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THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act,* SBC 1998, c. 9

and a hearing concerning

ROBERT COLLINGWOOD STROTHER

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	May 26, 27, 28, 29 and 30, 2014 and August 21, 2014
Panel:	Gavin Hume, QC, Chair Gregory Petrisor Alan Ross
Discipline Counsel:	Henry C. Wood, QC and Lars Kushner
Counsel for the Respondent:	Peter Gall, QC, Robert Grant, QC and Joanne Thackeray

[1] This matter has its origins in the film tax shelter business that existed in the 1990s. The client, M Corp., was a major player in that business. The lawyer, Mr. Strother, then a partner at Davis & Co., was M Corp.'s counsel.

[2] The film tax shelter business was described by Binnie J. in the Supreme Court of Canada decision in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 (para. 3) as follows:

> From 1993 to 1997, M Corp. devised and marketed tax shelter investments whereby Canadian taxpayers, through ownership of units in a limited partnership, provided film production services to American studios making films in Canada. In outline, the tax shelter worked like this. Limited partnerships were established. The investors would notionally produce a film for a studio in return for a fee, paid over time, that was contingent on the success of the film. The contingency of the payment introduced a substantial element of risk, and the right to receive such speculative income at some future date was considered by Revenue Canada not to be a capital asset. Therefore, expenditures for the film production were treated as deductible from other income in the year the expenditures were incurred. The scheme yielded a loss to the partnership in the early years because of the mismatch between the front-end expenses in the year the film was made and the delayed and uncertain return. The loss was deducted by investors from their unrelated income - thereby sheltering this income from immediate taxation. If the film was a success, the tax collector's cut would at least be deferred.

[3] The Federal Government appeared to close the film tax shelter business in October 1997.

[4] As discussed below, a further tax shelter opportunity was established in 1998. That opportunity revived the film tax shelter business for a few more years.

[5] Mr. Strother was partly responsible for establishing the new tax shelter opportunity in 1998. Further, he took a financial interest in the company that created the opportunity and first took advantage of the opportunity.

[6] At the same time, Mr. Strother continued to be counsel to M Corp., the same company that had been involved in the film tax shelter business from 1993 until October 1997.

[7] This hearing relates to Mr. Strother's ethical obligations to his existing client while he pursued business opportunities for a new client in which he had a financial interest.

[8] The facts of this case led to a 42-day trial and extensive Reasons for Judgment in the Supreme Court of British Columbia. That decision was overturned by the British Columbia Court of Appeal. That appellate decision was, in turn, overturned by the Supreme Court of Canada.

[9] At each level the Court made findings of fact and drew inferences from those facts.

[10] In this hearing, the Panel is asked to determine whether Mr. Strother's conduct was a breach of his fiduciary and ethical obligations, and whether his conduct was a marked departure from that expected of members of the legal profession.

[11] By agreement between the parties, the findings of fact from the original trial and the subsequent appeals are accepted into the record of this hearing. Because the Supreme Court of Canada ultimately overturned the Appeal Court decision, we have put little weight on any findings of fact made by the British Columbia Court of Appeal, except where they were adopted by the Supreme Court of Canada. (Quotes below taken from: 2002 BCSC 1179, 2005 BCCA 35 and 2007 SCC 24.)

[12] In addition, evidence was tendered at the hearing in the form of *viva voce* testimony of Mr. Strother, exhibits from the trial, transcripts from the trial and transcripts from Mr. Strother's examination for discovery. Mr. Strother was the only witness at the hearing.

THE BACKGROUND FACTS

[13] M Corp. promoted and marketed tax-assisted film tax shelters between 1993 and 1997.

[14] During the time that M Corp. was in business, it received tax advice from Robert Strother, a partner at Davis & Co. who restricted his practice to providing tax advice.

[15] M Corp. was one of a very few companies in the film tax shelter market between 1993 and 1997.

[16] Mr. Strother was one of very few tax lawyers providing advice in the area of film tax shelters.

[17] M Corp. relied heavily on Mr. Strother. In addition to tax advice, the marketing and selling of M Corp.'s tax shelter investment products required Advance Tax Rulings from Revenue Canada (now Canada Revenue Agency). Mr. Strother was responsible for obtaining those Advance Tax Rulings. Mr. Strother was M Corp.'s conduit to Revenue Canada when it required a ruling.

[18] Between 1993 and 1997 M Corp. had a written retainer agreement with Davis & Co. That agreement required Davis & Co. to refrain from acting for competitors of M Corp. (with certain exceptions).

[19] The written retainer in 1996 and 1997 required Mr. Strother to attend weekly meetings with M Corp. representatives to discuss the financing arrangements that they were involved in.

[20] In 1996 the Ministry of Finance announced its intention to amend the *Income Tax Act* with the effect that it would remove or amend the sections that allowed the film tax shelter business to exist.

[21] Despite lobbying by M Corp., its competitors and Mr. Strother, the film tax shelter business was closed down on October 31, 1997. Although some new ideas were floated with the hope of reviving film tax shelters, as of late 1997 everyone in the business agreed that film tax shelters were finished.

[22] In late 1997 M Corp. closed its offices except for staff required to administer the ongoing obligations of the company.

THE NATURE OF THE M CORP. RETAINER AGREEMENT IN 1998

[23] It is the events of 1998 and early 1999 that are of concern for this hearing.

[24] As noted, M Corp.'s exclusive retainer with Davis & Co. ended on December 31, 1997. It was replaced with an unwritten retainer that has been the subject of much judicial ink.

[25] This Panel adopts, and sees no reason to vary from, the following findings of the majority of the Supreme Court of Canada as described by Binnie J. (at para. 40 - 43):

> 40. Here, too, the claim arises out of "the parties' relationship of trust and confidence" but the case is pleaded as a breach of the fiduciary duty of loyalty rather than breach of contract. The critical findings of fact of the trial judge as to the scope of the retainer include the following:
>
> > In 1998, Mr. Strother's contact with M Corp. was quite limited but, arising out of suggestions he made during 1997 regarding the possibility of exploring alternative tax-assisted business opportunities, he was consulted to some extent by HK and SC.
> >
> > …
> >
> > During the latter part of 1997, those at M Corp. looked to Mr. Strother for ideas on what, if anything, they could do with M.

> Corp.'s resources in light of the fact that tax sheltered financing and their production services investment business was ended. Mr. Strother suggested some alternative tax-assisted business opportunities that could be explored. A decision was taken [by Mr. Strother] to defer consideration to the new year and that led to HK, and then later SC, consulting Mr. Strother in 1998. [Emphasis added (by Binnie, J.); paras. 32 and 96.]

Where a retainer has not been reduced to writing (as was the case with the 1998 retainer here) and no exclusions are agreed upon, as here, the scope of the retainer may be unclear. The court should not in such a case strain to resolve the ambiguities in favour of the lawyer over the client. The subject matter of the retainer here was, as it had been for years, "tax-assisted business opportunities". It was not to sell an office building, draft an informatics contract or perform other legal services unrelated to the subject matter of the earlier advice. The trial judge exonerated Strother by placing the emphasis on M Corp.'s interest in "alternative" tax opportunities, but of course M Corp. only considered "alternative" tax opportunities because Strother had given categorical advice that the tax-assisted film production services business in which Strother had profitably been advising M Corp. since 1993 was unequivocally dead.

41. I believe, as did the Court of Appeal, that the trial judge erred in drawing so narrowly the *legal* effect of his *factual* finding that the retainer dealt with tax-assisted business opportunities, alternative or otherwise. (In fact Strother's position is that what he pursued on behalf of S Corp. in 1998 *was* an alternative tax-assisted business opportunity and not the same TAPSF [tax-assisted production services funding] scheme as he had pronounced dead in 1997.) M Corp. was a major Davis client of long standing. It had been Strother's biggest source of billings for years. It was in the business of marketing tax schemes whose success turned on Strother's expertise in finding a "way [to get] around the rules" (to borrow a phrase from SC (BCCA #1, at para. 14). Strother's factum emphasizes nice distinctions between tax credits, tax shelters and so on (para. 24) but I do not think this oral retainer can or ought to be parsed so closely.

42. Nor can I agree with the Chief Justice when she characterizes the legal obligation arising out of the 1998 retainer as follows:

> Only if M Corp. had specifically asked Strother for advice on new film tax-shelter opportunities and Strother had agreed to give that

> advice, could Strother have been under any duty to provide M Corp. with such advice, placing him in a conflict of interest with S Corp. [para. 145]
>
> M Corp.'s tax business was in a jam. Strother was still its tax lawyer. There was a continuing "relationship of trust and confidence". M Corp. was dealing with professional advisors, not used car salesmen or pawnbrokers whom the public may expect to operate on the basis of "didn't ask, didn't tell", and who collectively suffer a corresponding deficit in trust and confidence. Therein lies one of the differences between a profession and some businesses.
>
> 43. In my view, subject to confidentiality considerations for other clients, if Strother knew there was still a way to continue to syndicate U.S. studio film production expenses to Canadian investors on a tax-efficient basis, the 1998 retainer entitled M Corp. to be told that Strother's previous negative advice was now subject to reconsideration.

[26] This Panel accepts these findings and the resulting legal effect of M Corp.'s oral retainer. M Corp. was entitled to be informed of tax-assisted business opportunities including potential ways to continue to syndicate film production expenses on a tax-efficient basis. It follows that Mr. Strother had a continuing obligation to advise M Corp. of such opportunities, subject to obligations of confidentiality.

THE FACTS RELATING TO THE CITATION (1998 AND 1999)

[27] Early in 1998, Mr. Strother was approached by PD, the former Chief Financial Officer of M Corp. M Corp. had laid him off as of October 31, 1997 with the closing of the business.

[28] PD had an idea for providing accounting services to American film studios that were making films in Canada. He wanted Mr. Strother's legal advice and assistance to start that business. In addition to the accounting services idea, PD also developed a related idea that had the potential to revive at least a portion of the film tax shelter business. The tax shelter portion of the concept required an Advance Tax Ruling.

[29] Mr. Strother was interested in being an investor in PD's company. According to Mr. Strother's testimony, he was primarily interested in the accounting services side of the business. Mr. Strother did not believe that PD's tax shelter idea had any chance of being accepted by Revenue Canada. Despite his pessimism, Mr. Strother

agreed to pursue the Advance Tax Ruling for PD's new venture. According to Mr. Strother, he agreed to pursue the ruling in order to "jolly PD along" so that Mr. Strother could participate in the other (accounting) aspect of the business.

[30] The company that was eventually incorporated was named S Corp.

[31] Discipline counsel concedes that, as of the beginning of 1998, all players in the tax-assisted film tax shelter business believed that the business was dead. The Ministry of Finance had made it clear that it had no intention of allowing any tax shelter business. It had replaced the old sections of the *Income Tax Act* with new provisions that were advantageous to American film studios without providing Canadian investors the ability to shelter income.

[32] During the initial discussions between Mr. Strother and PD, the prospect of obtaining a successful Advance Tax Ruling was seen as extremely unlikely. As found by Lowry J:

> [85] Even in March 1998, when the S. Corp. advance tax ruling request was submitted, it could not, on any account, have been more than the longest of long shots that a ruling would be issued. …

[33] We have set out below a chronology of facts that are established by the documentary evidence and the findings in different levels of Court. The facts relating to Mr. Strother's meetings with the principals of M Corp. are drawn from Davis & Co.'s invoices to M Corp. during the relevant period:

1. On January 11, 1998 PD put together a "barebones" outline of a financing structure that he sent to Mr. Strother in an email (Lowry J para. 55).

2. On January 15, 1998 Mr. Strother had a telephone conference and an in-person conference with the two principals of M Corp. (Ex. 1 Tab 19).

3. A "New Case Report" for PD's new venture, indicating a new file opening at Davis & Co. was created on January 19, 1998 (Exhibit 3 Tab 8 - Lowry J para. 57).

4. On January 21, 1998, Mr. Strother again met with the principals of M Corp. to "review tax planning and other items" (Ex. 1 Tab 19).

5. A request for an Advance Tax Ruling was created on the Davis & Co. word processing system. The evidence at trial indicated that the document had "last work done" on January 26, 1998 (Lowry J para. 57).

6. On January 27, 1998, Mr. Strother met with one of the principals of M Corp. for 1.5 hours (Ex. 1 Tab 19).

7. Mr. Strother (in his own capacity – not as a partner at Davis & Co.) and PD entered into an agreement dated January 30, 1998, whereby Mr. Strother created an obligation on Davis & Co. to take certain steps to incorporate entities and to request an Advance Tax Ruling for S Corp. According to the original draft of this document, if the venture was successful in obtaining an Advance Tax Ruling, Mr. Strother had the right to acquire 50 per cent equity in the new venture (subject to certain limitations). The agreement distinguishes between the relative entitlements to percentages of the first $2,000,000 in profit as opposed to all profits above that amount (Exhibit 3 Tab 9 - Lowry J para. 57).

8. On February 19, 1998, Mr. Strother met with the principals of M Corp. to discuss tax planning and a proposed capital loss generating transaction (Ex. 1 Tab 19).

9. On March 3, 1998 Mr. Strother sent a letter, on Davis & Co. letterhead, to Revenue Canada Taxation seeking the Advance Tax Ruling on behalf of S Corp.

10. On May 19, 1998 Mr. Strother had a planned lunch with one of the principals of M Corp. Prior to this meeting he discussed with another partner of Davis & Co. "what we could tell" M Corp. if they specifically asked about film tax shelters. Apparently the topic did not arise at the lunch (BCCA para. 28).

11. On May 26, 1998, Revenue Canada sent a letter to Mr. Strother setting out a list of missing information and queries that required answers before it would issue a ruling. This response from Revenue Canada was seen as an indication that it may be willing to issue a ruling. It is impossible for this Panel to gauge, at this point in time, the relative optimism that would have accompanied the receipt of this letter. However, in order for S Corp. to respond to Revenue Canada's requests, Davis & Co. was required to perform significant further legal work

12. On June 16, 1998 Mr. Strother met with one of the principals of M Corp. to review alternatives and structures for mitigation of deferred capital gains consequences (Ex. 1 Tab 19).

13. On June 23, 1998 Davis & Co. signed a written retainer agreement with S Corp. wherein the firm would be entitled to a certain percentage of the amount

of the subscriptions sold by the client. The retainer was graduated with a lower percentage of fees being paid for subscriptions exceeding $30,000,000. This letter agreement was accepted and signed by PD, on behalf of S Corp. on October 6, 1998.

14. On June 26, 1998 Mr. Strother met with one of the principals of M Corp. to discuss mitigation of capital gains consequences for investors in M Corp. (Ex. 1 Tab 19).

15. On July 7, 1998, Mr. Strother prepared a memorandum regarding a tax plan for M Corp. (Ex. 1 Tab 19).

16. On July 21, 1998 Mr. Strother sent a five-page letter to Revenue Canada answering the questions posed in the May 26, 1998 letter. This letter enclosed a binder containing drafts of relevant supporting agreements and a summary of agreements that had been prepared by Davis & Co. (Ex. 1 Tab 12).

17. On July 24, 1998 Mr. Strother had a telephone conference with M Corp. to discuss possible reorganization of M Corp. (Ex. 1 Tab 19)

18. On August 4, 1998, at the request of the managing partner of Davis & Co., Mr. Strother wrote a six-page memo outlining the history of his agreement with PD, the conflict of interest issues and the insurance issues (Ex. 1 Tab 14). The memo stated that:

    (a) Mr. Strother had not raised the issue earlier because he did not want to raise a controversial topic "unless and until the venture had some potential for economic gain." He had always intended to disclose his interest in S Corp. "if and when it became apparent that the transaction had some prospect of success."

    (b) The prospects of S Corp. were "highly speculative and uncertain" but, following Revenue Canada's May 26, 1998 letter "[p]reliminary indications [were] hopeful."

    (c) Mr. Strother had an option to acquire up to 50 per cent of the common shares in S Corp.

    (d) The file had required approximately $46,000 of Davis & Co. work in progress plus $5,000 in disbursements.

    (e) Davis & Co. would not be insured for any work done if Mr. Strother had more than 10 per cent ownership in S Corp. Given the insurance issue,

> Mr. Strother proposed to reduce his ownership entitlement in S Corp. to 10 per cent or less and turn over file responsibility to another partner "if and when the ruling is obtained."

19. Also on August 4, 1998, Mr. Strother met with a principal of M Corp. to review strategies for tax planning for limited partners and related tax planning issues (Ex. 1 Tab 19).

20. From August 10 – 13, 1998, Mr. Strother spent 12.5 hours researching and meeting with M Corp. regarding the tax implications of a proposed amalgamation of M Corp. (Ex. 1 Tab 19).

21. On August 11, 1998 the managing partner of Davis & Co. wrote a memo to Mr. Strother indicating that Mr. Strother had confirmed that he would not have any ownership interest in S Corp. (Ex. 1 Tab 15).

22. On October 6, 1998, Revenue Canada provided its Advance Tax Ruling. The Ruling was favourable to S Corp. The parties agree that the Ruling itself did not become public information and that the Supreme Court of Canada decision (para. 37 – 38 and 93) proceeds on an apparent misconception that the Ruling itself "became public shortly after it was issued on October 6, 1998."

23. However, information about the Ruling did become available to the public. The companies that had been competitors to M Corp. learned of the S Corp. transactions through the film industry grapevine. As noted by Lowry J (at para. 143):

> … nothing about the fundamentals of any structure could be kept confidential once it became the subject of an advance tax ruling and formed the basis of marketing a tax shelter investment through a public offering. …

This reference was clarified in the BC Court of Appeal Reasons for Judgment (at para. 38):

> In the marketplace, word had begun to spread in the summer of 1998 that, to quote from the testimony of Mr. B, A Corp.'s tax lawyer, "Mr. Strother was working on some kind of deal relating to production services". A Corp. heard about the ruling two days after it was issued, and within seven weeks, had prepared its own

ruling application. It received a ruling in February 1999 and began marketing its syndications the next day.

24. On October 14, 1998 the minutes of a meeting of the Davis & Co. Management Committee indicate that a member of the committee had spoken with Mr. Strother and he expected S Corp. to have sales in the area of $40 million by December 15, 1998. The prospect of an action by M Corp. against S Corp. and possibly Davis & Co. was also discussed in that memo (Ex. 1 Tab 17).

25. On November 20, 1998, Mr. Strother wrote a memo to a member of the committee advising on the "possible exposure of PD or Davis & Co." to M Corp. in respect of the new venture (Ex. 1 Tab 18).

26. Mr. Strother met on November 27 and December 8, 1998 with one of the principals of M Corp. and M Corp. personnel regarding tax matters and "tax planning for [M Corp.] 1993 and 1994 structures". (Ex. 1 Tab 19)

27. In December 1998, a further Advance Tax Ruling was provided to satisfy one of the studios that contracted with S Corp.

28. By December 31, 1998 S Corp. closed transactions worth $260 million in studio production. (Lowry J para. 24)

29. The principals of M Corp. heard about the S Corp. transactions through the film industry grapevine, but not until early 1999. They promptly severed their relationship with Davis & Co. (Lowry J Para 33) and retained litigation counsel.

30. While he was still a partner at Davis & Co., Mr. Strother received two advances from one of PD's companies that was related to S Corp.:

    (a) $450,000 on February 24, 1999; and

    (b) $335,000 on March 10, 1999.

31. Effective March 31, 1999 Mr. Strother resigned from Davis & Co. and joined S Corp. as a 50 per cent shareholder. The business was financially successful. The prior advances were applied against management fees payable to Mr. Strother.

[34] These further facts are not disputed by Mr. Strother:

(a) Mr. Strother continued to be the lawyer for, and owed a duty to, M Corp. until M Corp. severed the relationship in early 1999;

(b) At no time between January 1, 1998 and the severance of M Corp.'s retainer, did Mr. Strother advise his continuing client M Corp. that he had obtained a financial interest in a potential competitor;

(c) At no time between January 1, 1998 and the severance of M Corp.'s retainer did Mr. Strother advise M Corp. that his previous legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered;

(d) At no time between October 6, 1998 and the severance of M Corp.'s retainer, did Mr. Strother advise M Corp. of the existence of the successful Advance Tax Ruling.

THE LAW SOCIETY'S ALLEGATIONS

[35] The Law Society's allegations are set out in the citation:

> 2 In or about 1998, you took a personal financial interest in a new client, S Corp., which was a potential commercial competitor of another client, M Corp. … in a business market involving tax shelters related to film production services. You breached your duty of loyalty to M Corp. by failing to do one or more of the following:
>
> (i) to provide material disclosure to M Corp. of your financial interest in a potential commercial competitor;
>
> (ii) to advise M Corp. that your previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered;
>
> (iii) to advise M Corp. of a favourable advance tax ruling.

FINDINGS OF FACT

[36] Based on the facts set out above, we make the findings of fact set out below.

[37] Mr. Strother argues that he did not have any interest in S Corp. after August 11, 1998 when he was instructed by the managing partner to have no kind of ownership interest. However, the fact is that Mr. Strother always had the ability to leave Davis & Co. and join S Corp. if the new venture was successful. Of course, that is

exactly what he did in 1999. The significant loans from S Corp. to Mr. Strother (later converted to management fees) while he was still at Davis & Co. indicate that he continued to have a potential interest in S Corp., even though he was not a shareholder at any point until April, 1999.

[38] We find as fact that Mr. Strother always had a financial interest in S Corp.'s success. If the company was successful, he could leave the practice of law and join S Corp. This aspect was described by Binnie J at para. 67:

> Strother had *at least* an "option" interest in S Corp. from January 30th until at least August 1998 (when he was told by Davis to give up *any* interest). This was during a critical period when M Corp. was looking to Strother for advice about what tax-assisted business opportunities were open. The precise nature of Strother's continuing financial interest in S Corp. between August 1998 and March 31, 1999 (when Strother left Davis) is unclear, but whatever it was it came to highly profitable fruition in the months that followed. The difficulty is not that S Corp. and M. Corp. were potential competitors. The difficulty is that Strother aligned his personal financial interest with the former's success. By acquiring a substantial and direct financial interest in one client (S Corp.) seeking to enter a very restricted market related to film production services in which another client (M Corp.) previously had a major presence, Strother put his personal financial interest into conflict with his duty to M Corp.
>
> [emphasis in original]

[39] We find that Mr. Strother took a contingent financial interest in the financial success of S Corp. as of January 30, 1998 and kept that interest during the entire period from January 30, 1998 until he left Davis & Co. as of March 31, 1999.

[40] Mr. Strother concedes that the timing of the "realization" that the Advance Tax Ruling was a realistic possibility does not change or affect Mr. Strother's obligation. The fact is that he did not inform M Corp. of either the possibility of a change in the law, or the actual change in the law. The obvious inference is that he had no intention of informing M Corp. whatever his level of optimism. This Panel adopts the following findings of Binnie J at para. 46 where he discussed the May 19, 1998 meeting involving Mr. Strother and another partner at Davis & Co. (see para. 33 above):

> … The fact that Strother and RM discussed what should be said if M Corp. put the right question ("is there a way around ...?") recognized that Strother appreciated that his modified view about the potential of the s.

> 18.1(15)(*b*) exception would likely be of continuing interest and importance to M Corp. because M Corp. was still looking to him for advice in rebuilding its shattered tax-related business. At that point, of course, Strother had every interest in keeping M Corp. in the dark. In June of 1998, under the January 1998 agreement, he was entitled to 55 percent of the first $2 million in profits and 50 percent of S Corp.'s profits on the revival of tax-assisted film production services deals, which constituted a small and select marketplace. The fewer competitors faced by S Corp. the more money Strother would make and the faster he would pocket it.

And at para. 69 - 70:

> In these circumstances, taking a direct and significant interest in the potential profits of M Corp.'s "commercial competito[r]" (as described by Lowry J, at para. 113) created a substantial risk that his representation of M Corp. would be materially and adversely affected by consideration of his own interests (*Neil*, at para. 31). As Newbury JA stated, "Strother ... *was* 'the competition'" (BCCA #1, at para. 29 (emphasis in original)). It gave Strother a reason to keep the principals of M Corp. "in the dark" (*ibid*.), in breach of his duty to provide candid advice on his changing views of the potential for film production services tax shelters. I agree with Newbury JA that M Corp. was "*entitled* to candid and complete advice from a lawyer who was not in a position of conflict" (*ibid*., at para. 17 (emphasis in original)).
>
> Strother could not with equal loyalty serve M Corp. and pursue his own financial interest which stood in obvious conflict with M Corp. making a quick re-entry into the tax-assisted film financing business. As stated in *Neil*, at para. 24, "[l]oyalty includes putting the client's business ahead of the lawyer's business". It is therefore my view that Strother's failure to revisit his 1997 advice in 1998 at a time when he had a personal, undisclosed financial interest in S Corp. breached his duty of loyalty to M Corp. The duty was further breached when he did not advise M Corp. of the successful tax ruling when it became public on October 6, 1998. Why would a rainmaker like Strother not make rain with as many clients (or potential clients) as possible when the opportunity presented itself (whether or not existing retainers required him to do so)? *The unfortunate inference is that Strother did not tell M Corp. because he did not think it was in his personal financial interest to do so.*
>
> [Emphasis added]

[41] We find that the prospects of S Corp.'s venture being successful emerged during 1998 along the following lines:

(a) In March 1998 when the request for the Advance Tax Ruling was submitted, the chance of success was the "longest of long shots".

(b) When Revenue Canada wrote to Mr. Strother on May 28, 1998 with a list of specific queries, the prospects improved sufficiently such that Mr. Strother put into place a retainer agreement and had other lawyers at Davis & Co. do substantial amounts of work.

(c) The retainer agreement drafted by Mr. Strother on June 23, 1998 provided for contingent fees to be paid based on increments of subscriptions in $10,000,000 increments.

(d) By July 21, 1998 approximately $46,000 worth of fees had been incurred to draft a response to Revenue Canada and the supporting agreements.

(e) By the time of Mr. Strother's August 4, 1998 memo to the managing partner, while the prospects were still speculative and uncertain, the preliminary indications were "hopeful".

(f) On October 6, 1998, the Advance Tax Ruling was issued. While the issuance of the Ruling did not make it public, its existence became public knowledge within the film tax credit community. This Ruling changed "hopeful" to a "sure thing".

[42] Our conclusion, like that of the Supreme Court of Canada, is that Mr. Strother withheld from M Corp. the information regarding his personal investment in S Corp., the brightening prospects for the film tax shelter business and ultimately the existence of the Advance Tax Ruling (to the extent it was public knowledge) for the purpose of advancing his own financial interests in preference to M Corp.'s. As quoted above, Binnie J stated at para. 70:

> … The unfortunate inference is that Strother did not tell M Corp. because he did not think it was in his personal financial interest to do so.

[43] Mr. Strother took the position that his actions were equally blameworthy as the actions of his firm, Davis & Co. This argument has no merit for the following reasons:

(a) The Law Society governs lawyers, not law firms. It currently has no jurisdiction to sanction Davis & Co.

(b) No one at Davis & Co., apart from Mr. Strother, had a financial interest in S Corp. Further, until August 4, 1998, no one at Davis & Co. knew that Mr. Strother had a financial interest in S Corp. The managing partner immediately required Mr. Strother to confirm that he had no financial interest. Mr. Strother provided that assurance. Thus, there was only the briefest of periods (between August 4 and August 11) when Davis & Co. was aware that Mr. Strother had a financial interest in S Corp. Mr. Strother then assured the firm that he would take no interest in S Corp. Thereafter he departed Davis & Co. and joined S Corp. on the exact terms that had been described in the original January 30, 1998 agreement.

(c) Finally, on the evidence, the Respondent was the only person at Davis & Co. who had the tax knowledge regarding the prospects of revival of the film tax shelter business. That was his area of expertise.

THE RESPONDENT'S POSITION

[44] As noted above, there is little, if any, dispute on the relevant facts at this hearing. Mr. Strother admits that he did not advise M Corp. of:

(a) his financial interest in S Corp.;

(b) the changing prospects of obtaining a ruling that could revive the film tax shelter business; or

(c) the existence of the Advance Tax Ruling.

[45] In answer to all of the Law Society's allegations, Mr. Strother relies on his duty of confidentiality to S Corp. He says that he was not at liberty to disclose the existence of S Corp., let alone his financial interest in S Corp. or the subsequent events indicating the changing prospects for the film tax shelter business.

[46] In further answer to the Law Society's allegations, Mr. Strother made the following submissions:

(a) With respect to the allegation that Mr. Strother should have disclosed his financial interest in S Corp.:

(i) Mr. Strother says that he did not have a financial interest in S Corp. except that:

1. He may have had a contingent financial interest in S Corp., but only until August, 1998 when he was advised not to have any interest in S Corp.

2. He did not have any financial interest in S Corp. between August 11, 1998 and the end of February, 1999.

3. By the end of February, 1999, M Corp. was no longer a client of Davis & Co. and no duty was owed when Mr. Strother left Davis & Co. and joined S Corp.

(ii) Even if a contingent interest qualifies for the purpose of this allegation in the citation:

1. Mr. Strother had no separate obligation to disclose this interest to M Corp.

2. S Corp. only became a potential competitor of M Corp. once the Advance Tax Ruling was issued on October 6, 1998.

3. Mr. Strother says that the timing of when precisely it could be said that S Corp. became a potential competitor of M Corp. is irrelevant. He admits that, whether the chances increased before the October 6, 1998 Ruling or not, Mr. Strother did not advise M Corp. that it should seek advice on tax shelters from another law firm at any point in time, either before or after that ruling.

(b) With respect to the failure to advise M Corp. that his previous negative opinion should be reconsidered:

(i) Mr. Strother agrees with this allegation, based upon the finding of the Supreme Court of Canada, but says:

1. The Supreme Court of Canada made new law when it made that Ruling; and

2. The failure to advise M Corp. was not a “marked departure” from the conduct expected of members of the Law Society.

(c) With respect to the allegation that Mr. Strother failed to advise M Corp. of the favourable Advance Tax Ruling, Mr. Strother says:

(i) The Supreme Court of Canada incorrectly assumed that the Ruling was public in October, 1998;

(ii) The Law Society is incorrect when it argues that there was publicly accessible information regarding the Ruling;

(iii) It would have been a breach of Mr. Strother's ethical obligation of confidentiality to S Corp. to disclose the information to M Corp.

BURDEN OF PROOF AND STANDARD OF PROOF

[47] This Panel is mindful of the burden of proof, which is always with the Law Society. The standard of proof is the civil standard of proof on a balance of probabilities. See *FH v. MacDougall*, 2008 SCC 53; *Law Society of BC v. Harding*, 2014 LSBC 29.

OBLIGATIONS OF LAWYERS TO THEIR CLIENTS

[48] We turn first to Mr. Strother's submission that the Supreme Court of Canada changed the law in his own case and in *R. v. Neil*, 2002 SCC 70, and in the process changed the obligations of lawyers. Obviously, it would be unfair for the Law Society to impose duties upon Mr. Strother in 2015 that were not in existence in 1998 and 1999 when the facts of this case unfolded. We have set out below our examination of that argument. In short, our analysis discussed below has led us to a different conclusion. In reaching this conclusion, we also discuss the responsibilities of lawyers relevant to the citation.

[49] The *Legal Profession Act* provides that the Law Society must uphold and promote the public interest in the administration of justice. It goes on to provide, in part, that it does that by ensuring the integrity and honour of lawyers.

[50] The importance of this concept was also discussed by the Supreme Court of Canada in *McDonald Estate v. Martin*, [1990] 3 SCR 1235, 77 DLR (4th) 249. In that decision Sopinka J., writing for four judges, speaks on page 1243 under the heading "Legal Ethics – Policy Considerations" about three potentially competing public policy concerns:

A. Respect for the integrity of the administration of justice;

B. The right of a client to select the counsel of his or her choice, and;

C. The desirability of permitting movement within the legal profession.

[51] In identifying the need to respect the integrity of the administration of justice, he used these words:

> There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice.

[52] He described the right of a litigant to select the counsel of his or her choice as a countervailing value. Cory J, writing for the minority in discussing the above values concluded on page 1265 that the most important value was the preservation of the integrity of the judicial system and subsequently emphasized the importance of the role of lawyers in maintaining the public confidence in the administration of justice. Clearly, a review of this decision and subsequent decisions establishes that maintaining the high standards of the legal profession and the integrity of the system of justice is the paramount value.

[53] A version of the Canons of Legal Ethics was first approved by the Law Society of British Columbia in 1921. At the relevant time, as they do today, under the heading "To the Client" they provided as follows:

> (2) A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the controversy, if any, which might influence whether the client selects or continues to retain the lawyer. A lawyer shall not act where there is a conflict of interests between the lawyer and a client or between clients.

[54] Chapter 3, Rule 3 of the *Professional Conduct Handbook* under the heading "Quality of Service" also in effect at the relevant time provided in part as follow:

> 3. A lawyer shall serve each client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. Without limiting the generality of the foregoing, the quality of service provided by a lawyer may be measured by the extent to which the lawyer:
>
> (a) keeps the client reasonably informed,

…

(k) discloses all relevant information to the client, and candidly advises the client about the position of a matter, whether such disclosure or advice might reveal neglect or error by the lawyer, …

[55] Over the years authors and the courts have described the relationship between a lawyer and a client as a fiduciary relationship giving rise to a fiduciary duty. *Black's Law Dictionary*, 8th ed. defines fiduciary duty as:

> A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary … to the beneficiary … ; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the person … .

[56] The oft-cited decision in *Nocton v. Lord Ashburton*, [1914] AC 932 (HL), was an important case in the development of the rules governing the relationship between a lawyer and his or her client. Lord Haldane concluded at page 965 that Lord Ashburton's solicitor Nocton, as a fiduciary, had a special duty to make "a full and not misleading disclosure of the facts known to him when advising a client." Nocton had advised his client, Lord Ashburton, to release certain mortgage security without advising that he had an interest in the property in question. The result was to the benefit of Nocton, Lord Ashburton's solicitor. The failure to disclose his interest, while not fraud, was a breach of his fiduciary obligations to make full disclosure of relevant matters.

[57] In *Moody v. Cox and Hatt*, [1917] 2 Ch 71, the English Court of Appeal dealt with conflicting duties. On page 81 Lord Cozens-Hardy MR wrote as follows:

> A man may have a duty on one side and an interest on another. A solicitor who puts himself in that position takes upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other, namely, a duty to his client as solicitor on the one side and a duty to his beneficiaries on the other; but if he chooses to put himself in that position it does not lie in his mouth to say to the client "I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side." The answer is that if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say - which would be

> much better – "I cannot accept this business." I think it would be the worst thing to say that a solicitor can escape from the obligations, imposed upon him as solicitor, of disclosure if he can prove that it is not a case of duty on one side and of interest on the other, but a case of duty on both sides and therefore impossible to perform.

[58] Scrutton LJ on page 91 had this to say:

> A man who says that admits in the plainest terms that he is not fulfilling the duty which lies upon him as a solicitor acting for a client. But it is said that he could not disclose that information consistently with his duty to his other clients, the *cestuis que* trust. It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been put of a solicitor acting for vendor and a purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and who, if he does not disclose the flaw in the title, may be liable to an action by the purchaser for not doing his duty as solicitor for him. It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them.

[59] Both cases have been cited with approval by the Canadian courts.

[60] The BC Supreme Court in *McGrath v Goldman*, [1976] 1 WWR 743, dealt with a situation where the pecuniary interests of the lawyers and their client conflicted. The lawyers preferred their own interests and those of one of the clients to the detriment of the other client. Bouck J, under the heading "Breach of a Fiduciary Duty" had this to say at page 750:

> The relationship of a solicitor to his client is a fiduciary one. Consequently the solicitor has an obligation to act with strict fairness and openness towards his client. The failure to fulfil this obligation makes him liable to compensate the client for any resulting loss the client may suffer: *Halsbury* (3d ed.), Vol. 36, p. 95.
>
> Moreover, apart from the Defendants [sic] ethical responsibilities as members of the Law Society, equity has always held that no one should allow their duty to conflict with their interests. …

[61] This decision was cited with approval in *Jacks v Davis*, [1980] 6 WWR 11 (BCSC). The plaintiff's solicitor represented both sides of a transaction and withheld the fact that the other side had entered into an interim agreement to purchase the same building for a lesser amount six weeks earlier. Anderson J., in finding the defendant solicitor liable, said this at paragraph 15:

> … It is obvious that the law cannot countenance any breach of trust by a lawyer. All practising lawyers must be taken to know that they must act with the utmost good faith toward their clients. There are no exceptions to this equitable rule. A lawyer fails in his duty if he fails to make disclosure of all relevant facts to his client. Once he has been retained by a client he cannot escape from his duty to make full disclosure for any reason whatsoever. The public interest requires that the courts enforce this rule without exception.

[62] Similar language was used by Hinkson, JA in the appeal on damages when describing the responsibilities of a solicitor (see *Jacks v Davis*, [1983] 1 WWR 327, commencing at page 331). The defendant Davis was subsequently cited for professional misconduct by the Law Society of British Columbia. At the time of the hearing, Davis was not a member of the Law Society. However, the panel found that, if he had been a member, he would have been suspended, have conditions imposed on his practice and been ordered to pay costs. (*Law Society of BC v. Davis*, July, 1984 decision)

[63] The appeal decision in *Jacks* was cited with approval by the Ontario Court of Appeal in *Commerce Capital Trust Co. v. Berk*, 68 OR (2d) 257. The decision dealt with a solicitor acting for both parties in a mortgage transaction. In part the court said, at paragraph 10, that "Scrupulous behaviour is of particular importance where one of the clients is a person with whom the lawyer had a long-standing relationship – personal or professional."

[64] Another important discussion of the fiduciary responsibility of a lawyer is to be found in *Davey v Woolley*, (1982), 35 OR (2d) 599 (CA). In this instance the solicitor was found to be in breach of his fiduciary responsibilities in acting for the plaintiff when one of his partners had an interest in the ultimate purchase of a company owned by the plaintiff. Wilson JA (as she then was) had this to say:

> Although the law is fairly well settled as to the duty owed by a solicitor to his client, it is not always easy to apply it in a particular context. 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: see *Boardman et al. v. Phipps*, [1967] 2 AC 46, [1966] 3 All ER 721 at

> 756. This is not confined to situations where his client's interests and his own are in conflict although it of course covers that situation. It also precludes him from acting for two clients adverse in interest unless, having been fully informed of the conflict and understanding its implications, they have agreed in advance to his doing so. The underlying premise in both these situations 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.

[65] The Ontario Court of Appeal again discussed fiduciary obligations in *Szarfer v Chodos* (1986), 54 OR (2d) 663, 27 DLR (4th) 388. In this instance the court was dealing with the misuse of confidential information learned while acting for the plaintiff. The court described fiduciary duties in part as follows:

> … The highest and clearest duty of a fiduciary is to act to advance the beneficiary's interest and avoid acting to his detriment. A fiduciary cannot permit his own interest to come into conflict with the interest of the beneficiary of the relationship. The equitable principle is stated in Waters, *Law of Trusts in Canada*, 2nd ed. (1984), at p. 710:
>
> > It is a fundamental principle of every developed legal system that one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside. In the common law system this duty may be enforceable by way of an action by the principal upon the contract of agency, but the modes in which the rule can be breached are myriad, many of them in situations other than contract and therefore beyond the control of the law of contract. It was in part to meet such situations that Equity fashioned the rule that no man may allow his duty to conflict with his interest. Stated in this way, Equity has been able since the sixteenth century to provide a remedy for a whole range of cases where the person with a task to perform has used the opportunity to benefit himself.

[66] The Supreme Court of Canada dealt with a breach of a fiduciary duty by a solicitor in *Canson Enterprises Ltd v. Boughton & Co.*, [1991] 3 SCR 534. There was a failure to advise of a secret profit earned by one client of the firm when acting for another client of the firm. McLachlin J (as she then was), concurring that the appeal should be dismissed, had this to say at page 543:

> … The essence of a fiduciary relationship … is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken – an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": *Canadian Aero Service Ltd, v. O'Malley*, [1974] SCR 592, at p. 606. In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.

[67] La Forest J writing for the majority had this to say on page 572:

> This does not mean that a fiduciary duty has not been breached when, as in the present case, the solicitor fails to inform a client of a fact of which he should have informed him, or that he should seek independent advice. It is clear from earlier cases he discussed *(Burrowes v. Lock* (1805), 10 Ves. Jun. 470, 32 ER 927) and *Slim v. Croucher* (1860), 1 De G. F. & J. 518, 45 ER 462) that he considered that other situations might call for the superintending jurisdiction of equity. As well, it should be observed that Lord Dunedin and Lord Shaw of Dunfermline do not appear to rely on this factor. Indeed, the latter does not in his statement of the facts even mention the possible advantage enuring to the solicitor; he speaks more broadly of misrepresentation and misstatements made by a person entrusted with a duty and of the failure to comply with that duty (at p. 968), or again the liability of an advisor in respect of statements upon which the other is guided or upon which he justly relies, and this whether the statement is fraudulent or innocent (at pp. 969-71).
>
> What has just been said is consistent with the subsequent case of *Brickenden v. London Loan & Savings Co.*, [1934] 3 DLR 465 (PC), aff'g [1933] SCR 257, involving a similar fact situation. It is apparent from the language of Lord Thankerton, giving the judgment of the Privy Council, that a solicitor may be liable for a fiduciary duty for non-disclosure even when his or her personal interest is not at stake though that is a factor of some importance. Lord Thankerton had this to say, at pp. 468-69:
>
> > Their Lordships are clearly of opinion that the appellant's non-disclosure of these two mortgages was a breach of his duty as solicitor to the Loan Company, particularly in view of his personal interest in them, and that it would equally have been a breach of duty if, contrary to their Lordships' opinion, the appellant had only

> been employed for the certificate of title. It follows that the Loan Company were entitled at least to nominal damages against the appellant.

[68] *Ramrakha v. Zinner*, 1994 ABCA 341, 157 AR 279, dealt with a secret profit received by one party to the knowledge of the solicitor who did not disclose it to one of the clients he was acting for in the transaction. At para. 70 Harradence JA said:

> [70] 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: see *Boardman* v. *Phipps*. 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.

[69] He went on to discuss the obligation to disclose material facts citing with approval *Commerce Capital Trust Co. v. Berk, Canson Enterprises Ltd. v. Boughton & Co.* and the BCCA in *Jacks v. Davis*.

[70] In *Moffat et al. v. Wetstein et al.* (1996), 29 OR (3d) 371, the Ontario Court, General Division was dealing with an application to remove the solicitors of record because counsel for the plaintiffs was a former partner of the defendant and as a result had a financial interest in the outcome of the litigation if the plaintiff was successful. The plaintiffs swore affidavits waiving the conflict. The court held that the plaintiffs right to counsel of their choice had to be tempered by the public interest in maintaining confidence in the administration of justice by having lawyers avoid the appearance of impropriety and by ensuring that justice is not only done but is seen to be done. Having counsel acting in effect against himself could not be cured by the waiver in the absence of independent legal advice. At paragraphs 55 and 56, the court expressed it as follows:

> A fiduciary owes a duty of loyalty unequalled elsewhere in the law. In *Canadian Aero Service Ltd. v. O'Malley*, Laskin J. reviewed the trust-like nature of the relationship and stated, at p. 607:
>
> > An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties ... shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company

> with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.
>
> It is this fiduciary duty which is invoked by the appellant in this case and which is resisted by the respondents on the grounds that the duty as formulated is not nor should be part of our law and that, in any event, the facts of the present case do not fall within its scope.

Although *Canadian Aero* dealt with the duties of departing officers and directors of a corporation, the comments are applicable to all situations where a fiduciary concept is involved. A fiduciary is subject to a strict ethic to provide, among other things, the utmost good faith and loyalty to those to whom he acts in the capacity of fiduciary. Subsumed in the fiduciary's duties of good faith and loyalty is the duty to avoid a conflict of interest. The fiduciary must not only avoid a direct conflict of interest but must also avoid the appearance of a possible or potential conflict. The fiduciary is barred from dividing loyalties between competing interests, including self-interest.

[71] As set out above, the Respondent argues that the *Strother* decision "changed the law". Clearly the bright line rule articulated first in *Neil* at para 29 repeated in *Strother* and reviewed in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 ("*CN*") resolving the debate between the Federation and the CBA was a new development. However, that is not the point of the Respondent's submission though it was the focus in at least one of the articles relied on by the Respondent in support of that argument. The Respondent's submission is that, prior to the decision in *Strother*, there was no obligation to advise a client whose retainer for certain services had terminated that an opinion previously given was possibly no longer correct. We agree with that assertion. However, we have concluded that the M Corp. retainer had not ended in 1998 but instead continued. We have also concluded that it continued to obligate Strother to advise M Corp. on tax-assisted business opportunities. The Respondent did not, at any point before M Corp. learned of the new approach to tax-assisted film financing, advise M Corp. of the change or even suggest that M Corp. should seek other counsel with respect to that

approach to financing films. He did not do so as a result of his own personal financial interests.

[72] The *Legal Profession Act* mandates that the Law Society must uphold and promote the public interest in the administration of justice. That was reinforced in *McDonald Estate*. The Canons of Legal Ethics provides that a lawyer cannot act when there is a conflict. The *Professional Conduct Handbook* discussed the obligation of keeping a client informed of relevant information.

[73] In addition, the cases discussed above provide that the fiduciary obligations of a lawyer lead to at least two principles relevant to the matter before us. First, a lawyer's fiduciary obligations require that there be full disclosure of relevant information to a client no matter when that information arises. Secondly, those obligations require that a lawyer must not put him or herself in conflict with a client. The *Legal Profession Act* and the cases require that the public interest in the administration of justice be upheld by ensuring that lawyers act with integrity.

[74] The Respondent argues that he was not in a position to provide any direction to M Corp. as a result of his obligation to maintain client confidentiality with respect to S Corp. Maintaining client confidentiality is of great importance and another aspect of the administration of justice. Rule 3.3-1 of the *BC Code of Professional Conduct* emphasizes the importance of this obligation, as did Chapter 5 Rule 1 of the *Professional Conduct Handbook* in force at the time. However, the Respondent created a problem for himself when he took a financial interest in S Corp. It was in his interest not to advise M Corp. that they should seek other advice with respect tax-assisted film financing. As was discussed in *Moody*, the Respondent cannot now argue that he could not make any comment to M Corp. as a result of his confidentiality obligation to S Corp., having put himself in that position.

[75] The decisions of the BC courts in *McGrath* and *Jacks*, described the obligation of lawyers to act in good faith and with openness in their relationships with their clients. The Ontario Court of Appeal in *Commerce Capital Trust Co.* cited the appeal decision in *Jacks* with approval and made the point that, where a client has a long standing relationship with a lawyer, the lawyer must be particularly scrupulous. M Corp. had been one of the Respondent's most significant clients for a significant period. The Ontario Court of Appeal in both *Davey* and *Szarfer* described the need of a lawyer to avoid putting himself or herself in conflict with a client. All of the decisions reviewed above were decided before 1998 and consistently emphasized the fiduciary nature of the relationship between a client and a lawyer, the need for openness with a client and the need to avoid putting oneself in a positon of conflict with a client. The Respondent failed in this regard.

He decided to take a financial interest in a new client engaged in the same business as his existing client and did not advise the existing client to consider seeking other counsel. In addition, because it was in his financial interest, he did not advise M Corp. that his original opinion with respect to tax-assisted financing of films might need to be reexamined. He did not provide M Corp. with the loyalty and legal advice it could have otherwise expected. M Corp. looked to the Respondent for tax-assisted business opportunities. The Respondent, while he had the obligation to maintain confidentiality with respect S Corp.'s confidential information, put himself in a conflict by taking a financial interest in S Corp. and as a result did not advise M Corp. to seek other representation or seek that representation for the purpose of reconsidering his earlier advice. The representation of M Corp. was jeopardized by the personal financial interest he had in S Corp. He preferred his own interest over that of his client M Corp.

[76] In support of the argument that the *Neil* and *Strother* decisions made new law, the Respondent referred to various articles. There is passing reference to Professor Alice Woolley's 2010 article on the *Neil* and *Strother* Supreme Court of Canada decisions on the University of Calgary blog entitled "The Italics that Rocked the Decade (for Canadian Lawyers)". The article focuses on the "Bright Line" rule. As was stated in *CN* at para. 35, the "bright line" rule did not apply in *Strother*. The article does not deal with the impairment of the representation of a client as a result of a lawyer putting himself or herself in a conflict positon and as a result not providing the representation a client is entitled to expect.

[77] The Respondent relied on an article by James Edelman entitled "Unanticipated Fiduciary Liability" (2008) 124 LQR 21. In that article the author argues that, as a result of the majority decision in *Strother* concluding that the 1998 M Corp. retainer was to provide advice on tax-assisted business opportunities, it expanded the fiduciary obligations of a lawyer. We do not agree with that conclusion. We have concluded that M Corp. was seeking advice from the Respondent with respect to any and all tax-assisted business and that did not exclude advice with respect to tax-assisted film financing. As a result, he was in breach of his fiduciary obligation to M Corp. when he impaired his representation of M Corp. by taking a financial interest in S Corp., thereby creating a situation in which his interests were served by not advising M Corp. to go elsewhere and to seek further advice with respect to his earlier opinion on tax-assisted film financing.

[78] Similarly, the article by Jack Webster, QC entitled "The [M Corp.] Decision in the Supreme Court: A Conundrum" (2007) 115 *The Verdict* 52, is also critical of what is described as an expanded view of the 1998 M Corp. retainer (see page 53). The article then discusses the quandary that arises as a result of the obligation to keep

the S Corp. information confidential and the conclusion that the Respondent's fiduciary obligation required some notice to M Corp. As the court in *Moody* discussed, the Respondent put himself in that position, and he now only has himself to blame.

[79] The Respondent also relies on an extract from page 331 of an article by Anthony Duggan entitled "Solicitors' Conflict of Interest and the Wider Fiduciary Question" (2007) 45 *Can. Bus. LJ 420*, and argues that the change in the law was to use the fiduciary obligations to expand the scope of the retainer. The extract comments on the "apparent disagreement between the majority and minority on the relationship between contract and fiduciary duty." However, the article on pages 417 to 419 makes the point that, on a close read of the majority decision, the difference between the two judgments is more apparent than real. The author concludes on page 419 that the reason the majority ruled in M Corp.'s favour was that, on its reading of the retainer, the Respondent owed M Corp. a duty of disclosure. The author also notes that the scope of the retainer is a finding of fact. The majority at para. 39 of the *Strother* decision appears to conclude that the fiduciary duty of a lawyer is moulded by the terms of the retainer or contractual relationship. However, in our view, the scope of the retainer is to be determined in the first instance on the facts. We have concluded that the 1998 M Corp. retainer involved providing ongoing advice to M Corp. with respect to tax-assisted business opportunities. The majority decision in *Strother* with respect to the scope of the retainer was not as a result of a change in the law as asserted by the Respondent but instead its interpretation of the facts as determined by the trial judge (see paras. 39 to 41).

[80] The Respondent also refers to an aspect of the debate that took place between the Federation of Law Societies of Canada and the CBA Task Force on Conflicts to support the argument that this area of conflicts was an unsettled and, in effect, evolving area of law. The debate between the Federation and the CBA pertained to the differing views of the effect of the "Bright Line" rule. That rule, as we have noted, does not apply in these circumstances.

[81] We have concluded that the scope of the 1998 M Corp. retainer required the Respondent to provide advice with respect to tax-assisted business opportunities including tax-assisted film financing. As set out above, the relationship with a client is both contractual and fiduciary. The contract spells out the scope of the retainer, and the fiduciary obligations apply to that retainer.

[82] The Respondent's fiduciary obligations with respect to that retainer required him to avoid conflicts that would impair his ability and willingness to represent M Corp.

effectively with respect to that retainer. The Respondent did not avoid such a conflict when he agreed in January 1998 to take a financial interest in S Corp. As a result he failed in his fiduciary obligations to M Corp. In addition, he breached his fiduciary obligation in not providing information to M Corp. that was relevant to the retainer.

[83] To the extent that we have not already dealt with the Respondent's arguments, we now turn to the specific allegations in the citation that are before us.

[84] Allegation 2(i) asserts that the Respondent breached his duty of loyalty to M Corp. by failing to provide a material disclosure to M Corp. of his financial interest in a potential commercial enterprise. As we have outlined in our findings of fact, the Respondent obtained a financial interest in what ultimately became S Corp. In many circumstances this may not be a problem. However, the circumstances in which this interest was obtained were unique. This was a tiny market. Few companies were involved in the business of providing tax-assisted film financing. In addition, and more importantly, very few tax lawyers had the knowledge and skill to provide the necessary advice to support this business. On the evidence it is clear that the Respondent was a very important part of M Corp.'s involvement in this activity. M Corp. and its principals had relied on the Respondent's active involvement in their business affairs. For example, the written retainer in 1996 and 1997 required the Respondent to attend weekly meetings with M Corp. representatives to discuss the financing arrangements that they were involved in. No other lawyer at Davis & Co. had that relationship with M Corp. In addition, no other lawyer at that time knew of the Respondent's financial involvement in what ultimately became S Corp. M Corp. should have been given the opportunity to decide whether or not they wished to continue to retain the Respondent and Davis & Co. to act for them under the circumstances. The fiduciary duty of loyalty, including his obligation to be candid with M Corp. with respect to all matters relevant to the M Corp. retainer, required him to advise M Corp. that he had a financial interest in a potential competitor.

[85] Allegation 2(ii) asserts that the Respondent breached his duty of loyalty by failing to advise M Corp. that his previous opinion concerning the effect of the amendments to the *Income Tax Act* on tax-assisted film financing needed to be reconsidered. The Respondent argued that it created a problem with respect to his obligation to S Corp. to maintain confidentiality with respect to the potential new approach to tax-assisted film financing. However, the Respondent agrees that, as a result of the Supreme Court of Canada decision, he should have advised M Corp. that there may still have been life left in the film tax business and that, if they were interested in pursuing film tax shelters, as a result of the conflict, M Corp. should

consult other lawyers. As noted above, only the Respondent, and not the other lawyers at his firm, had the knowledge that there might be life in tax-assisted film financing. That was his particular expertise. However, he did not provide that advice as it was in his financial interest not to do so. He created this conflict himself.

[86] The Respondent also argued that the retainer was finished and that, as a result, he did not need to correct an opinion that was correct at the time. As discussed above, we have found that the retainer, while not the exclusive written retainer that was in place in 1996 and 1997, still required the Respondent to provide advice on tax-assisted business opportunities. However his financial interest in S Corp. resulted in it being in his best interest not to provide that advice to M Corp. It avoided potential competition from M Corp.

[87] Allegation 2(iii) asserts that the Respondent breached his duty of loyalty by failing to advise M Corp. of the favourable Advance Tax Ruling. The Respondent argues that the Ruling was not publicly known until later in 1999. As we have found, while a redacted version of the Ruling was not immediately available, the Ruling became, in effect, public knowledge shortly after the Ruling was issued. Given the Respondent's financial interest in the very attractive retainer that S Corp. entered into with him, it was not in the Respondent's interest to so advise M Corp. As a result he failed in his duty of loyalty, which obligated him to provide advice with respect to tax-assisted business opportunities. It was in his financial interest not to advise M Corp. of this possible tax-assisted business opportunity when the ruling in effect became public knowledge, as we have previously described.

PROFESSIONAL MISCONDUCT

[88] Given our findings, we must consider whether the Respondent's actions constitute professional misconduct.

[89] The citation does not specifically refer to any provisions in the *Legal Profession Act*; however, as we have pointed out, the Canons of Legal Ethics first approved of by the Law Society, our current *Code of Professional Conduct for British Columbia*, and the *Professional Conduct Handbook* in effect at the time during which the Respondent's conduct is under examination, all contain reference to a lawyer's duty to give clients undivided loyalty, full disclosure, and candid advice. As is stated by Gavin MacKenzie in *Lawyers and Ethics: Professional Responsibilities and Discipline*, cited with approval in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph 155;

> In jurisdictions in which professional misconduct is not defined in legislation or rules of professional conduct, not every breach of the rules of professional conduct will necessarily amount to professional misconduct. Conversely, not every act of professional misconduct will be specifically prohibited by the rules.

[90] The test for determining whether or not a lawyer's conduct constitutes professional misconduct is succinctly stated in *Martin* at paragraph 171:

> … The test … is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is a professional misconduct.

[91] That test as laid out has been adopted by other hearing panels and review panels, for example in the decision of *Re: Lawyer 12*, 2011 LSBC 35, and *Law Society of BC v. Liggett*, 2009 LSBC 21.

[92] The *Martin* decision includes the following reasoning at paragraph 154:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[93] The reasoning in *Martin* was cited with approval by a panel of Benchers on review in *Re: Lawyer 12*, at paragraphs 50 and 51:

> 50. *Martin* describes the threshold as gross culpable conduct. That is to say that the culpability is of an aggravated character, and not a mere failure to exercise ordinary care.
>
> 51. If the conduct of the lawyer falls into the latter category then it is not a marked departure from the norm, and thus the lawyer cannot be found to have committed professional misconduct. If the conduct rises to the level of the former category, then there must be a finding of professional misconduct and there is no need to look any further.

[94] In *Law Society of BC v. Lyons*, 2008 LSBC 09, the hearing panel, at paragraph 35, stated:

> In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must

> give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the respondent's conduct.

[95] That reasoning was cited with approval in *Liggett.*

[96] In accepting the retainer, the Respondent placed himself in a fiduciary relationship with M Corp, and obliged himself to provide to M Corp:

(a) undivided loyalty;

(b) full disclosure of any circumstances relevant to his ongoing representation of M Corp.; and

(c) candid advice.

[97] It is clear that the Respondent had a duty of loyalty to M. Corp., and he breached that duty by failing to:

(a) provide material disclosure to M Corp. of his financial interest in a potential commercial competitor;

(b) advise M Corp. that his previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered; and

(c) advise M Corp. of a favourable tax ruling.

[98] M Corp. was a significant client of the Respondent. His professional, fiduciary, relationship with M Corp. spanned approximately six years. As stated previously, M Corp. relied heavily on the Respondent.

[99] The Respondent's failure to provide material disclosure to M Corp. of his financial interest in a potential competitor deprived M Corp. of any opportunity to consider whether it wanted to continue to retain and rely on the Respondent despite that financial interest, or whether it wanted to retain a new solicitor. As stated, the Respondent breached his duty to M Corp. in favour of his own financial interest. The Respondent's failure to provide that disclosure to M Corp. persisted for approximately one year.

[100] In the circumstances of:

(a) the Respondent's relationship with M Corp.;

(b) M Corp.'s level of reliance on the Respondent;

(c) M Corp.'s loss of an opportunity to make a properly informed decision as to whether or not it wished to continue to rely on the Respondent;

(d) the Respondent's favouring his own financial interest over his duty to M Corp.; and

(e) the length of time during which the Respondent failed to make appropriate disclosure to M Corp.,

the Respondent's failure to provide material disclosure to M Corp. of his interest in a potential competitor, as set out in allegation 2(i) of the citation, constitutes professional misconduct.

[101] The Respondent's failure to advise M Corp. that his previous negative legal opinion concerning an amendment to the *Income Tax Act* negatively impacted M Corp.'s opportunity to consider re-entering into the tax-assisted film production business in a timely way. The prospects of the venture in which the Respondent was involved initially appeared to have a small chance of success. However, over time, the venture's prospects improved, and eventually its success was certain. It is reasonable to infer that the Respondent, but for his interest in S Corp., would have advised M Corp. that his earlier opinion needed to be reconsidered. The Respondent's failure to advise M Corp. to revisit his earlier advice took place over a period of time, when:

(a) M Corp. had an ongoing retainer agreement with the Respondent, and continued to look to him for advice on tax-assisted business opportunities; and

(b) the Respondent had a direct financial interest in keeping M Corp. out of the tax-assisted film production business.

[102] In the circumstances, including:

(a) the Respondent's relationship with M Corp.;

(b) M Corp.'s ongoing retainer of the Respondent for advice on matters related to the opinion he should have advised M Corp. to reconsider;

(c) the impact of the Respondent's conduct on M Corp.'s opportunity to re-enter the tax-assisted film production business in a timely way;

(d) the significant period of time during which the Respondent knew or ought to have known his previous opinion needed to be reconsidered; and

(e) the Respondent's favouring his own financial interest in keeping M Corp. out of the tax-assisted films production business,

the Respondent's failure to advise M Corp. that his previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered, as set out in allegation 2(ii) of the citation, constitutes professional misconduct.

[103] The Respondent's failure to advise M Corp. of the favourable tax ruling negatively impacted M Corp.'s opportunity to re-enter the tax-assisted film production business. On the evidence, a competitor of S Corp. heard of the Advance Tax Ruling within two days of its being released, and within approximately four to five months had obtained its own ruling and began marketing its syndication. As stated previously, it was in the Respondent's financial interest to keep knowledge of the favourable tax ruling from M Corp., in direct conflict with his retainer to provide tax advice to M Corp.

[104] In the circumstances, including:

(a) the Respondent's relationship with M Corp.;

(b) M Corp.'s ongoing retainer of the Respondent;

(c) the impact of the Respondent's conduct on M Corp.'s opportunity to re-enter the tax-assisted film production business; and

(d) the Respondent's favouring his own financial interest in keeping M Corp. out of the tax-assisted film production business,

the Respondent's failure to advise M Corp. of the favourable tax ruling, as set out in allegation 2(iii) of the citation, constitutes professional misconduct.

[105] M Corp. paid for, and was entitled to expect, better advice and representation from the Respondent than it received. M Corp. was entitled to expect undivided loyalty, full disclosure, and candid advice from the Respondent. The Respondent failed his client in that respect. The Law Society expects better of its members.