

Conflicts of Interest

BACKGROUND

- In *R. v. Neil*, the Supreme Court of Canada reaffirmed and restated the duty of loyalty owed by lawyers to current clients. The Court recognized that the duty of loyalty may be modified or waived with the informed consent of clients. However, the Court expressed the duty and its potential modification or waiver in broad and open-ended terms, creating uncertainty and practical difficulty for lawyers and their clients in applying this duty in particular situations. In its broadest interpretation, the rule expressed in *Neil* is felt to be unworkable for both small and large firms, in small and large centres, and in both general and specialty areas of practice, and serves neither the interests of justice nor any public interest.
- There is also concern that the duty of confidentiality as expressed in recent case law has been applied in a manner that is impractical in day-to-day practice, particularly with the increased mobility and concentration of the profession and in the context of the size and concentration of the market for legal services in Canada. Although there is no disagreement with the existence of an unqualified duty of confidentiality of client information, a more practical approach and guidance in situations involving, for example, deemed knowledge and relevance of information, would be of assistance to the profession and the public.

CURRENT STATUS

- In March 2007, the CBA established a Task Force on Conflicts of Interest.
- The mandate of the Task Force was to develop a consensus on reform of the legal and professional rules concerning conflicts of interest, and to prepare practical guidelines for the profession in applying the duty of loyalty, and in implementing appropriate modifications or waivers of the duty. In the course of its work, the Task Force considered the appropriate scope and content of client engagement letters. Finally, the Task Force proposed practical guidelines for the profession in the application of the duty of confidentiality, particularly in the areas of deemed knowledge and relevance of information.
- The Task Force was chaired by R. Scott Jolliffe. Its members were Robert C. Brun, Q.C., Simon Chester, Stuart (Kip) Cobbett, Gord Currie, Alan P. Fineblit, Q.C., (Liaison to the FLSC), Susan McGrath, Malcolm Mercer, Robert G. Patzelt, Q.C., Daniel E. Pinnington, W. Iain Scott, Isabel Schurman, Robert P. Stack, Alan J. Stern, Q.C., Gerald Tegart and Sean Weir.
- The Task Force held its first meeting in May 2007 and a [Consultation Paper](#) was published in October 2007.
- Consultation sessions were held in all CBA Branches. Presentations were made to several CBA groups, law societies, other legal organizations and various conferences and CLE programs.
- In addition, the CBA held a series of roundtable discussions with Managing Partners of law firms across the country, all focused on conflicts.
- A [Consultation Report](#) was published in April 2008 reflecting the views of a broad spectrum of the CBA and the legal profession.

- The [Task Force Final Report](#), Recommendations and Toolkit were published in August 2008.
- Council of the CBA adopted all 21 of the [Task Force recommendations](#) in August 2008.
- In February 2009, Council adopted amendments to the CBA Code of Professional Conduct to reflect the policy articulated in the Task Force recommendations.
- Managing Partner Roundtables on Conflicts were held throughout 2009 and 2010.
- The Task Force continues to publicize its Report and the Council resolution, with a particular emphasis on the Toolkit, which provides lawyers with practical tools to assist them in dealing with potential conflicts.
- In June 2010, the Federation of Law Societies of Canada issued its Advisory Committee Report on Conflicts of Interest. The Report agreed with much of the CBA's position on conflicts, but differed on the central issue of current client representation.
- In August 2010, the CBA submitted its response to the Federation Report. The response, prepared by the Conflicts Task Force, was approved by the CBA Board.

NEXT STEPS

- The CBA has offered any assistance that the FLSC would welcome in the latter's ongoing consideration of conflicts matters. The Advisory Committee Report has since been referred to the FLSC Code of Conduct Committee.
- The Task Force will pursue an initiative related to the universal adoption and use of a standardized, annotated, flexible engagement letter. This follows a CBA-wide consultation within the profession and with law firms, specifically about the current use of engagement letters.