February 1st, 2010

The Italics that Rocked the Decade (for Canadian Lawyers)

By Alice Woolley

Cases Considered:

R. v. Neil, 2002 SCC 70; [2002] 3 S.C.R. 631;
Strother v. 3464920 Canada Inc. 2007 SCC 24;[2007] 2 S.C.R. 177.

Those who follow sports know that some of the most fun you can have with your clothes on is debating the criteria for selecting the league MVP. Is it the best player, considered apart from the success (or ineptitude) of his team? Is it the player who contributed the most to the accomplishments of a successful team effort? Is it a particular type of contribution that matters – e.g., exceptional individual skill or above average skills combined with exceptional leadership? Or is it some more holistic determination, considering a variety of factors in a balance which is incapable of articulation beyond "I know it when I see it?"

So before identifying the case (or cases) of the decade in the law governing lawyers, let me begin by stating my criteria for selection, so that any armchair critics reading this can open their drinks and begin their lambasting of me for my idiocy: To be the case of the decade requires, at minimum, that the case break new ground in terms of what came before it, that it break new ground on a matter of central significance to this area of doctrinal law *and* that it have a significant influence on cases and events that follow it. On those criteria the leading cases of the decade in the law governing lawyers are incontrovertibly *R. v. Neil*, 2002 SCC 70; [2002] 3 S.C.R. 631 and its follow up *Strother v. 3464920 Canada Inc.* 2007 SCC 24;[2007] 2 S.C.R. 177.

Prior to *Neil* and *Srother* there were two main prohibitions against lawyers acting in circumstances of actual or potential conflicts between clients. First, a lawyer or law firm could not act for one client where there was a dispute, conflict or potential conflict with another client of the lawyer or law firm, and the matters were related. So, for example, if Company A was suing Company B for breach of contract, a lawyer or law firm could not act for both Company A and Company B. Or, to give an example of a conflict (real or potential), if Company A was taking over Company B, a lawyer or law firm could not act for both Company A and Company B, unless both companies consented and it was in their best interests that the representation take place (note that consent was only effective to permit representation in a conflict or potential conflict situation, not where the clients were in a dispute). Second, a lawyer or law firm could not act for one client against a former client where confidential information obtained in the representation of the former client was relevant or potentially relevant to the action now to be taken against the former client.

All of that changed with the decision of the Supreme Court in *Neil*. In *Neil*, the Supreme Court of Canada adopted a rule similar in fundamentals to the American Bar Association's Model Rule

1.7(a), which prohibits a law firm from representing client A in a matter adverse in interest to client B, even if the matter is unrelated to that in which the law firm is representing client B. In doing so the Court in *Neil* articulated a general duty of loyalty owed by lawyers to clients, including a "bright line" prohibition against acting contrary to a client's legal interests:

> 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 (*Neil* at para. 29, emphasis in original).

The "bright line" rule was not necessary to resolve the legal issue raised by the actual facts of *Neil*, in which the lawyer Lazin, of the Ventrakaman firm, represented Lambert who was co-accused in a criminal matter with Neil, another Ventrakaman client. Lambert's legal interests were directly adverse to Neil's in the criminal case, and Lazin took a number of steps that were directly prejudicial to Neil's interests (including with respect to confidential information) in order to benefit Lambert in that matter.

Nonetheless, a (bare) majority of the Court reiterated the "bright line" rule in *Strother*. In that case it clarified that the adversity of interests giving rise to an unrelated matter conflict must be legal, not merely economic. On the particular facts the Court held that Strother's provision of tax planning advice to his client Sentinel, where that advice might give Sentinel an economic advantage over its competitor Monarch, was acceptable even though Monarch was also a client of Strother's. The legal wrong to Monarch arose only when Strother took an economic position in Sentinel and then violated his contractual and fiduciary obligations to Monarch, not providing it with the loyalty and legal advice it could otherwise have expected. Had Strother not done so, and had merely had two clients taking advantage of his expertise with the hope of competitive supremacy, Strother would not have offended the bright line rule. This decision was not *obiter*; it was necessary for the determination that Strother had not violated that particular duty of loyalty (although he had violated others).

Neil and *Strother* thus significantly modified the legal landscape of the law governing lawyers from that which had come before. And they did so about something central to that landscape, not something with only a narrow or technical application to some particular aspect of legal practice. The two decisions talked about the very nature of the duty owed by a lawyer to her client, and made it clear that at the heart of that duty is lawyer loyalty and fidelity to the client's legal interests. In addition, the actual rule articulated by the Court has significant practical ramifications for how lawyers, particularly at large law firms, manage their practices – it opens up a far broader array of potentially disqualifying conflicts than could arise when conflicts were limited to related matters or the potential for misuse of confidential information.

The cases have also had a demonstrable impact on subsequent jurisprudence, on law society regulation of lawyers and on the relationship between the profession and the Court. The *Neil* and *Strother* cases have not been ignored by lower courts, and have been used to disqualify counsel in a number of cases (see, e.g., *De Beers Canada Inc. v. Shore Gold Inc. and Cameco corporation*, [2006] S.J. No. 210; 278 Sask. R. 171 (Q.B.)). In addition, while not all provincial law societies have responded, the Law Society of Alberta significantly amended its Code of

Professional Conduct following *Neil* to codify the bright line rule and give guidance to practitioners as to its meaning and significance (LSA Code of Conduct, Chapter 6, Rule 3(a) and associated commentary). Finally, the cases have led to significant unhappiness amongst some in the profession and, in August 2008, to a Canadian Bar Association Task Force Report recommending that the decisions of the Supreme Court be resisted by provincial law societies.

The Task Force Report states that it "has substantial concern with the Unrelated Matter Rule [from *Neil* and *Strother*] as it appears to be currently understood" (p. 59). This is putting the Task Force's perspective gently; the more accurate summation might be that the Task Force objects to the Unrelated Matter Rule as unprincipled, unjustified and harmful:

> The Unrelated Matter Rule cannot be explained by concern that duties of performance in the two matters conflict as, by definition, the two matters are unrelated. The Unrelated Matter Rule is clearly an extension of the duty of loyalty as previously understood in the law of Canada, England, Australia and New Zealand. None of the cases or authorities discussed in *Neil* or *Strother* provides authority for this extension. No reasoning for the extension is provided in either case. As the mandates in *Neil* and *Strother* were not unrelated, the extension does not arise out of the facts of those cases nor, presumably, argument before the Court in those cases, and the extension was not required to decide either case (p. 35).

The Task Force Report further suggests that the practice circumstances underlying the ABA Rule apparently adopted by *Neil* are "not necessarily the modern reality" and that "mandatory bright line rules… are doubtful today, even in the U.S." (p. 41). The Task Force questions the relevance of the Rule, suggesting that conflicts in unrelated matters are unlikely to create a substantial risk that the lawyer's representation of the client would be materially and adversely affected, particularly if the matters do not involve litigation (p. 41). The Task Force argues that the Unrelated Matter Rule is contrary to the public interest: it will restrict access to counsel, especially in remote communities (p. 61); will unduly restrict client choice (p. 62); will unduly consume lawyer time and resources (p. 62); and will result in inconsistent interpretations by lawyers (p. 63). Overall, the Task Force concludes "there is no justification for the expense and loss of freedom of choice that arises from a rule which extends beyond its principled foundation" (p. 63). The only necessary prohibition is of conflicts in unrelated matters which have the potential for a material and adverse effect on representation, such as "when there is the potential for cross-examination of, or otherwise challenging, one's own client in the adverse matter or [for] a sense of betrayal on the part of the client by virtue of the adverse matter" (p. 66).

This dispute between the CBA Task Force and the Supreme Court on the unrelated matters rule has had further ramifications. In October 2009 the Federation of Law Societies issued a Model Code of Professional Conduct, with the hopes that this Model Code would be adopted nationally. The Model Code has, however, no drafted rule on conflicts of interest, apparently because of an inability to come to a national consensus about whether the Supreme Court or the CBA Task Force should be followed.

As a consequence, the impacts of *Neil* and *Strother* are not as yet fully played out. But their significance – and worthiness as the legal ethics cases of the decade – is indisputable.