model Code* that would remedy this shortcoming. New or amended provisions are highlighted. The amendments fall into two categories.

First, we propose the *Model Code* be amended to make the Duty of Loyalty a freestanding Rule with Commentaries. This Rule would appear

133. As we have noted in the Introduction, from 2004 to 2011 the Federation of Law Societies of Canada undertook a major redesign and consolidation of law society codes, culminating in the publication of a *Model Code of Professional Conduct* in 2009. The provisions of this *Code* have been substantially adopted by law societies across Canada.

134. We have used the *Code*, *supra* note 1 as the foundational document against which we have examined the duty of loyalty and into which we incorporate the amendments.

135. *Code*, *ibid*, 'Definitions'; title to the Rule on Conflicts of Interest, Rule 3.4.1; Commentaries 5 and 6, the Title to Commentaries 7, 8 and 9 of Rule 3.4.1; Rule 3.4.2 and Commentary 6 on Client Consent to Conflicts; Commentary 1 of Rule 3.4.3 on Conflicts of Interest in Disputes; and Commentary 2 to Rule 3.4.30 on Conflicts of Interest in relation to Transactions with Clients.

136. *Ibid*, Commentary 1 to Rule 3.3.3.

137. *Ibid*, Commentary 4 to Rule 5.1.2A.

138. *Neil*, *supra* note 3 at para 12.

as the first Rule in Chapter 3, Relationship to Clients. We propose its placement at the beginning of this chapter for two reasons. First, the most central aspects of the lawyer's Duty of Loyalty are associated with duties owed to clients. Second, as we have sought to demonstrate, the duty is an over-arching one—an umbrella obligation that encompasses a series of duties captured in specific terms in Chapter 3—and constitutes a lodestar in terms of principled guidance for lawyers in fulfilling their duties to clients.

The second set of amendments relates to:

(i) a modification to a Commentary on Competence,
(ii) the Rule and Commentaries on Honesty and Candour,
(iii) a new Rule and Commentary on the Duty of Commitment,
(iv) a new Commentary on the Rule on Withdrawal,
(v) a sentence added to Commentary 1 on Confidentiality, and
(vi) the definition, Rule and Commentaries on Conflicts of Interest.

Each of these Rules and Commentaries is sound in itself, but the proposed amendments would link these specific duties to the overarching principle of loyalty, and align the content of these duties with the principle of loyalty as articulated in Canadian jurisprudence.

Most of these proposed amendments are self-explanatory. Where we have made a less obvious change we set out a brief explanation in a footnote. The proposed changes will require renumbering of the Rules and Commentaries in Chapter 3 of the *Model Code*.

A. LOYALTY

Loyalty

3.1-1 A lawyer has a duty of loyalty to his or her client.
3.1-2 Loyalty means undivided dedication to the client's interests.

Commentary

[1] Loyalty is a fundamental aspect of the lawyer's fiduciary duty to his or her client, a duty long recognized in law. In Codes of Professional Conduct and in Canadian jurisprudence, the essence of a lawyer's representation of a client is the advancement of the lawful interests of that client in preference to the interests of all others, including those of the lawyer. The lawyer's undivided loyalty to his or her client is the means by which the client can have confidence that his or her interests will be fairly and firmly advanced within an often complicated legal system.

[3] The duty of loyalty does not exist solely for the benefit of clients. Confidence in the administration of justice and in the integrity of the legal

profession is enhanced when clients and others know that their interests will be advanced and resolved free from compromising influences.

[4] The duty of loyalty is the principle upon which a number of obligations owed by lawyers to clients are founded: the duty of competence, the duty of candour, the duty of commitment to the client's cause, the duty to avoid conflicts of interest and the duty to preserve client confidences. Dedication to the client's interests embraces obligations of honest and complete disclosure to clients of all information relevant to their interests (candour), unwavering commitment to their cause (commitment), care to ensure that outside influences do not diminish or be reasonably viewed as diminishing or interfering with the effective, unqualified representation of a client (avoidance of conflicts of interest) and, in the representation of a client, ensuring that the client's confidences are preserved (confidentiality). Each of these obligations is expanded upon in other Rules and Commentaries in this Code.

B.1 COMPETENCE

We propose that Commentary 2 to the Duty of Competence be modified as follows[139]:

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles *and, in particular, the lawyer's duty of loyalty to the client.* Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied in *advancing the interests of the client.* To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practices.

B.2 CANDOUR

HONESTY AND CANDOUR

3.2-2 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

Commentary

[1] An important aspect of a lawyer's duty of loyalty to a client is the duty

139. The *Model Code* Rule on Competence presently states:
3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.
This duty is directly associated with the duty of loyalty to the client.

of candour—the duty to be open, honest and comprehensive with respect to all information relevant to the client's interests. The lawyer has a duty not to 'keep the client in the dark', but, to ensure that clients are fully informed about all matters relevant to the retainer, and in a position to judge for themselves the most appropriate course of action.

[2] A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any that might influence whether the client selects or continues to retain the lawyer.

[3] In those circumstances where a lawyer or law firm may, with consent, be able to represent two clients opposed in interest, the fulfillment of the duty of candour to a current client will require that the lawyer obtain consent from the new client to disclose to its current client the existence, nature and scope of the new retainer. Absent the ability to make this disclosure, the duty of candour will not be fulfilled and the lawyer must decline the new representation.

[4] A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

B.3 COMMITMENT

3.2-3 A lawyer owes a duty of commitment to the client's interests.

Commentary

[1] A lawyer's duty of loyalty requires the he or she be fully committed to the client's cause. This requires that a lawyer not allow other interests or opportunities, including possible future interests or opportunities, to qualify or compromise the lawyer's representation of the client. Once a lawyer undertakes a retainer, he or she is committed to act for the client's cause in the fulfillment of that retainer.

B.4 WITHDRAWAL

3.7 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.7-1 A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, a lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship. *Unless discharged by the client, or unless the client has acted in a way that requires or permits the lawyer to withdraw from representation, a lawyer cannot terminate a retainer in order to circumvent the duty of loyalty to a client.* It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds.

B.5 CONFIDENTIALITY

3.3 CONFIDENTIALITY

Confidential Information

3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

(a) expressly or impliedly authorized by the client;
(b) required by law or a court to do so;
(c) required to deliver the information to the Law Society; or
(d) otherwise permitted by this rule.

Commentary

[1] *A lawyer's duty to preserve client confidences is one of the central elements of a lawyer's duty of loyalty to a client.* A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

B.6 CONFLICTS OF INTERST

1.1-1 Definitions:

A "conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to a client[140] would be materially and adversely

140. The definition of a "conflict of interest" and the Rule setting out the Duty to Avoid Conflicts of Interest is focused upon the duty of loyalty. We propose that the reference to "or representation of" a client be removed. There is no need to make reference to representation since the duty of loyalty

affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

3.4 CONFLICTS OF INTEREST

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

3.4.2 *A conflict of interest exists when there is a substantial risk that a lawyer's loyalty to a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.*[141]

Commentaries[142]

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

[1] The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty.[143]

[2] A client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.[144] The lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, *and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests.*[145]

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automatically subsumes that part of the lawyer's involvement with a client.

141. Given its importance, we also propose that the definition of a conflict of interest be restated in the Rule.

142. We propose that Commentaries be reordered so that Commentaries 5 and 6 of the *Code* be placed at the beginning of the Commentaries and be renumbered Commentaries 1 and 2.

143. Because we have set out proposed language addressing each of candour, commitment, and confidentiality in separate locations more closely associated with the respective duties, and in greater detail above, we would delete the closing sentence in this Commentary and its somewhat misplaced reference to these corollary duties.

144. The 2014 amendments to the *Model Code* have deleted specific reference to the jurisprudence that has established the key loyalty-based principles establishing the content of specific conflict avoidance obligations. These appear in the present Commentary 1 to this Rule. We would preserve these comments, but as Commentary 3.

145. However, one reason for the duty to avoid conflicts of interest commented on in the jurisprudence

[3] [former Commentary 1, renumbered]

Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the bright-line rule as articulated by the Supreme Court of Canada. The bright-line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent. However, the bright-line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer or law firm will not act against it in unrelated matters. See also rule 3.4-2 and commentary [6].

[4] [former Commentary 2, renumbered and revised]

In cases where the bright-line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's *loyalty to*[146] the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

[5] [former Commentary 3][147]

This rule applies to a lawyer's representation of a client in all circumstances in which the lawyer acts for, provides advice to or exercises judgment on behalf of a client. Effective representation may be threatened where a lawyer is tempted to prefer other interests over those of his or her own client: the lawyer's own interests, those of a current client, a former client, or a third party.

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and that flows directly from the duty of loyalty is the client's sense of having been betrayed by the lawyer. In our proposals we have reinserted this point.

146. We have earlier proposed that the focus of the conflicts rule must be loyalty. While this Commentary rightly addresses the second aspect of the bright-line rule, "substantial risk to representation," this aspect of the duty is nevertheless grounded in the lawyer's duty of loyalty to the client. The reference to loyalty has been preserved in the second part of this Commentary, but has been deleted in the first part, inappropriately in our view. This creates an internal inconsistency in the language of this Commentary. More significantly, it could lead to the incorrect understanding that that the "substantial risk to representation" aspect of the bright-line rule concerns something other than loyalty.

147. This Commentary is the merged version of Commentaries 3 and 4 of the 2012 *Model Code*. There is no longer a Commentary 4 in the 2014 *Code*.

We would delete Commentaries 7, 8 and 9. We have previously proposed specific enrichments to the duties of Confidentiality, Commitment, and Candour, each of which is better located in other sections of the *Code* that address these duties specifically, as opposed to their placement at the end of the Commentaries on Conflicts of Interest. Subsequent Commentaries address specific conflict of interest scenarios and the role of law societies with respect to conflicts of interest, and do not speak directly to the duty of loyalty.

Rules 3.4-10 and 3.4-11

Acting Against Former Clients

3.4-10 Unless the former client consents, a lawyer must not act against a former client in:

(a) the same matter,
(b) any related matter, or
(c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if:

(a) the former client consents to the other lawyer acting; or
(b) the law firm has:
    (i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the lawyer to any other lawyer, any other member or employee of the law firm, or any other person whose services the lawyer or the law firm has retained in the new matter; and
    (ii) advised the lawyer's former client, if requested by the client, of the measures taken.

These rules relate to the more limited duty of loyalty owed by the lawyer to former clients. A new Commentary would highlight and explain important differences between the loyalty-based duties owed to current and former clients. We propose the following.

Commentary 1

Rules 3.4-10 and 3.4-11 establish the limits of the duty of loyalty in relation to former clients. The duty of loyalty is limited to aspects of the

previous representation that were integral to the client's interests in that matter. Consequently, the lawyer's duty not to act in ways that are adverse to the client's interests in general has no application provided that the lawyer respects the limited, continuing, loyalty-related duties associated with the previous representation—the duty to preserve client confidences associated with that previous representation and, absent consent, the duty not to act against the former client's interests in matters related to a previous representation.

Conclusion

Codes of conduct are, and should be, organic and evolutionary. As the practice of law develops, and as the jurisprudence unfolds, it is important that the *Code* be responsive to, and congruent with, such changes. While a code of conduct cannot anticipate or provide a solution for every conceivable ethical challenge faced by lawyers, if it is current and carefully crafted it can provide helpful orientation for lawyers. The duty of loyalty has come to be recognized as a fundamental principle of the lawyer-client relationship. It is our lodestar. The current *Code* does not adequately emphasize its importance, both as a legal obligation and an ethical principle. In this paper we have explained why this is the case and have suggested the nature and location of *Code* revisions in order to reorient that duty. We hope these recommendations will resonate with law societies and with the membership of the Canadian legal profession.