

*The Loyalty of Lawyers: A Comment on  
3464920 Canada Inc. v. Strother*

Remus Valsan\* and Lionel Smith\*\*

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*1. Introduction*

The cover of a recent issue of *Maclean's* magazine declares implacably: "Lawyers are rats."<sup>1</sup> The calumnious headline introduces an interview with ex-professor and ex-Bay street lawyer Philip Slayton, the author of the controversial *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession*.<sup>2</sup> In the *Maclean's* article, Slayton bemoans the condition of the lawyer and the public image of the legal profession, leaving readers with a ghastly image of lawyers: overcharging, arrogant, unethical and mentally unstable. The Canadian Bar Association countered promptly: "By cherry-picking the worst cases of lawyer misconduct, the article has tarnished the reputation of thousands of professionals who are honest, hard-working, and community-minded people."<sup>3</sup> In a press conference following her annual address to the CBA, the Chief Justice of the Supreme Court of Canada also disavowed Slayton's point of view. On the same occasion, McLachlin C.J.C. expressed her concern with the deterioration of the public confidence in lawyers: "Why do not more people, when they hear the word 'lawyer,' automatically think of decency and justice?"<sup>4</sup> And later on: "We need to do more to send the message that lawyers take it as their primary duty to serve the public...."<sup>5</sup>

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\* Doctoral candidate, Faculty of Law, McGill University; researcher, Quebec Research Centre of Private and Comparative Law; and associate lawyer with Pachiu & Associates, Bucharest, Romania.

\*\* James McGill Professor of Law and Director of the Quebec Research Centre of Private and Comparative Law, Faculty of Law, McGill University. We are grateful to the anonymous reviewers for helpful comments.

<sup>1</sup> Kate Fillion, "Lawyers are Rats: A Top Legal Scholar Exposes the Corruption of His Profession" *Maclean's* (6 August 2007), online: <[http://www.macleans.ca/article.jsp?content=20070726\\_161005\\_9580](http://www.macleans.ca/article.jsp?content=20070726_161005_9580)>.

<sup>2</sup> Philip Slayton, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* (Toronto: Penguin Group, 2007).

<sup>3</sup> These are the words of CBA President J. Parker MacCarthy, Q.C., cited in the press release available under the heading "CBA Condemns Unfair Characterization of Lawyers in *Maclean's* Magazine" (26 July 2007), online: The Canadian Bar Association <[http://www.cba.org/CBA/News/2007\\_releases/2007-07-26\\_macleans.aspx](http://www.cba.org/CBA/News/2007_releases/2007-07-26_macleans.aspx)>.

<sup>4</sup> Cristin Schmitz, "Chief Justice Defends Supreme Court and Legal Profession" *The Lawyers Weekly* (24 August 2007) 3.

<sup>5</sup> *Ibid.*

A recent decision of the Supreme Court of Canada, *Strother v. 3464920 Canada Inc.*,<sup>6</sup> was very much concerned with the duties that lawyers owe to their clients. In *Strother* the Court was faced with a classic example of circumstances that fuel the public's distrust in the legal profession: a conflict between the solicitor's duty of loyalty to the client and his own personal interests. By a narrow margin of five judges to four, the Court reaffirmed the primacy of a solicitor's fiduciary duty of loyalty, and the strict protection of that duty of loyalty by the rule that in the absence of informed consent, a fiduciary may not place himself in a position where the duty of loyalty conflicts with his own self-interest. McLachlin C.J.C., writing in dissent, would have significantly narrowed the protection bestowed by the traditional equitable rule. She stated that "a conflict arises when a lawyer puts himself or herself in a position of having irreconcilable duties or interests,"<sup>7</sup> and went on that "[i]nsisting on actual conflicting duties or interests based on what the lawyer has contracted to do in the retainer is vital."<sup>8</sup> As we shall explain in more detail in the following sections, such an approach would be destructive of a basic underlying principle of the fiduciary relationship; the traditional rule has always been that a fiduciary must avoid even the *appearance* of impropriety. The vigilant protection of the fiduciary obligation can have important consequences beyond the parties to the relationship; in this context, it helps to secure the public confidence in the judicial system.<sup>9</sup> It is important to remember, however, that the fiduciary obligation is not a public law phenomenon. It must be explained and understood as a private law relationship, one that rightly exists between the parties to it.

Rodent comparisons aside, the *Maclean's* interview makes the case that the public image of lawyers, already a classic topic for anecdotes, continues to decay. Assuming this to be a fact, the solutions are not readily ascertainable. From an academic perspective at least, one potential solution would be the development of a consistent and workable concept of the fiduciary duty of loyalty, capable of guiding the lawyer and protecting the client at the same time. The majority opinion in *Strother* provides several very useful insights regarding the meaning of conflicts of interest in the legal profession, but it avoids general statements that could contribute to the development of the fiduciary principle.

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<sup>6</sup> *3464920 Canada Inc. v. Strother*, 2007 SCC 24, 281 D.L.R. (4th) 640 [*Strother*].

<sup>7</sup> *Ibid.* at para. 132.

<sup>8</sup> *Ibid.* at para. 136.

<sup>9</sup> For other suggestions that fiduciary obligations serve a "public law" role, see *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1243-46, 77 D.L.R. (4th) 249 [*MacDonald Estate* cited to S.C.R.]; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 184-88, 117 D.L.R. (4th) 161 [*Hodgkinson* cited to S.C.R.]; *R. v. Neil*, [2002] 3 S.C.R. 631 at para. 12, 16, 218 D.L.R. (4th) 671 [*Neil* cited to S.C.R.]; *Strother*, *supra* note 6 at para. 34.

The decision in *Strother* joins two other landmark cases in this area — *MacDonald Estate v. Martin*<sup>10</sup> and *R. v. Neil*<sup>11</sup> — in a triad of judgments that articulate the Supreme Court’s understanding of conflicts of interest in the legal profession.<sup>12</sup> In this new decision, the Supreme Court develops the “bright line” test set out in *Neil* in 2002. This test generally forbids a lawyer from representing one client whose interests are “... directly adverse to the immediate interests of another current client—even if the two mandates are unrelated ...”<sup>13</sup> *Strother* is of major interest for legal practitioners, since it clarifies the circumstances in which a law firm could be found to have acted adversely to the interests of an existing client. From an academic perspective, however, the decision signals an unsettling lack of consensus among the judges on fairly basic principles of fiduciary law. The four dissenting judges diverged from the majority opinion on the issue of the interplay between lawyers’ contractual obligations and their fiduciary duties, as well as on the importance of public confidence in the legal profession. At the end of a rather lengthy judgment, the reader is left wondering what exactly this duty of loyalty entails.

## 2. Facts

Monarch Entertainment was a corporation that had acted in the field of tax-assisted production services funding (TAPSF) since 1993.<sup>14</sup> This means that Monarch and its advisors developed sophisticated tax shelter investments under which Canadian taxpayers, using a limited partnership, notionally produced a film for a studio in return for a fee, contingent on the success of the film. The partnership’s activity was designed to incur losses, which were subsequently flowed out to the investors and were deducted from their unrelated income.

Monarch retained the legal services of Davis & Company in Vancouver. Robert Strother, a partner with Davis, was responsible for all tax advice given to Monarch. Throughout 1996 and 1997, this relationship

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Supra* note 9.

<sup>12</sup> The term “conflict of interest” (or even “conflict”) is often used rather loosely. Usually it refers to a “conflict of self-interest and fiduciary duty.” Sometimes, as in *MacDonald Estate*, *supra* note 9, the concern is with a “conflict of duty and duty”; that is, a conflict between the fiduciary duty owed to one client and the fiduciary duty owed to another client. Although a conflict of duty and duty may seem less blameworthy because the self-interest of the lawyer is not implicated, the law forbids lawyers and other fiduciaries from being found in either kind of conflict without the fully informed consent of those to whom the fiduciary duty is owed.

<sup>13</sup> *Neil*, *supra* note 9 at para. 29.

<sup>14</sup> The summary of the facts is drawn from 3464920 *Canada Inc. v. Strother* (2002), 26 B.L.R. (3d) 235 (B.C.S.C.) [*Strother 2002*] and from *Strother*, *supra* note 6.

was governed by a written agreement which expressly precluded Davis from acting for entities other than Monarch in relation to TAPSF schemes.

In November 1996, the federal government announced its intention to amend the *Income Tax Act*<sup>15</sup> by introducing the Matchable Expenditures Rules (MER), with a view to defeating the kind of tax shelters that Monarch exploited. After the MER were announced, Monarch sought Strother's advice about what could be done to save what was left of their business. Strother advised that he did not have a solution and, even if he could devise one, he did not consider that any advance tax ruling could be obtained under the new rules. At the end of October 1997, Strother informed Monarch that the tax shelter business was over; Monarch went out of the TAPSF business by November 1997.

In 1998, after the demise of the TAPSF business, Davis and Monarch continued their relationship based on an oral retainer the scope of which was not clearly defined. Under the new circumstances, there was no continuing contractual requirement for Davis to act exclusively for Monarch.<sup>16</sup> In 1998 Davis performed mainly general corporate work for Monarch, though in the first part of 1998, Monarch's representatives sought Strother's advice on possible alternative tax-assisted business opportunities, in light of the new tax rules.

Around the same period of time, Strother became involved in exploring MER workarounds for the benefit of other potential clients. At the end of October or the beginning of November 1997, Strother was contacted by another tax lawyer from Vancouver, who informed him that there might be a way around the MER, and that a film producer was interested in exploring the new idea. Although Strother was unable to obtain from Revenue Canada a favourable advance ruling for the proposed scheme, he did obtain confirmation that a favourable tax ruling was not out of the question for a film production services transaction.

Also in the fall of 1997 or early 1998, Strother was approached by Paul Darc to discuss potential tax-related business opportunities. Darc had been Monarch's chief operating officer and chief financial officer until October 1997, when his employment was terminated.<sup>17</sup> In October 1998 a corporation controlled by Darc, Sentinel Hill Entertainment Corporation became Davis' client. Darc devised a scheme aimed at resuscitating the TAPSF business. Based on Darc's idea, in March 1998 Strother sought an advance tax ruling on behalf of Sentinel. Strother prepared the request for

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<sup>15</sup> R.S.C. 1985, c. 1 (5th Supp.).

<sup>16</sup> *Strother*, *supra* note 6 at para. 24.

<sup>17</sup> *Strother 2002*, *supra* note 14 at para. 20.

the ruling without charge, in return for Darc's promise that Strother would receive 55 percent of the first \$2 million of any profit obtained, and 50 percent thereafter, should the desired ruling be granted.<sup>18</sup> On October 6, 1998 Revenue Canada issued a favourable tax ruling for Sentinel.<sup>19</sup> Subsequently, other TAPSF businesses obtained their own rulings and were back in the film production services business by September 1999.

In August 1998, Strother informed the management committee of Davis about possible conflicts with respect to his acting simultaneously for Monarch and Sentinel, stating, inaccurately, that he had only an option to acquire up to 50 percent of the common shares of Sentinel. The managing partner of Davis forbade Strother from holding any interest in Sentinel.

In early 1999 Strother resigned from Davis and by April joined Darc as a 50 percent shareholder in Sentinel. By September 2001, when the government tried again to terminate tax shelters, Sentinel and its affiliates had reaped profits of almost \$130 million; between themselves, Darc and Strother had realized over \$60 million.<sup>20</sup>

During this period, Strother kept Monarch in the dark with regard to the possibility of a revival in the film production services business,<sup>21</sup> although the retainer agreement for 1996 and 1997 was sufficiently broad to require him to keep Monarch advised of all relevant legal developments.<sup>22</sup> Neither Strother nor anyone at Davis disclosed to Monarch the fact that Strother had requested a tax ruling for Sentinel in March 1998.<sup>23</sup> When Monarch's representatives learned of such ruling, several months after it had been granted,<sup>24</sup> they promptly severed Monarch's relationship with Davis and sought alternative legal representation.<sup>25</sup> Despite its efforts, Monarch failed to re-enter the TAPSF business. Its attempts ceased completely in 2001, when it learned that the government was planning further amendments to the *Income Tax Act*.

After learning of Sentinel's tax ruling, Monarch sued Strother, Davis, Darc and Sentinel for, among other things, breach of fiduciary duty and breach of confidence. In the trial court, Monarch alleged that Strother

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<sup>18</sup> *Ibid.* at para. 23.

<sup>19</sup> *Strother*, *supra* note 6 at para. 14. The trial judge added that the tax ruling "may have appeared at the time to be all but inexplicable": see *Strother 2002*, *supra* note 14 at para. 24.

<sup>20</sup> *Strother 2002*, *ibid.* at para. 31.

<sup>21</sup> *Strother*, *supra* note 8 at para. 13.

<sup>22</sup> *Strother 2002*, *supra* note 14 at para. 61.

<sup>23</sup> *Ibid.* at para. 33.

<sup>24</sup> *Strother*, *supra* note 14 at para. 20.

<sup>25</sup> *Strother 2002*, *supra* note 16 at para. 33.

breached his obligation of candour by deliberately concealing information on how the new regulations could be used for tax-sheltered financing, with a view to taking for himself the benefit to be derived from the continuation of the TAPSF business. Furthermore, Monarch claimed that Strother and Darc wrongfully used confidential information to usurp Monarch business opportunities. In terms of remedies, Monarch alleged that all profits derived by Sentinel and its affiliates from the promotion of tax-sheltered financing from 1998 onwards, and the profits obtained by Davis in relation thereto, were impressed with a constructive trust and should be disgorged. Alternatively, Monarch sought an award of compensatory damages and awards of aggravated and punitive damages. Monarch also claimed the return of all legal fees paid to Davis, which exceeded \$9 million.<sup>26</sup>

### 3. Lower Court Decisions

The British Columbia Supreme Court dismissed Monarch's claims. The court held that Strother's duty to advise was governed by the express and implied terms of the legal retainers between Davis and Monarch.<sup>27</sup> With regard to the 1996-1997 retainer, Lowry J. concluded that Strother provided Monarch all required legal advice concerning the MER and their impact on Monarch's business.<sup>28</sup> He also concluded that, under the 1998 retainer, Strother was not obliged to provide any advice to Monarch that was not specifically sought and that he had not agreed to give.<sup>29</sup> Moreover, Strother was free to be consulted by Darc in January 1998, and Davis was free to act for Sentinel thereafter.<sup>30</sup> The court also decided that Monarch failed to demonstrate any breach of confidence by Strother or by Darc.<sup>31</sup>

The British Columbia Court of Appeal substantially allowed Monarch's appeal. The Court held that, although the written retainer had expired at the end of 1997, the solicitor-client relationship between Monarch and Davis continued in the form of consultations on various matters from time to time.<sup>32</sup> The solicitor-client relationship triggered fiduciary duties, which were distinct from solicitor's contractual duty to advise his client.<sup>33</sup> As a fiduciary, Strother had the duty not to place himself in a position of conflict and the duty to disclose any personal

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<sup>26</sup> *Ibid.* at para. 31, 37.

<sup>27</sup> *Ibid.* at para. 45.

<sup>28</sup> *Ibid.* at para. 92.

<sup>29</sup> *Ibid.* at para. 117.

<sup>30</sup> *Ibid.* at para. 120.

<sup>31</sup> *Ibid.* at para. 154.

<sup>32</sup> *3464920 Canada Inc. v. Strother* (2005), 38 B.C.L.R. (4th) 159 at para. 13, [2005] 5 W.W.R. 108 (C.A.).

<sup>33</sup> *Ibid.* at para. 17.

interest he may have that might affect his loyalty and dedication to Monarch's interests.<sup>34</sup> Such a duty can survive the termination of a retainer in written or other form; it continued for as long as Strother had an "ascendancy" over Monarch.<sup>35</sup> The court concluded that Strother had breached his duties towards Monarch twice. First, by having undertaken to work for Sentinel towards a tax ruling that would contradict the advice he had given (and was continuing to give) to Monarch, Strother had placed himself in a position of conflict of duty and duty. At least in the absence of informed consent from Monarch, he should have refused to take Sentinel as a client, because his duties to the two clients were in conflict.<sup>36</sup> Secondly, upon agreeing to advise Darc, Strother allowed his personal interest to come into conflict with his duty towards Monarch, whether or not his entitlement to a "profit" or "equity" participation was immediate or contingent on obtaining a ruling.<sup>37</sup> This was a conflict of self-interest and fiduciary duty. Consequently, Strother was ordered to disgorge to Monarch all profits derived from Sentinel and its affiliates.<sup>38</sup> The Court also held Davis vicariously liable, and ordered the disgorgement of the profits it earned from acting for Sentinel in breach of its duty to Monarch after January 1, 1998.<sup>39</sup> Monarch's claims against Darc and Sentinel were dismissed. Strother and Davis appealed, and Monarch cross-appealed.

#### 4. *The Supreme Court of Canada*

With a majority of five votes to four, the Supreme Court of Canada dismissed Strother's appeal regarding his breach of fiduciary duty but allowed in part his appeal on the issue of remedy. Davis' appeal was allowed in part; Monarch's cross-appeal was dismissed.

##### A) *The Majority Decision*

The majority decision was written by Binnie J., with the concurrence of Deschamps, Fish, Charron and Rothstein JJ. At the outset, he stated the fiduciary obligation in positive terms:

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* at para. 24. On this point, see also *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.).

<sup>36</sup> *Ibid.* at para. 25.

<sup>37</sup> *Ibid.* at para. 27.

<sup>38</sup> *Ibid.* at para. 61.

<sup>39</sup> In a supplementary decision, (2005), 44 B.C.L.R. (4th) 275, 256 D.L.R. (4th)

A 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.<sup>40</sup>

In his analysis, Binnie J. distinguished between lawyers' contractual obligations and the fiduciary duties that are imposed by operation of law.<sup>41</sup> The retainer agreement (which is usually contractual) describes the specific legal services to be provided by the lawyer. The law, however, imposes on the lawyer fiduciary obligations that may not have been expressly bargained for by the client.

A crucial factor in the case was the scope of the 1998 oral retainer that replaced the earlier "exclusive" agreement that precluded Strother from acting for other parties in relation to TAPSF schemes. Binnie J. held the court should not strain to resolve ambiguities in the scope of a retainer in favour of the lawyer over the client. In his view, even this oral contract imposed on Strother a duty of candour, which entitled Monarch to be told that, in the light of the new tax rules, Strother's previous negative advice was subject to reconsideration.<sup>42</sup> This duty was clearly breached in October 1998, when Strother failed to inform Monarch of the successful Sentinel tax ruling, even though the ruling had by then been made public.<sup>43</sup> Monarch could not claim compensatory damages based on breach of contract, however, since it failed to establish any such damages.<sup>44</sup>

In the larger framework of fiduciary obligations imposed by law, the majority held that Strother did not breach any such obligation by the mere fact of acting for both Monarch and Sentinel.<sup>45</sup> In this, they disagreed with the Court of Appeal. In compliance with the "bright line" rule in *Neil*,<sup>46</sup> the interests of Sentinel were not "directly adverse" to any "immediate interest" of Monarch.<sup>47</sup> The Court made a clear demarcation between the lawyer's ability to provide proper client representation, which must always be protected, and the possibility of adverse commercial interests between competing clients, which may be acceptable under the bright line rule. A lawyer will be disqualified if the multiple retainers create a "real risk of impairment" of the lawyer's ability to provide even-handed

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319, [2005] 11 W.W.R. 399 (C.A.).

<sup>40</sup> *Strother*, *supra* note 6 at para. 1.

<sup>41</sup> *Ibid.* at para. 34.

<sup>42</sup> *Ibid.* at para. 43.

<sup>43</sup> *Ibid.* at para. 47.

<sup>44</sup> *Ibid.* at para. 48.

<sup>45</sup> *Ibid.* at para. 51.

<sup>46</sup> *Supra* note 9.

<sup>47</sup> *Strother*, *supra* note 6 at para. 52.



representation.<sup>48</sup> Note that it is a *risk* of impairment that disqualifies the lawyer, at least in the absence of fully-informed consent from both clients. It is not necessary to find that the lawyer has a contractual duty to one client that actually conflicts with the lawyer's contractual duty to another client in the sense that one or the other contract must be breached.

In contrast, the majority found that Strother breached his fiduciary duty to Monarch when he took on a personal financial interest in Sentinel:

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 (Sentinel) seeking to enter a very restricted market related to film production services in which another client (Monarch) previously had a major presence. 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 (*Neil*, at para. 19), a delinquency compounded by his lack of "candour" with Monarch "on matters relevant to the retainer" (*ibid.*), i.e. his own competing financial interest...<sup>49</sup>

Expanding on this, Binnie J. noted that Strother had created a "substantial risk that his representation of Monarch would be materially and adversely affected by consideration of his own interests."<sup>50</sup> Note, again, that the breach arises from the *risk* that Monarch would not be properly represented. On the question of remedies for breach of fiduciary obligation, the majority turned to Monarch's claim for the disgorgement of profits acquired by the defendants.<sup>51</sup> It was held that this included all fees acquired by Strother from Monarch during the time that Strother was in breach. Contrary to the holding in the Court of Appeal, the majority held that fees earned from Sentinel did not have to be disgorged, because of the decision that Strother was not in breach of his obligations in acting for Sentinel. The largest claim was for profits acquired by Strother, through his

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<sup>48</sup> *Ibid.* at para. 55.

<sup>49</sup> *Ibid.* at para. 67.

<sup>50</sup> *Ibid.* at para. 69.

<sup>51</sup> The adoption by the Court of the terminology of "disgorgement" for a claim measured by the defendant's gain without regard to any loss by the plaintiff, follows its recent acceptance in other courts; see e.g. *Air Canada v. Westjet Airlines Ltd.* (2005), 20 C.P.C. (6th) 141 (Ont. S.C.J.); *Serhan Estate v. Johnson & Johnson* (2006), 85 O.R. (3d) 665, 269 D.L.R. (4th) 279 (S.C.J.); *Heward v. Eli Lilly & Co.* (2007), 39 C.P.C. (6th) 153 (Ont. S.C.J.), leave to appeal to Div. Ct. granted, [2007] O.J. No. 2709. There is also some earlier usage in the Supreme Court of Canada itself; see *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1991] 1 S.C.R. 142, 167 D.L.R. (4th) 577; *Hodgkinson v. Simms*, *supra* note 9. For discussion of the meanings of "compensation," "disgorgement" and "restitution," see Lionel Smith, "The Province of the Law of Restitution" (1992) 71 Can. Bar Rev. 672 at 694-99.

interest in Sentinel. It was held that he was accountable for the profits that he acquired from the moment of the initial breach until the time he left Davis, which was after Monarch had commenced proceedings against Davis. By that time, it was held, the conflict was “spent.”<sup>52</sup>

As concerns Davis’s appeal, the majority concluded that the firm, while not in breach of fiduciary duty to Monarch, was nevertheless liable for Strother’s breach, based on the terms of the *Partnership Act*.<sup>53</sup>

### *B) The Dissenting Judgment*

McLachlin C.J.C. wrote the dissenting reasons for judgment, on behalf of herself and Bastarache, LeBel and Abella JJ. The dissent focused on the question whether there was an *actual* conflict between Strother’s duties to Monarch, and his duties to Sentinel or his own personal interests. McLachlin C.J.C. framed the issue in this way:

... a conflict arises when a lawyer puts himself or herself in a position of having irreconcilable duties or interests....<sup>54</sup>

Insistence on actual conflicting duties or interests based on what the lawyer has contracted to do in the retainer is vital.<sup>55</sup>

As we will see, this approach, had it prevailed, would have marked a radical reduction in the scope and strictness of the fiduciary obligation.

Like the majority decision, the dissent began by identifying the sources of the lawyer’s obligations. The Chief Justice observed that the general framework of the lawyer-client relationship is given by the express

<sup>52</sup> *Strother*, *supra* note 6 at para. 95.

<sup>53</sup> R.S.B.C. 1996, c. 348, s. 12. The majority in *Strother*, *ibid.* at para. 100 stressed that this claim was “purely statutory,” although it seems that this provision merely codifies the common law of vicarious liability. Partners are mutual general agents in the business of the partnership, and agency creates vicarious liability.

<sup>54</sup> *Strother*, *ibid.* at para. 132. The authorities cited for this proposition — *Hilton v. Barker Booth & Eastwood*, [2005] 1 W.L.R. 567 (H.L.) [*Hilton*] and *Neil*, *supra* note 9 — do not support any weakening of fiduciary standards. On *Hilton*, see Joshua Getzler, “Inconsistent Fiduciary Duties and Implied Consent” (2006) 122 L.Q.R. 1; on *Neil*, see Richard F. Devlin and Victoria Rees, “Beyond Conflicts of Interest to the Duty of Loyalty: From *Martin v. Gray* to *R. v. Neil*” (2005) 84 Can. Bar Rev. 433. Recall that the test from *Neil* will disqualify a lawyer whose clients have adverse interests, “even if the two mandates are unrelated.” This obviously does require that the two mandates be irreconcilable.

<sup>55</sup> *Strother*, *ibid.* at para. 136.

or implied contractual terms.<sup>56</sup> The fiduciary duties should be moulded to, and should not exceed, the contractual terms.<sup>57</sup> The investigation of a possible conflict of interest should therefore be limited to the provisions of the retainer agreements.

The Chief Justice continued by analyzing the scope of the contracts between Davis and the two clients and concluded that, given the very limited object of the 1998 retainer, “there was no conflict between what Strother agreed to do for Monarch and what he was doing for Darc and himself with Sentinel Hill.”<sup>58</sup> She took a similar approach regarding the question of a conflict between Strother’s own interest in Sentinel and his duty to Monarch. McLachlin C.J.C. found that the 1998 retainer did not oblige Strother to provide information to Monarch that was not specifically sought. As a result, she held that there was no *actual conflict* between the Monarch retainer and Strother’s self-interest; therefore, there was no breach of fiduciary duty by Strother.<sup>59</sup> The problem of a *risk* or *appearance* that the client was not being well-served was not mentioned.

## 5. Analysis

### A) Risks and Appearances

Had the dissenting view prevailed, Canadian fiduciary law would arguably have been turned into a weak shadow of itself. The dissenters would have required “irreconcilable duties or interests” and “actual conflicting duties or interests.”

The traditional understanding of the rule against conflicts is stricter than the dissenters suggest. Fiduciaries are forbidden to allow themselves to be placed in ambiguous situations, where it would be unclear whether or not they performed their fiduciary duty to act in what they consider to be the best interest of the beneficiary.<sup>60</sup> This rule is “equally rigorous”<sup>61</sup> for conflicts of interest and duty and conflicts of duty and duty, since the prohibition of both kinds of conflicts has the same core rationale: to protect the underlying fiduciary duty (the duty of loyalty). The *Code of Professional Conduct* adopted by the Canadian Bar Association, for instance, lists the same underlying principles for conflicts between clients’

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<sup>56</sup> *Ibid.* at para. 134.

<sup>57</sup> *Ibid.* at para. 141.

<sup>58</sup> *Ibid.* at para. 145.

<sup>59</sup> *Ibid.* at para. 144-45.

<sup>60</sup> Donovan W.M. Waters, Mark Gillen and Lionel Smith, *Waters’ Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005) at 918.

<sup>61</sup> *Ibid.* at 915.

interests, and the conflicts between the interests of a lawyer and his or her client. In relation to conflicts of duty and duty, the Code states that “[t]he client or the client’s affairs may be seriously prejudiced unless the lawyer’s judgment and freedom of action on the client’s behalf are as free as possible from compromising influences.”<sup>62</sup> In relation to conflicts of interest and duty, the Code provides that “[t]he principles enunciated in the Rule relating to impartiality and conflict of interest between clients apply *mutatis mutandis* to this Rule.”<sup>63</sup>

Although they serve the same prophylactic purpose, the two types of conflicts arise in different circumstances. A closer examination of the two conflict scenarios is necessary to understand what it is that “conflicts” with what, when we say that there is a conflict of interest and duty or a conflict of duty and duty.

*a) Conflicts of Interest and Duty*

McLachlin C.J.C. was addressing the case of conflicts of duty and duty (as in the case of multiple clients) when she said that a conflict only arises if there are “irreconcilable duties or interests” and “actual conflicting duties or interests.” The natural reading of these tests is that there is only a relevant conflict if the lawyer is in a position where it would be impossible to comply with the duty owed to one client without breaching the duty owed to another. But when we consider conflicts of interest and duty, we see immediately that this does not work. In that context, it would mean that the lawyer must have a self-interest that is irreconcilable with his duty to the client. Such a test could never be satisfied, however, because no one is ever *obliged* to perform an action that is in his own self-interest. And it is clear that such a strict test need not be satisfied; the law finds a conflict of self-interest and duty where the fiduciary, who might be perfectly innocent and acting in good faith, is in a position where he or she *might* favour self-interest over duty. In order to find liability, there is no requirement of any finding that self-interest *was in fact* favoured over duty. Here is one of the classic statements of the principle, by Lord Herschell in *Bray v. Ford*:

It is an inflexible rule of the court of equity that a person in a fiduciary position, such as the plaintiff’s, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interests and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding

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<sup>62</sup> Canadian Bar Association, *Code of Professional Conduct*, 2006 rev. (Ottawa: Canadian Bar Association, 2006) at 25.

<sup>63</sup> *Ibid.* at 46.

a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services.<sup>64</sup>

What this shows us is that when we speak of a “conflict of self-interest and duty,” we actually mean “a conflict of self-interest and the fiduciary duty to act in the best interests of the beneficiary.” Contrary to the suggestion in the dissenting judgment in *Strother*, “conflict” means *only* that the two things point in opposite directions, not they are irreconcilable. For example, *Bray* concerned the governor of a college, who was also employed as its solicitor. His duty of loyalty to the college required him to get legal services for the lowest cost consistent with the required quality. His self-interest as a solicitor pointed in the opposite direction. That was the conflict. Merely being in that situation constituted a breach of the duty to avoid conflicts of interest and duty. As the passage makes clear, there is no requirement to show that the solicitor *actually sacrificed* the interests of the college. The rule is all about dangers, appearances and risks. Another canonical statement, in a similar context, was by Lord Cranworth L.C. in *Aberdeen Ry. Co. v. Blaikie Brothers*:

A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the cestui que trust which it was impossible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted...<sup>65</sup>

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<sup>64</sup> [1896] A.C. 44 at 51 [*Bray*].

<sup>65</sup> [1843-60] All E.R. 249 at 252-53, (1854), 1 Macq. 461.

This tells us two things. In the case of a conflict of duty and self-interest, the conflict arises merely because the two things—duty to the beneficiary, and self-interest—point in opposite directions, thereby creating a *risk* of a breach of the duty owed to the beneficiary. Secondly, and more subtly, we see that the “duty” that conflicts with self-interest is not a contractual duty; rather, it is the fiduciary duty, the duty to act in the best interests of the beneficiary.<sup>66</sup>

*b) Conflicts of Duty and Duty: Multiple Clients*

*Strother* raises a difficult practical problem. Lawyers have multiple clients who may be competing with one another in some sense. This is especially true at big law firms, and it is also especially true in specialized practices, such as the sub-field of taxation law in which *Strother* excelled. Both the majority and the dissent held that *Strother* was able to act simultaneously for competing clients. Generally, a law firm may act concurrently for clients in the same line of business – even for commercial competitors – as long as its ability to provide proper and even-handed legal representation remains intact. With these specifications, the Supreme Court provided the long-awaited qualification of the “bright line principle” set forth by *Neil*, which forbade a lawyer to represent a client whose interests are directly adverse to the immediate interests of another current client, unless both clients give their informed consent. In *Strother*, the Supreme Court emphasized that lawyers’ duty to avoid conflicts of interests is not concerned with clients’ business interests, but with their interests in even-handed legal representation. Care has to be taken, of course, regarding the precise terms of a retainer. It might be exclusive, as was the first *Monarch* retainer. Again, care has to be taken if the relationship between or among the clients is such that there is a “real risk of impairment” of the lawyer’s ability to provide even-handed representation. Obviously, if there were a dispute between the clients, the lawyer would have to withdraw from one or both sides.

Recalling the lessons of the law governing conflicts between self-interest and duty, we can conclude that a conflict between duty and duty does not require a finding of irreconcilable contractual duties. Rather, it only requires a finding that the fiduciary is in a position where his fiduciary duties to the two clients point in opposite directions, with the result that his duty to act in the best interests of one client *might* clash with his duty to act in the best interests of the other client. The majority judges were correct to say that there should be a disqualifying conflict of duty and duty where

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<sup>66</sup> For a full discussion, see Lionel Smith, “The Motive, Not the Deed” [Smith, “The Motive”] in J. Getzler, ed., *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: Butterworths, 2003) at 53.

there is a material *possibility* of an adverse effect on the lawyer's ability to give proper and timely legal advice.<sup>67</sup> In other words, "[a]s Monarch's fiduciary, Strother's duty was to 'avoid situations where he has, or potentially may, develop a conflict.'"<sup>68</sup>

It might be argued that the prohibition on conflicts of duty and duty should not be as strict as the prohibition on conflicts of self-interest and duty. In the latter case, a lawyer always has the option of abandoning or avoiding the conflicting personal interest. On the other hand, in the case of multiple clients, a lawyer does not know in advance the details of the problems or issues that his or her clients may reveal, and therefore cannot predict when a conflict may arise. It is certainly true that the conduct of a lawyer who is in a conflict of self-interest and duty may seem more worthy of condemnation than that of a lawyer who is in a conflict of duty and duty. From the point of view of the client, however, the problem is the same. The client should not be in a position where there is an appearance or a risk that his or her fiduciary advisor is or may not be acting in what the advisor thinks are the best interests of the client. From the client's perspective, that risk is unacceptable whether it arises from the interests of the lawyer, or the interests of another client of the lawyer. It is because the rules against conflicts exist to protect the beneficiary, and not to condemn the fiduciary, that they are just as strict for conflicts of duty and duty as they are for conflicts of self-interest and duty.<sup>69</sup> Moreover, although conflicts of duty and duty may arise unpredictably, there is always a solution. The lawyer, just like any fiduciary, can usually solve the problem by obtaining the fully informed consent of both clients. If that is impossible, perhaps due to reasons of confidentiality or simply because the consent is not forthcoming, the solution is to cease acting for one or both sides. This may not always be the solution of choice for a remunerated fiduciary, but it means that there is always a way out of a conflict.

These are the reasons why the law has always treated the two kinds of conflicts equally severely.<sup>70</sup> In *Neil*, Binnie J. adopted a definition of a conflict of interests that encompasses both types of conflicts: a conflict of interests gives rise to a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own

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<sup>67</sup> *Strother*, *supra* note 6 at para. 61.

<sup>68</sup> *Ibid.* at para 51, quoting *Ramrakha v. Zinner* (1994), 157 A.R. 279 (C.A.) at para. 73.

<sup>69</sup> This is what Lord Herschell meant when he said (see *Bray*, *supra* note 64) that the conflict rules are not "founded upon principles of morality."

<sup>70</sup> Many of the Supreme Court's leading cases deal with conflicts of duty and duty rather than conflicts of self-interest and duty, and clearly treat both kinds of conflict equally severely. These include *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 [*Canson*] and *MacDonald Estate*, *supra* note 9.

interests or by the lawyer's duties to another current client, a former client, or a third person."<sup>71</sup> In *Strother* the learned judge further explained the rule, by emphasizing that, "[w]hile it is sufficient to show a possibility (rather than a probability) of adverse impact, *the possibility must be more than speculation.*"<sup>72</sup>

The next question that arises is: How can a fiduciary distinguish a real risk from a mere speculation? *Phipps v. Boardman*, a case of conflict of interest and duty, provides a test which, in our opinion, could be applied in both instances of conflicts. In the words of Lord Upjohn:

The phrase "possibly may conflict" requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.<sup>73</sup>

Binnie J. applied a similar criterion in *Neil*, referring to the conflict between duty and duty. The learned judge qualified the bright line rule by mentioning that, by means of exception, a law firm might represent a client against a current client if the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.<sup>74</sup> The rules against conflicts are strict, but they do not require lawyers to have superhuman abilities. They require the careful exercise of judgment, something that can always be demanded of a professional. This judgment must be exercised in an unclouded way, because in many situations a lawyer may not relish taking the steps that are necessary to avoid or remove a conflict, or to obtain informed consent to it.

#### *B) The Core Duty and its Protection by Prophylactic Rules*

What is the relationship between the lawyer's undoubted duty to act in a client's best interests, and the rules about conflicts? This section attempts to answer that question, in order to permit a better understanding of the nature and purpose of the rules about conflicts, and in order to present a complete image of the lawyer's role as fiduciary.

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<sup>71</sup> *Supra* note 9 at para. 31, adopting § 121 of the *Restatement (Third) of the Law Governing Lawyers*, vol. 2 at 244-245.

<sup>72</sup> *Strother*, *supra* note 6 at para. 61 [emphasis added].

<sup>73</sup> [1967] 2 A.C. 46 (H.L.) at 124.

<sup>74</sup> *Supra* note 9 at para. 29.



At the outset of his analysis, Binnie J. said:

A 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.<sup>75</sup>

The duty to act in what one considers to be the best interests of another is the heart of the fiduciary duty.<sup>76</sup> This is the core duty. The core duty is *protected* by the prophylactic rules; these are the duties to avoid conflicts of self-interest and duty (including the “no-profit” rule), and the duty to avoid conflicts of duty and duty. This relationship was captured by Binnie J. when he said,

Fiduciary responsibilities include the duty of loyalty, of which an element is the avoidance of conflicts of interest ...<sup>77</sup>

It is a mistake to think that the prophylactic rules *are* the duty of loyalty. The prophylactic rules require the fiduciary to avoid certain situations; but avoiding things is not the same as being loyal. The prophylactic rules merely exist to prevent the fiduciary from being in situations where loyalty is in danger of being sacrificed. They build a zone of protection around the possibility of disloyalty.<sup>78</sup> Similarly, the following comments of Megarry V.-C. illustrate this point very clearly:

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<sup>75</sup> *Strother*, *supra* note 6 at para. 1.

<sup>76</sup> *Peoples Department Stores (Trustee of) v. Wise*, [2004] 3 S.C.R. 461 at para. 32, 244 D.L.R. (4th) 564 [*Wise*].

<sup>77</sup> *Strother*, *supra* note 6 at para. 35 [emphasis added].

<sup>78</sup> For similar reasons, it does not seem correct to argue that fiduciary law is only concerned with controlling self-interested misappropriation, or “opportunism,” by the fiduciary, as argued by Robert Flannigan, “The Boundaries of Fiduciary Accountability” (2004) 83 Can. Bar Rev. 1. This view cannot account for the rule against conflicts of duty and duty, where a fiduciary can be in breach even though he or she has acted in a totally disinterested way. As a matter of law, Flannigan’s view was specifically rejected in *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 230 D.L.R. (4th) 513 [*K.L.B.*], where it is explained that there can be disloyalty without self-seeking opportunism. It is also inconsistent with the Court’s understanding of the duty of loyalty as set out in *Wise*, *supra* note 76. Flannigan might respond by characterizing actions that confer advantages on anyone other than the beneficiary as “opportunistic” in a wide sense; this would open up the possibility of bringing all control of fiduciaries under the rubric of preventing opportunism. But this is a trap. It amounts to defining “acting opportunistically” as “acting other than in what one perceives to be the best interests of the beneficiary”; but then to say that fiduciary obligations *forbid* opportunism is just another way of saying that they *require* one to act in what one perceives to be the best interests of the beneficiary, which is our approach.

If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty ...<sup>79</sup>

The core duty of loyalty imposes on the fiduciary the obligation to act with the “right” motive, in what he perceives to be the best interests of the beneficiary.<sup>80</sup> Motives are inscrutable at the best of times, and the beneficiary usually has no way of knowing what motivated the fiduciary’s decisions.<sup>81</sup> The law’s solution is to require that the fiduciary’s judgments be made in a “sterile” environment, where even the slightest appearance of impropriety is not tolerated.<sup>82</sup> The role of the no-conflict and no-profit rules is to ward off illegitimate factors that may taint the fiduciary’s motivations; this is their “prophylactic” role. In the context of lawyers, the prophylactic rules attempt to ensure that, while assessing one client’s best interests, the lawyer’s judgment is not affected by other clients’ interests or by his personal interests. Clearly, the prophylactic rules do not guarantee that the fiduciary’s actual assessment of the client’s best interests is “right.” The judgment as to what is right, in any particular situation, has been entrusted to the fiduciary, although his or her judgment is required to comply with a duty of care, skill and diligence. The prophylactic rules are objective rules developed to guarantee fiduciary trustworthiness.<sup>83</sup> The duty of care ensures competence.

### *C) Contracts and Fiduciary Obligations*

The primary point of disagreement between the majority and the dissent—and, arguably, the source of all their divergences—is the relationship between contractual obligations and fiduciary duties. According to the majority, fiduciary duties constitute the foundation of the relationship between lawyer and client. Building on this foundation, the retainer spells

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<sup>79</sup> *Tito v. Waddell (No. 2)*, [1977] 1 Ch. 106 at 230. The rules about self-dealing are merely an example of the rule against conflicts of self-interest and fiduciary duty.

<sup>80</sup> Smith, “The Motive,” *supra* note 66; *Wise*, *supra* note 76 at para. 32.

<sup>81</sup> Earl R. Hoover, “Basic Principles Underlying Duty of Loyalty” (1956) 5 Clev.-Marshall L. Rev. 7 at 16 [“No one would have doubted the good faith of Justice Holmes or Cardozo, yet no one would have cared for them to sit on a case in which they were parties.”]; see also the quotation by Binnie J. in *Strother*, *supra* note 6 at para. 55 of *Williams v. Reed*, 29 F. Cas. 1386 (D. Maine, 1824).

<sup>82</sup> In *Strother*, *ibid.* at para. 75 Binnie J. quoted Deane J. in the High Court of Australia in *Chan v. Zacharia* (1984), 154 C.L.R. 178 at 198, who said of the no-profit rule that it required the disgorgement of “... any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest.”

<sup>83</sup> Of course, they can be waived by the beneficiary, but only with full information

out the concrete services to be performed by the lawyer, and other elements of the relationship. The dissenting judges offer an inverse view: the contractual relationship is the basis on which the fiduciary relationship is erected. The purpose of the fiduciary duties is to enhance the contract by imposing on the lawyer a duty to perform *with loyalty* the obligations undertaken contractually. In the majority's view, loyalty is not confined to following the black letter of the retainer; instead, the requirements of loyalty may disqualify the lawyer if the mere possibility of a conflict of interest and duty occurs. In the view of the dissenters, however, this approach is too broad, and generates a vast potential for disqualifying conflicts. The dissenting judges held that the fiduciary relationship must accommodate itself to the terms of the contract, and a lawyer should be free to act, as long as there is no *actual* conflict of interests based on his express contractual commitments.<sup>84</sup>

The dissenting opinion seems to echo the contractarian model of fiduciary duties. According to this theory, in a world of high transaction costs and bounded rationality, the parties to a fiduciary relationship cannot conclude a complete contract that would address every contingency that may occur and every action that may be feasible in any possible state of the world. Therefore, the law fills in the contractual gaps by imposing a duty of loyalty upon the fiduciary. As Easterbrook and Fischel argued, "The duty of loyalty replaces detailed contractual terms, and courts flesh out the duty of loyalty by prescribing the actions the parties themselves would have preferred if bargaining were cheap and all promises fully enforced."<sup>85</sup> Furthermore, "[f]iduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings."<sup>86</sup>

In this note, it is not possible to engage in a substantive critique of the contractarian argument.<sup>87</sup> We observe only that it seems unlikely that the

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regarding any conflict.

<sup>84</sup> "Insistence on actual conflicting duties or interests based on what the lawyer has contracted to do in the retainer is vital. If the duty of loyalty is described as a general, free-floating duty owed by a lawyer or a law firm to every client, the potential for conflicts is vast"; see *Strother*, *supra* note 6 at para. 136.

<sup>85</sup> Frank H. Easterbrook and Daniel R. Fischel, "Contract and Fiduciary Duty" (1993) 36 J. of Law and Economics 425 at 427.

<sup>86</sup> *Ibid.*; see also Henry N. Butler and Larry E. Ribstein, "Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians" (1990) 65 Wash. L. Rev. 1 at 28-32; Brian R. Cheffins, "Law, Economics and Morality: Contracting Out of Corporate Law Fiduciary Duties" (1991) 19 C.B.L.J. 28.

<sup>87</sup> We may note, however, that the mere fact that fiduciary duties can be weakened by consensual arrangements does not in any sense prove that they are contractual in origin. Legally imposed duties to take care not to cause injury can also be weakened by consensual

dissenting judges in *Strother* should have wanted to move Canadian law in that direction. McLachlin C.J.C. is on record as one who forcefully emphasizes the normative differences between fiduciary obligations and other branches of private law, including ordinary contract law.<sup>88</sup> We can also ask what would be the result in a case in which a lawyer acts *pro bono*? In the absence of consideration, there is no contract as the common law understands that concept; but surely the absence of a contractual bargain would not exclude fiduciary obligations.

Another observation is that the Supreme Court of Canada has frequently underlined the importance of fiduciary law to the public interest, especially in relation to the lawyer-client relationship. This would seem to be inconsistent with viewing the fiduciary obligation as a purely contractual creation. In *MacDonald Estate*,<sup>89</sup> the Supreme Court suggested that the rule against conflicts of interest is rooted in public policy. Sopinka J. acknowledged the Court's concern with three competing values: maintaining "the high standards of the legal profession and the integrity of our system of justice,"<sup>90</sup> the freedom of the client to secure the counsel of his choice, and the need for mobility in the legal profession. In the same decision Cory J. went one step further and declared the primacy of public confidence in the judicial system over the need for mobility in the legal profession.<sup>91</sup> The same concerns were reiterated twelve years later, in *Neil*.<sup>92</sup> In both *MacDonald Estate* and *Neil* the relevant conflicts concerned a law firm's capacity to represent in court a client, given the existence of a simultaneous duty to another current client (*Neil*) or to a former client (*MacDonald Estate*). The public interest, in these cases, was said to rest on the concern that the truth would be ascertained by an adversarial judicial system that "functioned clearly and without hidden agendas."<sup>93</sup> In *Strother*, however, the majority refers to the need "to protect the integrity of the administration of justice"<sup>94</sup> in a purely advisory context. This approach points to the conclusion that the law must foster public confidence in lawyers, both in and out of court, in order to preserve a trustworthy image of the judicial system.<sup>95</sup>

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arrangements. Moreover, the contractual theory ill-suits the recognition of fiduciary obligations between parents, or those *in loco parentis*, and their dependent children; see e.g. *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289; *K.L.B.*, *supra* note 78.

<sup>88</sup> *Canson*, *supra* note 70.

<sup>89</sup> *Supra* note 9.

<sup>90</sup> *Ibid.* at 1243.

<sup>91</sup> *Ibid.* at 1265.

<sup>92</sup> *Supra* note 9.

<sup>93</sup> *Ibid.* at para. 24.

<sup>94</sup> *Strother*, *supra* note 6 at 34.

<sup>95</sup> The Court also referred to a public interest function of fiduciary obligations,

Of course, the public interest can point in more than one direction. In *MacDonald Estate*, the public interest in being able to choose one's own lawyer was opposed to the disqualification that was sought on the basis of fiduciary obligations. Similarly, in *Strother*, McLachlin C.J.C. noted that there is a public interest in lawyers' being able to serve multiple clients:

Whether an interest is "directly" adverse to the "immediate" interests of another client is determined with reference to the duties imposed on the lawyer by the relevant contracts of retainer. This precision protects the clients, while allowing the lawyers and the law firms to serve a variety of clients in the same field. This is in the public interest.<sup>96</sup>

In the end, it is probably a mistake to try to explain and justify the scope and incidence of fiduciary obligations by reference to public policy considerations. Fiduciary obligations are private law relationships; they would properly be applicable between a trustee and his beneficiary even if they were the only two people in the jurisdiction. The public effects are merely that; they are effects, not constitutive reasons for fiduciary obligations.<sup>97</sup>

The majority decision offers a more meticulous analysis of the interplay between contractual and fiduciary duties. First, Binnie J. noted that where there are ambiguities as to what the contract requires, "[t]he court should not ... strain to resolve the ambiguities in favour of the lawyer over the client."<sup>98</sup> Secondly, he noted that a professional cannot rely on a purely technical interpretation of his contractual obligations in order to take advantage of his client's failure to ask exactly the right question.<sup>99</sup> Most importantly, he held that a conflict of interest and duty arose when *Strother* created a "substantial risk that his representation of Monarch would be materially and adversely affected by consideration of his own interests."<sup>100</sup>

There is no doubt that the contract governing the relationship between the parties is very important. It can affect the scope of the obligation of loyalty. The core duty of loyalty is a duty to act in the client's best interests. Expressed in those terms, however, it lacks any limits. It is not the case that

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beyond the legal profession as such, in *Hodgkinson*, *supra*, note 9.

<sup>96</sup> *Strother*, *supra* note 6 at para. 140.

<sup>97</sup> Similarly, the duty to take care not to cause injury, or the duty to keep contractual promises, may have effects on the behaviour of other people; but the duties themselves can be explained, justified and understood as private law relationships between the relevant parties, without any need to bring in issues of public policy.

<sup>98</sup> *Strother*, *supra* note 6 at para. 40.

<sup>99</sup> *Ibid.* at para. 42.

<sup>100</sup> *Ibid.* at para. 69.

the lawyer has an open-ended obligation to do whatever he can to help his clients. Otherwise he would never be allowed to go home from work. The relationship between the contract and the duty of loyalty could be described in this way. The contract indicates what it is that the lawyer (or other fiduciary) must do on behalf of the client. It says *what* the lawyer has to do.<sup>101</sup> The fiduciary obligation indicates *how* the lawyer must do it: decisions must be made loyally. In one sense, the fiduciary obligation is shaped and limited by the contract;<sup>102</sup> but there is an important sense in which this is not true, namely that the strictness of the obligations imposed by fiduciary law, and the resultant remedies, can be much more exacting than the contract would seem to imply.

The dissenting judgment can therefore be understood as proceeding in the following way. Strother's contractual obligations, properly understood, did not require Strother to do anything for Monarch after 1997 except exactly what he was specifically asked to do.<sup>103</sup> He was not asked for taxation advice by Monarch after 1997 and therefore he had no contractual obligations in that regard towards Monarch. In the light of that, neither his retention by Sentinel, nor his taking an interest in Sentinel, created any conflict, because Strother's duties to Monarch were so limited. On this view, Monarch was like a client who had retained Strother to draft her will: there was a fiduciary obligation, but even fiduciary obligations have limits.

The majority judgment turns in part on a different conclusion about Strother's positive contractual obligations to Monarch. As we have seen, the majority interpreted the 1998 retainer more expansively in favour of Monarch, taking the view that it required Strother to disclose new information about evolutions in Strother's understanding of tax law.<sup>104</sup> That in itself would be enough to explain the difference between the two judgments, although as we have seen, the majority judgment is more sound in holding that a breach is triggered whenever self-interest is opposed to one's fiduciary duty, without the need for "irreconcilable duties or interests."

### 6. Conclusion

Canadian fiduciary law has narrowly avoided falling badly out of step with the traditional norms that still govern elsewhere in the common law world. It is true that lawyers must be able to have multiple clients, and they may

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<sup>101</sup> Similarly, in a trust, it is either the terms of the trust or the general (non-fiduciary) rules of trust law that indicate what the trustee must do (for example, invest trust money).

<sup>102</sup> It is in this sense that we can understand the statement in the dissenting judgment 136 that the duty of loyalty is not "free-floating;" see *Strother*, *supra* note 6 at para. 136.

<sup>103</sup> *Ibid.* at para. 145.

<sup>104</sup> *Ibid.* at para. 40-43.

be permitted by their rules of professional conduct to engage in business transactions with clients. The solution of any such difficulties, however, should not be found by weakening fiduciary standards, nor by a narrow interpretation, in favour the professional lawyer, of the contractual arrangements made between lawyer and client. The majority view is preferable: a lawyer who wants to narrow the scope of his prior obligations to his client must take great care to make sure that the client agrees to this, as a matter of substance and not just form. Moreover, the prophylactic rules are breached when self-interest (or a fiduciary duty owed to another client) *potentially* comes into conflict with the lawyer's fiduciary duty to his or her client; there is no need to show that the interests of a client have actually been sacrificed, nor to show that the lawyer is actually unable to fulfil the contractual terms of both retainers. Lawyers who do not obtain substantial and fully informed consent can expect no more sympathy than the trustee in *Keech v. Sandford* who wanted to take for his own benefit the renewal of a lease that he had formerly held in trust for an infant:

I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to cestui que use; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui que use.<sup>105</sup>

The surest way to ensure that the reputation of the legal profession does not improve would be to relax these strict standards, which serve to prevent even an appearance that a lawyer is competing with his or her own client.

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<sup>105</sup> (1726), Sel. Cas. T. King 61 at 63, 25 E.R. 223.