LOYALTY

Lionel Smith[*]

Loyalty has many meanings, within and without the law. There is a difficult question about whether loyalty is a virtue, inasmuch as one can be loyal to many causes, not all of them virtuous. For many jurists, the notion of loyalty evokes the common law's fiduciary relationship and the norms that are particular to that relationship. Although fiduciary relationships represent the common law's most thorough implementation of loyalty, the law also requires loyalty in other situations.

In his study of loyalty, George Fletcher distinguished a minimalist understanding—"do not betray me"—from a maximalist reading—"be one with me." This distinction has echoes all through private and public law. Betrayal is disloyalty. Etymologically, betrayal arises when one person hands another person over: the "-tray" part of the word comes from the Latin verb *tradere*, to deliver, which is also the root of "traitor." But the disloyalty of betrayal, while it can occur in fiduciary relationships, can occur in many other situations as well. An employee who gives their accomplice information about how to break into the warehouse is disloyal to the employer, in a way that the accomplice is not. The employment relationship, however, is not generally a fiduciary one. The law's implementation of loyalty in this context—minimalist loyalty—is through contractual obligations.

In the common law, this would probably be via an implied term. The *Civil Code of Québec* imposes on the employee an obligation to "act faithfully and honestly" (article 2088); in the French version, "*avec loyauté*." This is a text of law that demands loyalty outside of a fiduciary relationship; an example of a legal implementation of minimalist loyalty. While the *Code* stipulates that spouses owe each other fidelity/*fidélité*, the text of article 2088 suggests an equivalence between loyalty and faithfulness—and not only in this article. The *Code*, in its French text, contains four occurrences of an *obligation de loyauté*. Apart from the employee, the

* Sir William C. Macdonald Professor, Faculty of Law, McGill University; Visiting Professor, Faculty of Law, Oxford University. The original version of this entry was adopted as part of the *McGill Companion to Law* at a meeting in February 2015.

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others are in relationships that the common law considers to be fiduciary: the director of a legal person, the administrator of the property of another (which in Quebec includes the trustee), and the mandatary. In English, the *Code* uses the word "loyalty" only for the director; like the employee, the administrator and the mandatary are required to act "faithfully." The implication that loyalty and faithfulness are synonymous is supported by the observation that the words are often used to define each other: loyalty is faithfulness, and vice versa. Etymologically there is some distance between them: "faithfulness" comes from *fides*, which also gives us "fiduciary" and "confidence"; it connotes a personal relationship of trust. "Loyalty" shares with "legality" a root in *leges*, and speaks therefore more to compliance with a set of norms.

Minimalist loyalty forbids betrayal. There are many ways to betray someone. But it remains wrongful in a particular way; a stranger who hurts or steals does not betray. A person can only be betrayed by someone who holds some power over them, coupled with an expectation, generated by the betrayer's own conduct or position, that this power will not be used against the one betrayed. This power, of course, can arise in many ways; it may be emotional or affective as well as juridical. Because betrayal is a kind of disloyalty, and because loyalty is linked for many jurists to fiduciary relationships, the mere possibility of betrayal may suggest the presence of such a relationship. But the distinction between minimalist and maximalist loyalty shows that such an inference is unreliable: both morality and the law require loyalty in some relationships that are not fiduciary. This may explain some of the disputes and disagreements among common lawyers about the proper extension of the category of fiduciary relationships.

In fiduciary relationships, the fiduciary holds power of a more significant kind: not just power *over* another person, but power held *for* that other person. Fiduciary relationships are those in which the fiduciary *manages* part of the beneficiary's life, in the sense that the former can make authorized choices, for and on behalf of the latter, that a person typically makes on their own account: what contracts to make, what investments to buy, what legal or medical procedures to follow. There are many situations in which one person is empowered to make choices that will affect the interests of another, without the creation of a fiduciary relationship: a creditor may demand repayment of a loan, and an employer may dismiss an employee. A crucial feature of the fiduciary relationship is that the fiduciary holds powers not as wealth, not to do with them as they please, but rather for the better flourishing of the beneficiary. This situation is ripe for disloyalty in the form of betrayal, but it also explains the law's embrace of a wider conception of loyalty, evoking Fletcher's idea of being "one with another." The fiduciary must do more than not betray.

The fiduciary can only use their fiduciary powers in what they believe to be the best interests of the beneficiary.

This requirement of the loyal use of fiduciary powers might be described as the governance aspect of fiduciary relationships. It manifests itself in a judicial willingness to review the exercise of such powers, at the instance of beneficiaries. When powers are used for the wrong reasons, their exercise can be avoided, or annulled. And this feature opens the door to one of the most striking features of fiduciary governance, which is the set of highly sensitive norms regarding conflicts of interest. Discourse about conflicts is often tied to concerns about corruption. This link is potentially misleading: the rules about conflicts certainly catch those who are corrupt, but they are much wider. They are so wide that it is not true to say, as a general proposition, that a person who is in a conflict has done something wrongful.

The rules about conflicts aim to ensure loyalty in the context of fiduciary governance. They do this by forbidding the exercise of fiduciary powers in situations where the fiduciary may be unable to use those powers loyally—that is, as the law requires. Conflicts are situations in which the fiduciary is subjected to motivational pressures that may distract them from focusing on the best interests of the beneficiary. One such situation is where the fiduciary's own interests are in play: this is a conflict of self-interest and duty. But the rule is equally strict in a conflict of duty and duty: where the fiduciary stands in a fiduciary relationship to some other beneficiary. Here there is no possibility of benefit to the fiduciary. This shows that the norm's focus is on the *beneficiary's* side of the relationship: the beneficiary is entitled to the single-minded loyalty of the fiduciary, and this risks being absent whether the fiduciary might be distracted by their own interests or by paying attention, selflessly, to the interests of some other beneficiary. In other words, whether or not the fiduciary is behaving in a self-seeking way is actually irrelevant.

The legal rules about conflicts have deep roots, reaching back to norms in Roman law governing lay judges and guardians. In the common law, they were articulated in the context of eighteenth century trust law. They reveal a deep understanding of human psychology: the human brain cannot reliably and systematically exclude some factors from the decision-making process. Not only lawyers, but ethicists and behavioural psychologists, are aware of this impossibility, and literature about conflicts is developing in both of these fields.

The rules about conflicts are characteristic of private law fiduciary relationships. These relationships also feature another distinctive legal norm, which is the rule against unauthorized profits. This is not tied so directly to governance in the sense of loyal decision making, but flows instead from the relationship as one in which the fiduciary acts *for another*.

From this, it follows straightforwardly that any advantage derived from the role—whether in the form of legal rights, or information, or otherwise—is held for the beneficiary. Although the acquisition of a profit often coincides with a conflict of interest, the norms are independent of one another: unauthorized profits have to be surrendered even if the interests of the fiduciary were aligned with those of the beneficiary.

Often, fiduciaries are thought of as people who are required to be loyal to another person: the beneficiary. Sometimes, however, their loyalty must be directed not to a person, but to an abstract purpose. This is the case in relation to dispositive discretions that trustees hold, such as a power to add beneficiaries. Charitable trusts, which are widely seen to belong more to public law than private law, are understood to be "purpose trusts." This more abstract form of loyalty illuminates the way in which fiduciary norms are also applied to the holders of public powers. A judge of the Supreme Court of Canada, on taking office, swears an oath " ... that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me." There is faithfulness again, but without any obvious answer to the question: to whom, or to what? A judge is certainly not bound to act in the interests of the litigants; but their judicial powers are not held for their own interests. A judge is required to exercise their powers in the public interest, in the interests of justice. A judge who acted in another way would be unfaithful and disloyal, and would betray the public trust. Of course, in this more public law context, the questions of how loyalty is to be enforced, and who may exact it, must be answered differently than they are in private law.

The relationship between fiduciary governance and conflicts of interest reveals itself in public law as well: for the same reasons that fiduciaries should not exercise their powers in a conflict, judges should not exercise theirs in a conflict. Again, the rule goes far beyond a narrow concern with corruption. It is about the inscrutability of reasons for decisions: the impossibility for even a good faith decision-maker to know exactly what factors influenced their decision. Judges, like fiduciaries, must use their powers loyally; this means using them for the correct purposes. It is to protect this requirement that we say that they should not use their powers in a conflict situation. If they do, then like fiduciaries, they will find that their use of their powers may be set aside.

And this is why concerns regarding conflicts go well beyond legal norms. Whenever someone is required to exercise judgment in an unselfish way—required by law or by an extralegal norm—there is a natural instinct that conflicts must be avoided, because conflicts imperil loyalty. This is why there may be a concern about conflicts in relation to a committee to award a scholarship, just as much as when a Minister of the Crown is involved in governmental policy decisions.

The fiduciary norm against unauthorized profits also finds its echo in the public sphere. A wide range of norms, some legal and some non-legal, operate either to forbid the receipt of benefits tied to the holding of public powers, or at least to require their public disclosure. Again, the reasons are parallel: when a power is held so that it can be used unselfishly, it should not be possible to extract a private benefit from the situation.

Both the wide and the narrow ideas of loyalty that Fletcher described relate to acting unselfishly: acting for another or for others. Indeed, it seems to be part of what loyalty means, that it be defined in opposition to self-interest. True, it is possible to think about being loyal to oneself: "to thine own self be true," said Polonius to his son Laertes in *Hamlet*. But even this poetic formulation seems to posit unselfish behaviour by one part of a divided self: who is being enjoined to be true to whom? If the familiarity of Polonius' injunction shows its insightfulness, it must be because it is not always easy to be true to oneself; sometimes one is tempted to act selfishly, even where the other is oneself. It may be that every act of loyalty toward another is also an act of loyalty, and lawfulness, to oneself. If so, the implication is that every betrayal is a betrayal of oneself.

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