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

David Lloyd Neil *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Neil

Neutral citation: 2002 SCC 70.

File No.: 28282.

2002: January 25; 2002: November 1.

Present: Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for alberta

Criminal law — Remedies — Stay of proceedings — Accused seeking stay of criminal prosecutions on basis that his lawyers were in a conflict of interest — Whether stay of jury's guilty verdict warranted.

Barristers and solicitors — Duty of loyalty — Conflict of interest — Accused seeking stay of criminal prosecutions on basis that his lawyers were in a conflict of interest — Proper limits of a lawyer's "duty of loyalty" to a current client in a case

where the lawyer did not receive any confidential information relevant to the matter in which he proposes to act against the current client's interest.

Following complaints that the accused paralegal was providing legal advice contrary to the Alberta *Legal Profession Act*, a police investigation led to a 92-count indictment. The trial judge severed the counts into five separate indictments. One charged that the accused had fabricated court documents in a divorce action. Another contained charges regarding an alleged scheme to defraud Canada Trust. The accused argued that the V law firm, with which he had a solicitor-client relationship, was in a conflict of interest. Specifically, L, a member of the V firm, had brought a court application to regularize a divorce which had been obtained on the basis of documents allegedly forged by the accused. At the suggestion of the trial judge in the divorce, L suggested to the husband that he report the forgery to the police. L in fact steered him to the same police officer who was responsible for the Canada Trust file and other cases pending against the accused.

With respect to the Canada Trust indictment which was factually unrelated to the divorce proceedings, the accused consulted the V firm (including L) at a time when L, unbeknownst to him, was acting for his business associate whom L knew, or ought to have known, would also be charged in the same proceedings. The trial judge found that L had met with the accused on the Canada Trust matters while in fact looking to run a "cut-throat" defence against the accused for the benefit of his former associate.

Both indictments proceeded to trial by jury. On the indictment arising out of the divorce file, the accused was convicted. In the subsequent trial on the Canada Trust charges, the conflict of interest involving the V firm was brought to the attention

of the trial judge, who declared a mistrial. He also stayed further action on the jury's verdict in the divorce matter. The stay was vacated and the verdict restored by the Court of Appeal, which sent the divorce matter back to the trial judge for sentencing. The Court of Appeal also rejected the accused's argument for a stay of further proceedings in the Canada Trust indictment on the basis that he was denied his right to effective representation contrary to s. 7 and s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, and that further proceedings would be an abuse of process.

Held: The appeal should be dismissed.

While the Court is most often preoccupied with uses and abuses of confidential information in cases where it is sought to disqualify a lawyer from further acting in a matter, or other related relief, the duty of loyalty to a current client includes the much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role. The aspects of the duty of loyalty relevant to this appeal do include issues of confidentiality in the Canada Trust matter, but engage more particularly three other dimensions: the 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. The general rule is 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.

Here, the V law firm, and L in particular, put themselves in a position where the duties they undertook to other clients conflicted with the duty of loyalty which they already owed to the accused. Loyalty required the V law firm to focus on the interest of the accused without being distracted by other interests including personal interests. The V firm breached their duty to the accused in accepting a retainer that required them to put before the divorce court judge evidence of the illegal conduct of their client, the accused, at a time when they knew he was facing other criminal charges related to his paralegal practice, in which their firm had had a longstanding involvement. The divorce matter was adverse to the accused's interest, and advantageous to the "cut-throat" defence planned by his former business associate. Further, the V firm ought not to have met with the accused on the Canada Trust matters when it was conflicted by its *de facto* representation of his former business associate.

The law firm, as fiduciary, could not serve two masters at the same time. Having said that, the accused falls short on the issue of remedy. He may (and perhaps did) choose to take his complaint to the Law Society of Alberta, or seek other relief, but he is not entitled to a stay of proceedings. The law firm's conduct did not affect the fairness of the divorce action trial and there was no issue of confidential information. L's involvement in the divorce matter was in violation of his and the firm's professional obligations, but it contributed little to the accused's predicament. The falsification of the court documents came to light without the involvement of the V firm and the independent investigation by the police militates against a finding of abuse of process. This is manifestly not one of those clearest of cases where a stay of the jury's verdict is warranted. The Court of Appeal was correct to remit the divorce matter to the trial judge for sentencing.

Similarly, while the V law firm was in a conflict of interest when they attempted to act simultaneously for both the accused and his eventual co-accused in the Canada Trust matter, in the end, the V firm did not act for the accused. Their conflict did not result in the charges being so vitiated as to render it an abuse of process for the state to seek a conviction at a new trial. It is certainly not one of the clearest of cases in which a stay would be justified. There may be other or different evidence before the judge presiding at the new trial and the disposition of the stay application in the Canada Trust indictment, if renewed, will be for that trial judge to decide.

Cases Cited

Referred to: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; *Tanny v. Gurman*, [1994] R.D.J. 10; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McCallen* (1999), 43 O.R. (3d) 56; *Re Regina and Speid* (1983), 8 C.C.C. (3d) 18; *Teoli v. Fargnoli* (1989), 30 Q.A.C. 136; *R. v. Parsons* (1992), 100 Nfld. & P.E.I.R. 260; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Montreal Trust Co. of Canada v. Basinview Village Ltd.* (1995), 142 N.S.R. (2d) 337; *Enerchem Ship Management Inc. v. Coastal Canada (The)*, [1988] 3 F.C. 421; *Jans v. Coulter (G.H.) Co.* (1992), 105 Sask. R. 7; *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24; *Gaylor v. Galiano Trading Co.* (1996), 29 B.L.R. (2d) 162; *Drabinsky v. KPMG* (1998), 41 O.R. (3d) 565; *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599; *Services environnementaux Laidlaw (Mercier) Ltée v. Québec (Procureur général)*, [1995] R.J.Q. 2393; *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663, aff'd (1988), 66 O.R. (2d) 350; *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371; *R. v. Silvini* (1991), 5 O.R. (3d) 545; *R. v. Widdifield* (1995), 25 O.R. (3d) 161; *R. v. Graham*, [1994] O.J. No. 145 (QL); *R. v.*

Henry (1990), 61 C.C.C. (3d) 455, [1990] R.J.Q. 2455; *Spector v. Ageda*, [1971] 3 All E.R. 417; *Ramrakha v. Zinner* (1994), 157 A.R. 279; *Bolkiah v. KPMG*, [1999] 2 A.C. 222; *Re Regina and Robillard* (1986), 28 C.C.C. (3d) 22; *R. v. Chen* (2001), 53 O.R. (3d) 264; *R. v. Graff* (1993), 80 C.C.C. (3d) 84; *R. v. Barbeau* (1996), 110 C.C.C. (3d) 69; *Glasser v. United States*, 315 U.S. 60 (1942); *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 2001 SCC 19; *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Mickens v. Taylor*, 122 S. Ct. 1237 (2002); *R. v. Finn*, [1997] 1 S.C.R. 10; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Pearson*, [1998] 3 S.C.R. 620; *R. v. Jewitt*, [1985] 2 S.C.R. 128.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(*d*).

Criminal Code, R.S.C. 1985, c. C-46, s. 686(4)(*b*)(ii).

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Britain, and Consort of King George the Fourth, vol. II, Part I. London: J. Robins, 1821.

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APPEAL from a judgment of the Alberta Court of Appeal (2000), 266 A.R. 363, 228 W.A.C. 363, [2000] A.J. No. 1164 (QL), 2000 ABCA 266, allowing an appeal from a judgment of the Court of Queen's Bench (1998), 235 A.R. 152, [1998] A.J. No. 1135 (QL), 1998 ABQB 859. Appeal dismissed.

Nathan J. Whitling and *Matthew Milne-Smith*, for the appellant.

James A. Bowron, for the respondent.

The judgment of the Court was delivered by

1 BINNIE J. — What are the proper limits of a lawyer's "duty of loyalty" to a current client in a case where the lawyer did not receive any confidential information that was (or is) relevant to the matter in which he proposes to act against the current client's interest? The issue arises here in the context of a series of criminal prosecutions against the appellant. He complains that a member of a law firm, with which he had an ongoing solicitor-client relationship in respect of certain transactions that were the subject of criminal proceedings pending against him, provided to the police information about an unrelated matter which led directly to the laying of additional charges. He was eventually convicted on those unrelated charges. The appellant's position is that his

lawyers violated their duty of loyalty, and on that account the conviction that grew out of their conflict of interest should be stayed.

2 The Alberta Court of Appeal, in brief reasons, considered the key point to be that the lawyers did not disclose to the new client "any confidential information attributable to a solicitor-and-client relationship" with an existing client ((2000), 266 A.R. 363, 2000 ABCA 266, at para. 4). In its view, the stay was unwarranted.

3 In my view, the law firm did owe a duty of loyalty to the appellant at the material time, and the law firm ought not to have taken up the cause of one of the appellant's alleged victims (Darren Doblanko) in proceedings before a civil court at the same time as it maintained a solicitor-client relationship with the appellant in respect of other matters simultaneously pending before the criminal court (the "*Canada Trust*" matters). The *Doblanko* mandate, though factually and legally unrelated to the *Canada Trust* matters, was adverse to the appellant's interest. The law firm, as fiduciary, could not serve two masters at the same time. Having said that, the appellant falls short on the issue of remedy. He may (and perhaps did) choose to take his complaint to the Law Society of Alberta, but he is not entitled to a stay of proceedings. The law firm's conduct did not affect the fairness of the *Doblanko* trial. Its involvement predated the laying of charges by the police. There was no issue of confidential information. The *Doblanko* charges were serious and would almost certainly have been laid in any event. In my view, the prosecution of the *Doblanko* charge was not an abuse of process. More specifically, I agree with the conclusion of the Alberta Court of Appeal that this is manifestly not one of those clearest of cases where a stay of the jury's verdict of guilt is warranted. I would therefore dismiss the appeal.

I. The Facts

4 The appellant carried on a business in Edmonton as a paralegal for many years. He was assisted by Helen Lambert. He regularly consulted "Pops" Venkatraman, a solicitor, about issues arising in his files, and when advised by "Pops" that matters exceeded his competence he would refer his clients to the Venkatraman law firm. The Law Society of Alberta took the view that these referrals did not take place frequently enough, and in October 1994 supplied the Prosecutors' Office in Edmonton with complaints that the appellant was providing legal advice contrary to the Alberta *Legal Profession Act*, S.A. 1991, c. L-9.1. The police investigation eventually led to a 92-count indictment against the appellant for a variety of different transactions related to different complainants.

5 The conflict of interest largely concerns the activities of one of the Venkatraman firm's associates, Gregory Lazin. Lazin shared office space and some facilities with the law firm in the fall of 1994. The trial judge found that as of January 1, 1995 he should be considered a member of the Venkatraman firm for the purpose of conflict of interest and confidentiality by virtue of the extended definition of "firm" adopted by the Law Society of Alberta in its *Code of Professional Conduct* (loose-leaf), effective January 1, 1995, at p. ix. I say "extended meaning" because the evidence established that Lazin was essentially carrying on an independent practice despite the shared facilities. Effective May 1, 1995, however, Lazin's practice was rolled into the Venkatraman firm, and Lazin himself became an employee. He has since left.

6 The trial judge concluded that the lack of legal and factual connections among some of the 92 counts required its severance into five separate indictments. It

was agreed that all five indictments would proceed before him and he would, after all the indictments had been dealt with, impose a sentence if convictions were obtained.

7 We are concerned here with two of the five indictments. The first trial involved charges that the appellant had fabricated court documents in the *Doblanko* divorce action. A second group of charges related to an alleged scheme to defraud Canada Trust. The appellant and his business associate, Ms. Helen Lambert, were said to have combined their efforts to obtain from Canada Trust mortgages on behalf of people whose credit worthiness would have been rejected if their identity had been disclosed. In one such transaction, for example, a couple called Rambaran wished to buy a property but could not obtain financing by reason of their recent bankruptcy. The allegation was that the appellant went to Canada Trust ostensibly to obtain a mortgage on behalf of Helen Lambert, but in fact on behalf of the bankrupt Rambaran family, with the intention of having the Rambarans assume the mortgage once the monies had been advanced by Canada Trust. Other indictments related in part to allegations of the misappropriation of funds from an estate.

8 The conflicts of interest involving the Venkatraman firm came from two sources:

> (i) With respect to the *Canada Trust* indictment, the firm acted simultaneously for the appellant in the criminal proceedings and his business associate Helen Lambert in divorce proceedings at a time when they knew, or ought to have known, that she would also be charged in the *Canada Trust* criminal proceedings, with an interest adverse to his. Two members of the firm visited the appellant at the Remand Centre on April 18, 1995, including

Lazin who arrived late and was there for about 12 minutes during a two-hour interview. At the time he was acting for Helen Lambert. The trial judge concluded that Lazin attended for no purpose except to collect information from the appellant that would be useful to him in his defence of Helen Lambert in the anticipated criminal proceedings. Lazin's plan was to run a "cut-throat defence", seeking to paint the appellant as the manipulative criminal and Helen Lambert as an innocent dupe. He was subsequently retained formally as her defence counsel and eventually offered the Crown Attorney's Office a deal under which Lambert would testify against the appellant if the charges against her were dropped. As it was put in cross-examination, "in return for Lambert sinking [the appellant], Lambert would walk". None of this, obviously, was in the appellant's interest. The appellant was belatedly advised that the Venkatraman law firm would not act for him in the *Canada Trust* criminal case because of its involvement with Helen Lambert.

(ii) In July 1995, Lazin, still a member of the Venkatraman firm, was approached by Darren Doblanko whose wife had obtained a divorce with the assistance of the appellant some years previously. Quite innocently, she had relied on an affidavit of service on Darren Doblanko (who had earlier deserted her). The affidavit was false. The jury found that the false affidavit of service had been prepared by the appellant. Moreover, the wife had innocently relied on a Certificate of No Appeal containing the forged signature of Doblanko. At the suggestion of the trial judge in the *Doblanko* divorce, Lazin suggested to Doblanko that he report the forgery to the police. In fact, Lazin steered Doblanko to the same police officer who was

responsible for the *Canada Trust* file and other cases pending against the appellant. It was suggested by the appellant's counsel that Lazin's strategy was to multiply the allegations of dishonesty against his client to strengthen the credibility of the "cut-throat" defence he planned to run on behalf of Helen Lambert in the *Canada Trust* case.

II. Analysis

9 I make three preliminary observations. The first is that while misuse of confidential information is not an issue in the *Doblanko* case, in which the stay was entered, it is an issue in the *Canada Trust* matter where Lazin, acting against the appellant's interest, sat in on part of the solicitor-client interview on April 18, 1995, described above. Secondly these cases do not require the imputation of confidential knowledge from one partner of the firm to another. Here the same member of the firm (Lazin) had a finger in each of the conflict situations. Thirdly, we are not being asked to intervene based merely on an "appearance" of conflict. The conflicts were actual.

10 The *Doblanko* indictment was the first to go to trial. The appellant was convicted by the jury. The verdict was entered, but as stated, sentencing was delayed by prior arrangement until the outcome on the other four indictments was known. During the trial of the second indictment (on the *Canada Trust* matters), members of the Venkatraman law firm sought to avoid testifying on the basis that the firm was acting for the appellant "in circumstances that could create a conflict". With the Crown's consent, the judge declared a mistrial. The trial judge then entertained the appellant's application for a stay of all proceedings. At the conclusion of the stay hearing, at which time all the relevant conflicts of interest emerged in the testimony, the trial judge stayed further

action on the jury's verdict in the *Doblanko* matter. He also expressed the view that while he would not, having presided over the stay application, proceed to hear the *Canada Trust* case, it was his opinion that those proceedings ought to be stayed as well: (1998), 235 A.R. 152, 1998 ABQB 859.

11 As stated, the stay was vacated and the verdict restored by the Alberta Court of Appeal, which sent the matter back to the trial judge for sentencing.

A. *The Lawyer's Duty of Loyalty*

12 Appellant's counsel reminds us of the declaration of an advocate's duty of loyalty made by Henry Brougham, later Lord Chancellor, in his defence of Queen Caroline against the charge of adultery brought against her by her husband, King George IV. He thus addressed the House of Lords:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.
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> (*Trial of Queen Caroline* (1821), by J. Nightingale, vol. II, The Defence, Part 1, at p. 8)

These words are far removed in time and place from the legal world in which the Venkatraman law firm carried on its practice, but the defining principle — the duty of loyalty — is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that

integrity be maintained: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1243 and 1265, and *Tanny v. Gurman*, [1994] R.D.J. 10 (Que. C.A.). Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies: *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2; *Smith v. Jones*, [1999] 1 S.C.R. 455. As O'Connor J.A. (now A.C.J.O.) observed in *R. v. McCallen* (1999), 43 O.R. (3d) 56 (C.A.), at p. 67:

> . . . the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case.

13 The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests. Other objectives, I think, can be related to the first. For example, in *MacDonald Estate*, *supra*, Sopinka J. speaks of the "countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause" (p. 1243). Dubin J.A. remarked in *Re Regina and Speid* (1983), 8 C.C.C. (3d) 18 (Ont. C.A.), at p. 21:

> We would have thought it axiomatic that no client has a right to retain counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client and a former one.

See also: *Teoli v. Fargnoli* (1989), 30 Q.A.C. 136.

14 These competing interests are really aspects of protecting the integrity of the legal system. If a litigant could achieve an undeserved tactical advantage over the opposing party by bringing a disqualification motion or seeking other "ethical" relief using "the integrity of the administration of justice" merely as a flag of convenience, fairness of the process would be undermined. This, I think, is what worried the Newfoundland Court of Appeal in *R. v. Parsons* (1992), 100 Nfld. & P.E.I.R. 260, where the accused was charged with the first degree murder of his mother. The Crown sought to remove defence counsel on the basis that he had previously acted for the father of the accused in an unrelated matrimonial matter, and might in future have to cross-examine the father at the son's trial for murder. The accused and his father both obtained independent legal advice, after full disclosure of the relevant facts, and waived any conflict. The father also waived solicitor-client privilege. The court was satisfied there was no issue of confidential information. On these facts, the court concluded that "public confidence in the criminal justice system might well be undermined by interfering with the accused's selection of the counsel of his choice" (para. 30).

15 Sopinka J. in *MacDonald Estate, supra*, also mentioned as an objective the "reasonable mobility in the legal profession" (p. 1243). In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection. Lawyers are the servants of the system, however, 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. Yet it is important to link the duty of

loyalty to the policies it is intended to further. An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests.

16 The duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship. One of the roots of the word fiduciary is *fides*, or loyalty, and loyalty is often cited as one of the defining characteristics of a fiduciary: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 149; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 405. The lawyer fulfills squarely Professor Donovan Waters' definition of a fiduciary:

> In putting together words to describe a "fiduciary" there is of course no immediate obstacle. Almost everybody would say that it is a person in whom trust and confidence is placed by another on whose behalf the fiduciary is to act. The other (the beneficiary) is entitled to expect that the fiduciary will be concerned solely for the beneficiary's interests, never the fiduciary's own. The "relationship" must be the dependence or reliance of the beneficiary upon the fiduciary.
>
> (D. W. M. Waters, "The Development of Fiduciary Obligations", in R. Johnson et al., eds., *Gérard V. La Forest at the Supreme Court of Canada, 1985-1997* (2000), 81, at p. 83)

Fiduciary duties are often called into existence to protect relationships of importance to the public including, as here, solicitor and client. Disloyalty is destructive of that relationship.

B. *More Than Just Confidential Information*

17 While the Court is most often preoccupied with uses and abuses of confidential information in cases where it is sought to disqualify a lawyer from further acting in a matter, as in *MacDonald Estate*, *supra*, the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role: *Montreal Trust Co. of Canada v. Basinview Village Ltd.* (1995), 142 N.S.R. (2d) 337 (C.A.); *Enerchem Ship Management Inc. v. Coastal Canada (The)*, [1988] 3 F.C. 421 (C.A.); *Jans v. Coulter (G.H.) Co.* (1992), 105 Sask. R. 7 (C.A.); *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Ct. (Gen. Div.)); *Gaylor v. Galiano Trading Co.* (1996), 29 B.L.R. (2d) 162 (B.C.S.C.).

18 In *Drabinsky v. KPMG* (1998), 41 O.R. (3d) 565 (Gen. Div.), where the plaintiff sought an injunction restraining the accounting firm KPMG (of which the plaintiff was a client) from further investigating the financial records of a company of which the plaintiff was a senior officer, Ground J., grouping together lawyers and accountants, said, at p. 567:

> I am of the view that the fiduciary relationship between the client and the professional advisor, either a lawyer or an accountant, imposes duties on the fiduciary beyond the duty not to disclose confidential information. It includes a duty of loyalty and good faith and a duty not to act against the interests of the client. [Emphasis added.]

Some members of the accounting profession assert the efficacy of "Chinese walls" in accounting practices even with respect to the affairs of *current* clients. Whether this belief is justified in the absence of informed consent from the clients concerned is an issue for another day. Insofar as the *legal* profession is concerned, Ground J.'s view of the duty of loyalty to current clients is unassailable.

19 The aspects of the duty of loyalty relevant to this appeal do include issues of confidentiality in the *Canada Trust* matters, but engage more particularly three other dimensions:

(i) the duty to avoid conflicting interests: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599 (C.A.), and *Services environnementaux Laidlaw (Mercier) Ltée v. Québec (Procureur général)*, [1995] R.J.Q. 2393 (C.A.), including the lawyer's personal interest: *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663 (H.C.), aff'd (1988), 66 O.R. (2d) 350 (C.A.); *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.); *Stewart v. Canadian Broadcasting Corp.*, *supra*.

(ii) a duty of commitment to the client's cause (sometimes referred to as "zealous representation") from the time counsel is retained, not just at trial, i.e. ensuring that a divided loyalty does not cause the lawyer to "soft peddle" his or her defence of a client out of concern for another client, as in *R. v. Silvini* (1991), 5 O.R. (3d) 545 (C.A.); *R. v. Widdifield* (1995), 25 O.R. (3d) 161 (C.A.); *R. v. Graham*, [1994] O.J. No. 145 (QL) (Prov. Div.); and,

(iii) a duty of candour with the client on matters relevant to the retainer: *R. v. Henry* (1990), 61 C.C.C. (3d) 455, [1990] R.J.Q. 2455 (C.A.), at p. 465 C.C.C., *per* Gendreau J.A.; *Spector v. Ageda*, [1971] 3 All E.R. 417 (Ch. D.), at p. 430; the Canadian Bar Association, *Code of Professional Conduct* (1988), c. 5, Commentary 4-6. If a conflict emerges, the client should be among the first to hear about it.

C. *The Venkatraman Law Firm's Breach of Professional Obligations*

20 The present appeal involves criminal proceedings and it is in that context that I propose to review the applicable legal principles.

(1) Did a Solicitor-Client Relationship Exist at the Relevant Time?

21 The Crown argues that the *Canada Trust* retainer ended before the *Doblanko* retainer began, and the relevant principles are therefore those that govern acting against a *former* client rather than the stricter and more comprehensive rules about acting against a *current* client.

22 The *Code of Professional Conduct* of the Law Society of Alberta defines "client" as follows, at p. viii:

> "client" generally means a person on whose behalf the lawyer renders professional services and with whom the lawyer has a current or ongoing lawyer/client relationship, but may also include a person who reasonably believes that a lawyer/client relationship exists although one or more of the customary indicia of such a relationship are absent.

23 The trial judge made the finding that "Venkatraman and Associates had a solicitor client relationship with Neil [the appellant] relating to the giving of advice generally but including specifically advice relating to matters for which Neil [the appellant] was charged" (para. 66). This relationship, which seems to have been in the nature of a general retainer, predated the events in question, and continued through the events in question. Not only did the appellant claim a continuing solicitor-client relationship but the Venkatraman law firm took the position at the time of the *Canada*

Trust trial in 1997 that there was a *continuing* solicitor-client relationship (see Exhibit 6, letter dated January 14, 1997). In these circumstances, the trial judge's finding that a solicitor-client relationship existed between the appellant and the Venkatraman law firm at all relevant times should not be disturbed.

(2) The Duty of Loyalty to an Existing Client

24 The Law Society of Alberta's *Code of Professional Conduct* provides that "[i]n each matter, a lawyer's judgment and fidelity to the client's interests must be free from compromising influences" (c. 6, Statement of Principle, p. 50). The facts of this case illustrate a number of important objectives served by this principle. Loyalty required the Venkatraman law firm to focus on the interest of the appellant without being distracted by other interests including personal interests. Part of the problem here seems to have been Lazin's determination to hang onto a piece of litigation. When Lazin was asked about "the ethical issue" in acting for Lambert, he said maybe "it was a question of not wanting to give up the file". Loyalty includes putting the client's business ahead of the lawyer's business. The appellant was entitled to a level of commitment from his lawyer that whatever could properly be done on his behalf would be done as surely as it would have been done if the appellant had had the skills and training to do the job personally. On learning that his own lawyer had put before the divorce court evidence of his further wrongdoing, the appellant understandably felt betrayed. Equally, the public in Edmonton, where the prosecution of the appellant had attracted considerable notoriety, required assurance that the truth had been ascertained by an adversarial system that functioned clearly and without hidden agendas.

25 The general duty of loyalty has frequently been stated. In *Ramrakha v. Zinner* (1994), 157 A.R. 279 (C.A.), Harradence J.A., concurring, observed, at para. 73:

> A solicitor is in a fiduciary relationship to his client and must avoid situations where he has, or potentially may, develop a conflict of interests . . . . The logic behind this is cogent in that a solicitor must be able to provide his client with complete and undivided loyalty, dedication, full disclosure, and good faith, all of which may be jeopardized if more than one interest is represented.

26 The duty of loyalty was similarly expressed by Wilson J.A. (as she then was) in *Davey v. Woolley, Hames, Dale & Dingwall*, *supra*, at p. 602:

> The underlying premise . . . is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith.

27 More recently in England, in a case dealing with the duties of accountants, the House of Lords observed that "[t]he duties of an accountant cannot be greater than those of a solicitor, and may be less" (p. 234) and went on to compare the duty owed by accountants to *former* clients (where the concern is largely with confidential information) and the duty owed to *current* clients (where the duty of loyalty prevails irrespective of whether or not there is a risk of disclosure of confidential information). Lord Millett stated, at pp. 234-35:

> My Lords, I would affirm [possession of confidential information] as the basis of the court's jurisdiction to intervene on behalf of a <u>former</u> client. <u>It is otherwise where the court's intervention is sought by an existing client</u>, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with

> the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation. [Emphasis added.]
>
> (*Bolkiah v. KPMG*, [1999] 2 A.C. 222 (H.L.))

28 In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied.

29 The general prohibition is undoubtedly a major inconvenience to large law partnerships and especially to national firms with their proliferating offices in major centres across Canada. Conflict searches in the firm's records may belatedly turn up files in another office a lawyer may not have been aware of. Indeed, he or she may not even be acquainted with the partner on the other side of the country who is in charge of the file. Conflict search procedures are often inefficient. 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.

30 The Venkatraman law firm was bound by this general prohibition to avoid acting contrary to the interest of the appellant, a current client, who was a highly vulnerable litigant in need of all the help and reassurance he could legitimately get.

(3) Breaches of the Duty of Loyalty

31 In my view the Venkatraman law firm, and Lazin in particular, put themselves in a position where the duties they undertook to other clients conflicted with the duty of loyalty which they owed to the appellant. I adopt, in this respect, the notion of a "conflict" in § 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person".

32 The initial conflict was to attempt to act simultaneously for both the appellant and his eventual co-accused in the *Canada Trust* charges, Helen Lambert. They were clearly adverse in interest. It is true that at the time Lazin and his colleague from the firm met the appellant in the Remand Centre on April 18, 1995 Lazin had not been retained by Lambert on the criminal charges. He was acting only with respect to her divorce. It is also true that in the end the appellant was eventually represented by other counsel. Nevertheless the trial judge found that on April 18, 1995, Lazin was *in fact* (if not yet officially) acting on Lambert's behalf in the criminal proceedings. Her indictment was reasonably anticipated (given her involvement in the subject matter of the *Canada Trust* charge) and, most importantly, the trial judge held that the purpose of Lazin's attendance at the Remand Centre was to get evidence to run a "cut-throat" defence against the appellant who, he found, was an ongoing client of the Venkatraman

law firm. The fact that the appellant eventually looked elsewhere for a lawyer in the *Canada Trust* case, whether as a result of his choice or theirs, did not diminish their duty of loyalty. Nor does it make a difference that no professional fee was charged for that particular consultation. The Venkatraman firm (Lazin) appreciated that the appellant having been arrested, the long arm of the law would soon be laid on Helen Lambert. In fact, Helen Lambert was arrested less than two months later, on June 6, 1995.

33 The second conflict relates to the *Doblanko* charges. As mentioned, both Doblanko and his former wife (who had by now remarried and produced children of her second "marriage") needed their earlier divorce to be regularized. The Venkatraman firm breached their duty to the appellant in accepting a retainer that required them to put before the divorce court judge evidence of the illegal conduct of their client, the appellant, at a time when they knew he was facing other criminal charges related to his paralegal practice, in which their firm had had a long-standing involvement. It was contended that the *Doblanko* and *Canada Trust* cases were wholly unrelated in the sense that Lazin could not have obtained in the *Doblanko* mandate confidential information that would be relevant in the *Canada Trust* mandate. This, as stated, is not the test of loyalty to an *existing* client, and it is not entirely true either. While the two cases were wholly independent of each other in terms of their facts, the Lambert's cut-throat defence was helped by piling up the allegations of dishonest conduct in different matters by different complainants in a way that would make it easier for the jury to consider her a victim rather than a perpetrator. The linkage was thus strategic. The *Doblanko* application was initiated in July 1995. The Crown advised us that the *Canada Trust* criminal charges against Helen Lambert were not resolved until the spring of 1996.

34 In the course of the *Doblanko* application, the divorce court judge expressed the view (according to Lazin) that Lazin should report the appellant's apparent falsification of documents to the police. I think at that point that Lazin, as an officer of the court, was obliged to do so. Lazin then called the Law Society (without disclosing that the appellant was a client of his firm) who advised that Lazin *could* advise his divorce court client to report the matter to the police but he was not bound to. Lazin advised neither the trial judge nor the Law Society that the suspected forger (the appellant) was a client of his firm. Further, Lazin made a point of having the matter reported to the police officer who was responsible for investigating the appellant in connection with the *Canada Trust* and other matters.

35 It was the Venkatraman firm that put the cat among the pigeons by bringing the *Doblanko* application before the divorce court. Mr. Doblanko would likely have found another lawyer to make the application, and the facts might equally have eventually made their way to the police, but it was in violation of the firm's duty of loyalty to the appellant to contribute in this way to the appellant's downfall.

(4) Remedies for Breach of the Duty of Loyalty

36 It is one thing to demonstrate a breach of loyalty. It is quite another to arrive at an appropriate remedy.

37 A client whose lawyer is in breach of his or her fiduciary duty has various avenues of redress. A complaint to the relevant governing body, in this case the Law Society of Alberta, may result in disciplinary action. A conflict of interest may also be the subject matter of an action against the lawyer for compensation, as in *Szarfer v.*

Chodos, *supra*. Breach of the ethical rules that could raise concerns at the Law Society does not necessarily give grounds in a malpractice action or justify a constitutional remedy.

38 More specifically, in the criminal law context, if the material facts surface while court proceedings are ongoing, an application to disqualify the lawyer from acting further may be brought, as in *Re Regina and Robillard* (1986), 28 C.C.C. (3d) 22 (Ont. C.A.); *Re Regina and Speid*, *supra*, at pp. 20-21; *Widdifield*, *supra*, at p. 177, *per* Doherty J.A.; *R. v. Chen* (2001), 53 O.R. (3d) 264 (S.C.J.). The conflict should, of course, be raised at the earliest practicable stage. If the trial is concluded, the conflict of interest may still be raised at the appellate level as a ground to set aside the trial judgment, but the test is more onerous because it is no longer a matter of taking protective steps but of asking for the reversal of a court judgment.

39 In *R. v. Graff* (1993), 80 C.C.C. (3d) 84, the Alberta Court of Appeal held that in a post-conviction situation, if an accused is to challenge a conviction or sentence on appeal, he or she must show more than a possibility of conflict of interest; while actual prejudice need not be shown, the appellant must demonstrate the conflict of interest and that the conflict adversely affected the lawyer's performance on behalf of the appellant. See also *Silvini*, *supra*, at p. 551, *per* Lacourcière J.A.; *Widdifield*, *supra*, at p. 173; *R. v. Barbeau* (1996), 110 C.C.C. (3d) 69 (Que. C.A.), at p. 81, *per* Rothman J.A. It is not necessary for the accused to demonstrate actual prejudice because "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial": *Glasser v. United States*, 315 U.S. 60 (1942), at p. 76.

40 If the two-part conflict/impairment test is satisfied, the court may order a new trial. The appellant is unable to meet this test because, of course, he was not represented in any court proceedings (trial or pre-trial) by the Venkatraman law firm in either the *Doblanko* or the *Canada Trust* matters. Moreover he seeks more than a new trial. The appellant seeks a stay of the *Doblanko* verdict and a stay of further proceedings in the *Canada Trust* matters on the basis he was denied his right to effective representation contrary to s. 7 and s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, and that further proceedings on these matters would be an abuse of process. So abusive, he says, that this sorry affair amounts to one of the "clearest of cases" where a stay is justified: *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 2001 SCC 19; *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21.

41 Here again his pathway is impeded by the fact that the Venkatraman law firm did not act as his counsel, ineffective or otherwise, at any stage of the criminal proceedings. He consulted them and took them into his confidence, but he was not represented by them. He is therefore thrown back on the "residual category" of stay applications, described in *R. v. O'Connor*, [1995] 4 S.C.R. 411, as follows, at para. 73:

> This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, the Court added that the residual category is a small one. "In the vast majority of cases, the concern will be about the fairness of the trial" (para. 89).

42 The appellant's argument that the purity of the waters of the fountain of justice was irredeemably polluted in these cases by the action of the Venkatraman law firm (to borrow a metaphor from Lord Brougham's era) is very difficult to sustain on the facts.

43 The Alberta Court of Appeal noted that the actions of the Venkatraman law firm are not state actions, and therefore do not as such attract *Charter* scrutiny. The appellant says that a lawyer is an "officer of the court" but this, I think, is an inadequate basis on which to base state responsibility. However, I would not want to shut the door entirely on the basis of lack of state action. At common law, the doctrine of abuse of process was rooted in objectionable conduct by private litigants, for example using the courts for an improper purpose. Although s. 7 of the *Charter* incorporates the abuse of process doctrine, it does not extinguish the common law doctrine under which the courts have an inherent and residual discretion to control their own processes and prevent their abuse: *Cobb*, *supra*, at para. 37. Even in *Charter* terms, there is much to be said for the view of Powell J. of the United States Supreme Court who observed in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), that, if defence counsel is incompetent or otherwise violates his or her duties in such a way as to adversely affect the representation of an accused, "a serious risk of injustice infects the trial itself. . . . When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty" (p. 343). See also *Mickens v. Taylor*, 122 S. Ct. 1237 (2002), at p. 1245. We do not need to consider this argument in this case. It is difficult to see how the conduct of a law firm that is not actually engaged as defence counsel, as here, could have such a drastic impact on the constitutionality of the trial. Here there was no wrongful state action. Nor did the conduct of the Venkatraman law firm "infect" the appellant's trial with "a serious risk of injustice". Further, with respect to the tertiary

ground, there is nothing in the *Doblanko* verdict to contravene our fundamental notions of justice.

D. *The Stay Sought by the Appellant With Respect to the Doblanko Verdict*

44 In my view, the stay entered by the trial judge against the *Doblanko* verdict was properly vacated by the Court of Appeal for the following reasons:

> (i) The falsification of court documents came to light without the involvement of the Venkatraman firm. Mr. Doblanko had already obtained from the divorce court the documents incriminating the appellant before he came to see Lazin. Doblanko wished to remarry and both he and the wife he had deserted years previously required that their status be regularized. A court action was inevitable and any judge confronted with court documents possibly falsified by someone holding themselves out as a paralegal could be expected to have the matter reported to the police. Lazin's involvement in the process was in violation of his and the firm's professional obligations, but it in truth contributed little to the appellant's predicament.
>
> (ii) The Venkatraman firm's involvement ended with the report to the police. At that point, the police conducted their own investigation and laid charges. The "independent investigation and decision by the authorities" to prosecute militates against a finding of abuse of process here: *R. v. Finn*, [1997] 1 S.C.R. 10, at para. 1.

(iii) The appellant acknowledged that any confidential information obtained with respect to the *Canada Trust* matters or his other files with the Venkatraman law firm had no relevance whatsoever to the *Doblanko* divorce.

(iv) In light of the tenuous connection between the Venkatraman law firm and the *Doblanko* prosecution, it simply cannot be said that the lawyers' violation of their duty of loyalty was an "affront to fair play and decency . . . disproportionate to the societal interest in the effective prosecution of criminal cases [and] the administration of justice": *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667.

(v) The charges are extremely serious. Falsification of court documents strikes at the root of the integrity of the court's process. It would be irrational to deprive the state of the jury's verdict because of a law firm's private conduct of which the state had no knowledge and over which it had no influence.

45 The appellant's alternative submission is that the Alberta Court of Appeal was wrong to send this case back for sentencing. He says he is entitled to a new trial in the *Doblanko* matter as well as the *Canada Trust* matters. He treats the trial judge's stays as an acquittal, and argues that where an appeal court overturns an acquittal by a judge sitting with a jury it has no power to enter a verdict of guilty; it must order a new trial: *Criminal Code*, R.S.C. 1985, c. C-46, s. 686(4)(*b*)(ii). However, the jury in this case did not acquit. It found the appellant guilty. The effect of its guilty verdict was stayed by the trial judge. As we pointed out in *R. v. Pearson*, [1998] 3 S.C.R. 620, at

para. 15, stay procedures may "lead to a two-stage trial, in which the two stages are autonomous". The stay was lifted by the Court of Appeal. The jury's verdict was thereby not reversed but activated. For purposes of the right of an appeal to this Court, the reversal of the stay was treated as equivalent to setting aside an acquittal, but only for that limited purpose. Dickson C.J. pointed out in *R. v. Jewitt*, [1985] 2 S.C.R. 128, at p. 148:

> We are concerned here with a stay of proceedings because of an abuse of process by the Crown. While a stay of proceedings of this nature will have the same result as an acquittal and will be such a final determination of the issue that it will sustain a plea of *autrefois acquit*, its assimilation to an acquittal should only be for purposes of enabling an appeal by the Crown. Otherwise, the two concepts are not equated.

Accordingly the Court of Appeal was correct to remit the *Doblanko* matter to the trial judge for sentencing.

E. *The Stay Sought by the Appellant With Respect to the Pending Canada Trust Charges*

46 As mentioned, the trial judge declared a mistrial with respect to the *Canada Trust* charges and directed that they proceed to a new trial before a different judge. He did, however, express in his reasons the view that eventually those charges as well should be stayed because of the conflict of interest engaged in by the Venkatraman law firm. It is appropriate that we comment on his expression of opinion.

47 The conflict of interest in *Canada Trust* relates to a brief period of consultation that ended soon after it began. The Venkatraman law firm was in breach of its duty of loyalty to the appellant, but shortly thereafter they recognized the conflict and acted no further on the *Canada Trust* file. Other counsel were retained, who were

not privy to whatever confidential information the Venkatraman firm possessed. The Helen Lambert charges have been resolved. There is no danger that the Venkatraman law firm's conflict would affect the fairness of a new trial. On the basis of the record we have before us, I would not regard the *Canada Trust* charges as so vitiated by the law firm's conduct as to render it an abuse of process for the state (which had no role in the conflict of interest) to seek a conviction at a new trial. In any event it is certainly not one of the "clearest of cases" in which a stay would be justified. There may of course be other or different evidence before the judge presiding at the new trial and the disposition of the stay application, if renewed, will be for that trial judge to decide.

III. Disposition

48 I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Parlee McLaws, Edmonton.

Solicitor for the respondent: The Attorney General for Alberta, Edmonton.