BANKING ON CORPORATE

BY NEILL MAY

# Neill on *Neil*: conflicts and Canadian corporate law

The breadth of a lawyer's and a law firm's duty to a client has been well analyzed since the Supreme Court of Canada's 2002 decision in *R. v. Neil*. That being said, since the bright-line rule laid down in that case continues to stand uncontradicted nearly a decade later, its potentially significant effect on the practice of business law in an increasingly interconnected economy warrants consideration and comment.

The irony in a lawyer complaining about overbroad conflict rules is manifest. But my area of expertise is not lawyer jokes; in fact, for reasons I can't explain, I don't find them all that funny.

Personal conflicts aside, there are reasons to be concerned about the breadth of and uncertainty in conflict rules, especially given the realities of the Canadian market for legal services. In one sense Canada is a big place: if the only lawyer in your town is conflicted, it can be a long drive to the next one. But it's equally true that, at least in the context of the market for specialized legal services, Canada is a very small place. There is a limited number of highly specialized lawyers in an economy that is complex, developed, and highly regulated. In that context, overbreadth and uncertainty can limit clients' access.

The lawyer's fiduciary duty is clear: as the Supreme Court put it in the 2007 *Strother v. 3464920 Canada Inc.* decision, the "fundamental duty of a lawyer is to act in the best interest of his or her client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client." From a theoretical perspective, the problem sounds simple: if you have a conflict, don't act. But consider the literal application of the "unrelated matter rule" as set forth in *Neil* in the real world of specialized legal services. Expert anti-trust counsel couldn't act for a consolidator one day and argue against anti-competitive mergers the next; an investment fund might not get access to unique tax expertise of one firm because it acts for a competitor in a completely unrelated context; and a government agency couldn't retain a top litigator because she's worked for just about anyone else.

The point is that the market here is sophisticated but small, that there's a very small cluster of firms servicing clients with needs that, as the economy and the resultant regulation become more complex, are expanding. Access to the most qualified, experienced, and well-positioned advisers can be critically important. Rules that limit access in a manner disproportionate to their intended objective therefore need to be re-thought.

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I'm not saying anything that others haven't already noticed. The Canadian Bar Association's report on this issue took a comprehensive look and recommended a realistic, balanced approach. My perspective, similarly, is that it is only where there is potential for material and adverse effect on the client that a lawyer should be prevented from acting, not just where a client has an interest in an unrelated matter. It's the existence of a real conflict that bars the retainer, not the existence of a relationship with another client. One must accept that some relationships are benign.

Speaking of which, when I was a young lawyer I was at a social event and happened to speak to a senior regulator. I asked him why the regulators give all kinds of technical relief in circumstances where only a wildly overbroad reading of the rules would require any relief at all and, it appeared clear to me, the rules were probably not intended to apply in the first place. He told me, I think with some intentional dramatic overstatement, that it was because young lawyers lacked either the experience or the courage to make practical judgments and kept applying for relief that was, in practical terms, unnecessary.

I realized then that mature judgments by counsel and practical thinking by the arbiters could combine to get some sensible results. In the context of conflicts, in the first instance it's the lawyers who have to decide whether a real conflict exists at the time of the retainer. My hope is that scrutiny of those decisions will be based in practical perspectives that recognize the benefits of clear and balanced application of conflict principles. I hope too that one day I find humour in lawyer jokes.

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