

Fiduciary Aspects of Misfeasance in a Public Office

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Whether public officers hold their powers in a fiduciary capacity has long been a subject of debate. The author does not focus directly on that debate, but takes the position that whether the notion of public fiduciary duties is interpreted literally or metaphorically, useful parallels can be drawn between discretionary decision making in public law and fiduciary duties in private law. The notion that public officers hold their powers in a fiduciary capacity can, in her view, help to refine the tort of misfeasance in a public office.

The paper begins by describing the main areas of conceptual overlap between the tort of misfeasance in a public office and public fiduciary duties. The author then suggests the ways in which the principles underlying them can be mutually enlightening. First, she argues that the misfeasance tort can serve as an enforcement mechanism for notional public fiduciary duties, by providing a cause of action for anyone harmed by a bad faith breach of those duties. Second, she argues that looking at the tort's elements through a fiduciary lens can help to identify who qualifies as a public officer, what type of misconduct can ground an action, and how the public fiduciary duties that she sees as being owed to individuals can be balanced with those owed to the public at large.

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Introduction

There is a long-standing and ongoing debate about the parallels between discretionary decision making in public law and in the private law of fiduciaries. In both areas, the ability to make decisions in what is sometimes described as “absolute discretion” is in fact limited by a requirement of good faith. Depending on the context, this may mean that the decision must be reasonable and that only proper considerations are taken into account. The similarities between the two types of decision making have led some to argue that public officers hold their powers in a fiduciary capacity—an argument that could have far-reaching implications for the rights and remedies of individual citizens against government.

The purpose of this paper is not to rehash or defend the notion that public officials hold their powers in a fiduciary capacity. Rather, it is to explore how the debate can help provide a theoretical grounding for the tort of misfeasance in a public office, which has experienced a resurgence in recent years. Part I of the paper gives an overview of that tort and of some key concepts in fiduciary law, and outlines the main areas of conceptual overlap between the two. Part II explores how the unique structure of the misfeasance tort, as a hybrid of tort law and administrative law, can shed light on the fiduciary aspects of public decision making, particularly by providing an enforcement mechanism that is otherwise lacking. Part III explains how looking at misfeasance through the lens of

fiduciary law may help to determine the appropriate scope of the tort, and more specifically, the types of officers and types of misconduct to which it should apply.

I. Some Key Concepts Underlying Misfeasance in a Public Office and Fiduciary Duties

A. Misfeasance in a Public Office

Although the roots of misfeasance in a public office can be traced to the well-known case of *Ashby v White* in 1703,¹ the modern form of the tort has been restated in three early twenty-first century cases: *Three Rivers District Council v Governor and Company of the Bank of England (No 3)*,² *Odhavji Estate v Woodhouse*,³ and *Watkins v Home Office*.⁴ From these cases, the elements of the tort can be summarized as follows.⁵ First, the defendant must be a public officer. Second, the defendant must have engaged in some deliberately unlawful conduct. Third, he or she must have acted in bad faith, either through targeted malice (i.e., the deliberate misuse of a power in order to harm a citizen) or through “knowledge” (i.e., knowledge that the conduct is unlawful and that the plaintiff will likely be harmed).⁶ The requirement of bad faith is meant to protect public officers from being sued for negligence or errors of judgment.⁷ Finally, the plaintiff must have suffered material damage. As Lord Bingham explained in *Watkins*, the “primary role of the law of tort is to provide monetary

1. (1703), 92 ER 126 (KB), rev'd (1706), 92 ER 710 HL (Eng) (the case involved the wrongful rejection of Ashby's vote by the defendant returning officer, and is the most famous source of the maxim *ubi ius, ibi remedium*).

2. (2001), [2003] 2 AC 1 HL (Eng) [*Three Rivers*].

3. 2003 SCC 69, [2003] 3 SCR 263 [*Odhavji Estate*].

4. [2006] UKHL 14, rev'g [2004] EWCA Civ 966 [*Watkins*].

5. See generally GHL Fridman et al, *The Law of Torts in Canada*, 3d (Toronto: Carswell, 2010), ch 37.

6. The “knowledge” branch of the tort also includes recklessness. See *Three Rivers, supra* note 2 at 192, Lord Steyn.

7. See Erika Chamberlain, “The Need for a ‘Standing’ Rule in Misfeasance in a Public Office” (2007) 7:2 OUCLJ 215 at 220–21 [Chamberlain, “The Need for a ‘Standing’ Rule”].

compensation for those who have suffered material damage rather than to vindicate the rights of those who have not".⁸

Although it was largely unused for most of the twentieth century, the tort of misfeasance in a public office has had a rapid renewal in recent decades. Claims have been brought against a broad range of officials for a wide variety of alleged misconduct, including: a Canadian Prime Minister's opposition to a Canadian citizen's peerage;⁹ refusing to provide individualized services to children with special needs;¹⁰ passing invalid zoning restrictions;¹¹ refusing to provide reasons for disapproving an appointment as a horse racing official;¹² revoking a licence to import turkeys into England;¹³ providing misleading information on the legality of a tax-avoidance scheme;¹⁴ and failing to provide a prison inmate with properly fitting shoes.¹⁵ As this list illustrates, not all modern misfeasance cases involve conduct that one would intuitively label as "abusive" or in bad faith. While many claims are struck out in preliminary stages, this is generally done on an ad hoc, case-specific basis. The courts have neither thoroughly explored the underlying rationale for the tort nor explained why it should encompass certain types of claims and not others.

The next section considers whether the fiduciary-like nature of public powers can provide some much-needed theoretical underpinning for the resurgent tort of misfeasance in a public office.

8. *Supra* note 4 at para 9.

9. See *Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215, 199 DLR (4th) 228 (CA) (the Prime Minister intervened with the Queen to oppose Black's appointment on the basis of the Nickle Resolution of 1919, which requested that the King not confer titles on Canadian subjects).

10. See *L(A) v Ontario (Minister of Community and Social Services)* (2006), 83 OR (3d) 512, 274 DLR (4th) 431 (CA).

11. See *Dunlop v Woolabro Municipal Council*, [1982] AC 158 PC.

12. See *O'Dwyer v Ontario (Racing Commission)*, 2008 ONCA 446, 293 DLR (4th) 559 [*O'Dwyer*].

13. See *Bourgoign SA and Others v Ministry of Agriculture, Fisheries and Food*, [1986] 1 QB 716 (CA) [*Bourgoign*].

14. See *Longley v MNR*, 176 DLR (4th) 445, [1999] 11 WWR 502 (BCSC); *Commissioner of Inland Revenue v Reid and Ors*, [2007] NZCA 576.

15. See *McMaster v Canada*, 2008 FC 1158, 336 FTR 92 (Prothonotary), aff'd 2009 FC 937, 352 FTR 225.

B. The Concepts of Public Trust and Public Fiduciary Duty

The notion that public officers hold their powers on trust or in a fiduciary capacity has a lengthy pedigree. It can be traced at least as far back as Cicero's *De Officiis*, which set out two precepts of government:

The one requires, that [those who manage the state] protect the interest of their citizens; that their whole conduct bear this reference, without ever implying a regard to their own advantage. The second requires, that they protect the whole body public alike, and support no single party to the prejudice of the rest. The charge of the state, like that of a guardian, is to be conducted for the benefit of those who are given in trust, not of those to whom it is entrusted.¹⁶

This description of government looks very much like a modern fiduciary duty. The public officer is not to act in her own best interest, but for those of the citizens. Further, the public officer must treat all citizens with an even hand.

Similarly, in his *Second Treatise of Government*, John Locke saw government in terms of the people entrusting the state to exercise certain powers on their behalf:

Though in a constituted commonwealth . . . there can be but one supreme power which is the legislative, to which all the rest are and must be subordinate, yet, the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them; for all power given with trust for the attaining an end being limited by that end; whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited and the power devolve into the hands of those that gave it.¹⁷

In Locke's portrayal, the people act as both settlor and beneficiary of the public trust and can revoke the arrangement if the legislature fails to act in their best interests. In addition, there is a clear limit on the purposes for which the government may exercise its powers.

More recently, the most persistent writer on the concept of public fiduciary duties has been Australian Justice Paul Finn. Finn first introduced the concept in his seminal treatise *Fiduciary Obligations*,

16. *The Treatise of Cicero, De Officiis; or, his Essay on Moral Duty*, translated by William McCartney (Edinburgh: Bell & Bradfute, 1798) at Book I, ch 25, 64–65.

17. John Locke, *The Second Treatise of Government*, ed by Thomas P Pardon (New York: The Liberal Arts Press, 1952) at para 84.

where he noted the close resemblance between fiduciaries and public officers.¹⁸ He explained that a public officer, “while entrusted with duties and discretions by statute or statutory instrument, discharges those duties and exercises those powers in the interests of the public”.¹⁹ Further, in a 1995 paper, “The Forgotten ‘Trust’: The People and the State”, Finn reviewed the ways in which the apparently fiduciary obligations of public officers are policed through criminal law, tort and equity.²⁰ He also highlighted the similar roots of the principles of administrative law and fiduciary law: “Beyond the trust, beyond the company, the most fundamental of fiduciary relationships in our society is that which exists between the community (the people) and the State and its agencies.”²¹ Drawing primarily on Australian law, Finn showed that the courts have, to some extent, recognized the sovereignty of the people. For example, in *Australian Capital Television Pty Ltd & New South Wales v Commonwealth*, Mason J explained,

The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives.²²

Finn went on to explain the parallels between the private law of fiduciaries and the notion that public officers hold their powers in a fiduciary capacity. Specifically, both fields of law deal with the same “twin concerns”: the propriety or legality of the exercise of power, and the standard of conduct that applies to those who hold that power.²³ The

18. PD Finn, *Fiduciary Obligations* (Sydney: The Law Book Company, 1977) at 14.

19. *Ibid.*

20. PD Finn, “The Forgotten ‘Trust’: The People and the State” in Malcolm Cope, ed, *Equity: Issues and Trends* (Sydney: The Federation Press, 1995) 131 [Finn, “The Forgotten ‘Trust’”].

21. *Ibid* at 131. Finn’s review demonstrates, however, that the link between the two bodies of law has been much more evident in the United States than in the English Commonwealth. In particular, the notion of popular sovereignty sits uneasily within the English constitutional monarchy and is much better suited to the republican system of the United States. *Ibid* at 133. But see William Rich, “Converging Constitutions: A Comparative Analysis of Constitutional Law in the United States and Australia” (1993) 21:2 Fed L Rev 202.

22. [1992] HCA 45 at para 37.

23. Finn, “The Forgotten ‘Trust’”, *supra* note 20 at 140.

rules that have historically regulated the exercise of fiduciary powers are mirrored in many administrative law concepts. Finn suggests that “the ordered development of both bodies of law could well be enhanced if their community of purpose was more openly recognised and exploited”.²⁴ There are also some areas where private and public fiduciary obligations may overlap. For instance, a public officer who misuses the office to obtain a personal profit has breached a duty of loyalty to the public (which may lead to criminal liability) and must also account for the profit as a constructive trustee. Such was the case in *Attorney General for Hong Kong v Reid*, where the defendant prosecutor had taken bribes to obstruct certain criminal prosecutions.²⁵ The Privy Council found that he held the bribe monies on trust for the Crown and had to account for their increase in value after he invested them in three properties. For Finn, such an overlap of public and private fiduciary principles is no mere coincidence, but demonstrates that public obligations are essentially trust-like in character.

Both Locke and Finn grounded the fiduciary obligations of public officers in the concept of popular sovereignty, that is, in the notion that the people have surrendered certain powers over to the state to act on their behalf. This creates a relationship similar to agency or to the fiduciary obligations owed by company directors. In theory, since the government derives its powers from the public, the public is entitled to rescind the arrangement if the government breaches its trust. The notion of popular sovereignty has held considerable rhetorical appeal in the United States.²⁶ Yet, as Finn notes, popular sovereignty “was and remains a potent fiction and one which people in effectively operating democratic societies are in varying degrees prepared to embrace and to do so with a willing suspension of disbelief”.²⁷ The lack of enforceability was underscored by

24. *Ibid* at 141.

25. (1993), [1994] 1 AC 324 (PC) [*Reid*]. Reid was convicted under the *Prevention of Bribery Ordinance* and was found to be in breach of the fiduciary duty he owed to the Crown. See also *Reading v Attorney General*, [1951] AC 507 HL (Eng).

26. See especially Pa Const of 1776.

27. Paul Finn, “Public Trusts and Fiduciary Relations” in Ken Coghill, Charles Sampford & Tim Smith, eds, *Fiduciary Duty and the Atmospheric Trust* (London, UK: Ashgate, 2012) 31.

A.V. Dicey, who stressed that popular sovereignty was a political concept that could not give rise to a trust in any legal sense.²⁸

In any event, popular sovereignty is not the only theoretical basis for the notion that public officers hold their powers in a fiduciary capacity. Evan Fox-Decent has argued that the state's fiduciary role arises from its assumption of power and from the vulnerability of citizens to that power.²⁹ Since private citizens have no authority to administer, adjudicate or otherwise vindicate rights, these powers must necessarily be exercised by the state. Fox-Decent explains:

Legal subjects, in other words, are in a position of *de facto* and *de jure* dependence on the state for the provision of legal order. This dependence reflects our vulnerability to the state, which itself arises from the state's assumption and exercise of the powers necessary to govern through law and legal institutions. It is this fact situation to which the fiduciary principle responds.³⁰

Fox-Decent has expanded on this argument in his recent treatise, *Sovereignty's Promise: The State as Fiduciary*.³¹ As discussed below, he argues for the broader acknowledgment of public fiduciary obligations and is critical of approaches that restrict the application of the fiduciary principle to orthodox property-holding categories.

C. Established Categories of the Crown's Fiduciary Duties

Both popular sovereignty and Fox-Decent's argument rely on a *general* assumption of power by the state and the *general* vulnerability of citizens to that power. This contrasts with the Supreme Court of Canada's treatment of alleged public fiduciary duties in recent years, which has focused on the undertakings and vulnerabilities that arise in *specific* relationships. As McLachlin CJC wrote in *Alberta v Elder Advocates of*

28. AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: Macmillan & Co, 1959). "Nothing is more certain than that no English judge ever conceded . . . that Parliament is in any legal sense a 'trustee' for the electors. Of such a feigned 'trust' the courts know nothing." *Ibid* at 75.

29. Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31:1 Queen's LJ 259.

30. *Ibid* at 308.

31. Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011) at 111 [Fox-Decent, *Sovereignty's Promise*].

Alberta Society, “Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties.”³² The Supreme Court has also stressed that a fiduciary obligation will only arise where the government power “affects a legal or significant practical interest”,³³ and that “a strong correspondence with one of the traditional categories of fiduciary relationship . . . is a precondition to finding an implied fiduciary duty on the government”.³⁴ These limitations are reflected in the established categories of the Crown’s fiduciary duties as set out below.

Because the Supreme Court has been faced with claims for “true” fiduciary obligations (i.e., those enforceable in equity), the Court has legitimately focused on the particular undertakings, vulnerabilities and interests that inform the relationship between the parties. As discussed below, some of the factors considered by the Court in that regard are helpful in assessing the appropriate scope of misfeasance in a public office and particularly helpful in developing rules to keep the tort within reasonable bounds. At the same time, the purpose of this paper is not to argue that the misfeasance tort overlaps completely with the idea of public fiduciary duties, but only to discuss how fiduciary principles and misfeasance in a public office can be mutually enlightening.

Canadian law recognizes that the Crown owes fiduciary duties to at least two specific groups:³⁵ Aboriginal peoples³⁶ and disabled veterans whose pension funds the Crown manages.³⁷ The category of fiduciary

32. 2011 SCC 24 at para 33, [2011] 2 SCR 261 [*Elder Advocates*].

33. *Ibid* at para 51.

34. *Ibid* at para 47.

35. A third area of fiduciary obligations is toward francophone minorities outside of Quebec. See *Commission Scolaire Francophone du Yukon No 23 c Procureur Générale du Territoire du Yukon*, 2011 YKSC 57, 205 ACWS (3d) 952, rev’d 2014 YKCA 4 (available on WL Can) (new trial ordered on account of reasonable apprehension of bias by the trial judge). The case involved a claim that the territorial government had mismanaged federal funds that were intended to support French-language schools. For discussion, see F Larocque, M Power & M Vinclette, “L’élargissement du concept d’obligation fiduciaire au profit des communautés de langue française en situation minoritaire dans leurs relations avec l’État” (2012) 63 UNBLJ 363.

36. See *Guerin v The Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321.

37. See *Authorson v Canada (Attorney General)* (2002), 58 OR (3d) 417 at paras 73–74, 215 DLR (4th) 496 (CA), rev’d on other grounds 2003 SCC 39, [2003] 2 SCR 40 (at the Supreme Court of Canada, the Crown conceded that it owed a fiduciary duty, so the issue was not argued before or decided by the Court).

obligations owed to Aboriginal peoples has consistently been described as *sui generis* and has been restricted to situations where the Crown has assumed control over a cognizable interest (such as lands that a Band has surrendered to the Crown for lease or sale to a third party).³⁸ Fiduciary obligations owed to disabled veterans respecting their pensions are a fairly classic example of asset management. Thus, both recognized classes of fiduciary duties owed by the Crown closely resemble traditional trust relationships (and have been described by the courts as “trust-like”), so their governing principles cannot be generalized to establish a broader class of public fiduciary obligations. Indeed, in *Elder Advocates*, McLachlin CJC explained that the Crown’s unique position makes it an unlikely candidate for fiduciary obligations: “The Crown’s broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare.”³⁹

Not surprisingly, Fox-Decent is critical of the Canadian courts’ general unwillingness to expand public fiduciary duties beyond traditional property-holding arrangements. He identifies the “fundamental mistake” of that view as supposing “that the content of the fiduciary obligation is necessarily the private law duty of loyalty in which the fiduciary acts solely on behalf of a discrete beneficiary”.⁴⁰ In his view, this overlooks the not uncommon situation in private law where a fiduciary is required to act impartially among multiple classes of beneficiaries. In Fox-Decent’s words, “the fiduciary must treat the beneficiaries of different classes fairly or impartially, and she must exercise her discretion reasonably, with due regard for the interests of each person subject to her power”.⁴¹ Therefore, he argues, a fiduciary obligation is not precluded simply because a public official has to balance the public interest against the interests of an individual: fiduciary obligations are not concerned with “loyalty *per se*”, but with an obligation to act fairly and reasonably “in accordance with the other-regarding purposes for which fiduciary power is held or conferred”.⁴²

38. See *Wewakum Indian Band v Canada*, 2002 SCC 79 at para 85, [2002] 4 SCR 245.

39. *Elder Advocates*, *supra* note 32 at para 44. See also *Harris v Canada*, 2001 FCT 1408, [2002] 2 FC 484 [*Harris*].

40. Fox-Decent, *Sovereignty’s Promise*, *supra* note 31 at 166.

41. *Ibid*. See also *Edge and others v Pension Ombudsman and another*, [2000] Ch 602 (CA).

42. Fox-Decent, *Sovereignty’s Promise*, *supra* note 31 at 167.

Fox-Decent's argument is instructive in determining the appropriate scope of misfeasance in a public office. It is not necessary in these cases to find that the public officer holds his duties in a strictly fiduciary capacity because, as discussed below, the officer's obligations may be fiduciary in a more metaphorical sense. Furthermore, if we consider the officer's powers as being held in a form of public trust, then it is entirely legitimate to suggest that the public interest must play a part in the officer's decision making, and that good faith is critical to the legitimate performance of his duties.

D. Public Trust as Metaphor

Notwithstanding the views of the authors referred to above, the notion of public fiduciary duties is most often cast in metaphorical terms. As Frederic William Maitland wrote, "There is metaphor here. Those who speak thus [of public trusts] would admit that the trust was not one which any court could enforce, and might say that it was only a 'moral' trust."⁴³ This is demonstrated in English law by the distinction between trusts in the "strict" or "lower" sense and trusts in the "higher" sense. In *Tito v Waddell (No 2)*, for example, Megarry VC explained that "the term 'trust' is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction, but also other relationships such as the discharge . . . of the duties or functions belonging to the prerogative and the authority of the Crown".⁴⁴ Trusts in the higher sense impose political or moral obligations, but unlike conventional trusts, they are not enforceable in the courts of equity. According to Megarry VC, the distinction between the two types of trust is a matter of construction, looking at the entirety of the relevant instrument and its context. But he admitted that there is "a certain awkwardness in describing as a trust a relationship which is not enforceable by the courts".⁴⁵

43. Frederic William Maitland, "Trust and Corporation Note" in HAL Fisher, ed, *The Collected Papers of Frederic William Maitland* (Cambridge, UK: Cambridge University Press, 1911) vol 3 at 403.

44. [1977] 1 Ch 106 at 216. See also *Kinloch v Secretary of State for India* (1882), 7 App Cas 619 HL (Eng).

45. *Ibid.*

It seems fair to say that most obligations that form the basis of potential claims for misfeasance in a public office are only trusts in the higher sense, and are therefore not enforceable in the courts as a matter of equity. Nevertheless, there is value in examining the conceptual parallels between discretionary decision making by public officials and private law fiduciaries. In particular, the concept of good faith is fundamental to both. This concept can be given more substantial content in both spheres if a common (or at least overlapping) jurisprudence is developed.

Along these lines, Lorne Sossin has sought to identify the principles common to fiduciary obligations and administrative decision making.⁴⁶ In his view, administrative decisions ought not to be measured solely against the concept of legality (i.e., by asking whether a decision is *intra* or *ultra vires*), but against a broader “equitable duty of reasonableness”.⁴⁷ This broader duty would consider the context of the particular decision, including any relevant statutory provisions, the relationship between the public official and the affected parties, and the relative vulnerability of those parties. Sossin calls this a “political trust”, and describes it as

an important middle-point on the spectrum of public trust obligations . . . existing somewhere between the high point of fiduciary obligations (which will give rise to . . . rights enforceable through civil actions) and the low point of discretionary powers (which will give rise to . . . constraints such as reasonableness enforceable on judicial review).⁴⁸

Thus, the fact that a political trust does not give rise to enforceable rights does not mean that it has no impact on the obligations of administrative decision makers. A political trust, in Sossin’s view, helps to flesh out the equitable obligation of public officials to make decisions that are “not only lawful, but also just”.⁴⁹

Such an analysis can help uncover the theoretical foundations of the tort of misfeasance in a public office. The misfeasance tort focuses not only on the lawfulness of the public officer’s conduct, but also on her state of mind. An officer may perform an act that is lawful on its face but that, if performed for the purpose of harming a citizen, can give rise to liability in

46. See e.g. Lorne Sossin, “Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law” (2003) 66:1 Sask L Rev 129.

47. *Ibid* at 182.

48. *Ibid* at 163.

49. *Ibid* at 182.

misfeasance. Further, as discussed in more detail below, the misfeasance tort serves an important function in the enforcement of the fiduciary-like obligations owed by public officers: although those obligations may not be enforceable in the courts of equity, they may be actionable in tort if their breach leads to material damage. The tort of misfeasance in a public office therefore complements the efforts of administrative law by providing a meaningful deterrent to the misuse of public power.

E. The Overlap of Fiduciary Law and Misfeasance in a Public Office

Generally speaking, the debate about the fiduciary nature of public obligations has taken place in the context of administrative or public law, with only minor reference being made to its application in other areas (criminal law, equity and tort). The tort of misfeasance in a public office is often raised as an afterthought or footnote—as a form of redress that is potentially useful but rarely pursued. However, a review of decided cases on that tort provides fairly striking evidence that its underlying basis is in fiduciary law. The language used to describe public law decision making could easily have been transposed from the law of equity. For instance, in *Smith v East Elloe Rural District Council*, the plaintiff alleged that the defendant council had wrongfully procured an order for the compulsory purchase of her property.⁵⁰ Lord Radcliffe explained that it would be an abuse of power to procure such an order for improper purposes:

[Statutory] powers are not conferred for the private advantage of their holders. They are given for certain limited purposes, which the holders are not entitled to depart from: and if the authority that confers them prescribes, explicitly or by implication, certain conditions as to their exercise, those conditions ought to be adhered to. It is, or may be, an abuse of power not to observe the conditions It is an abuse of power to exercise it for a purpose different from that for which it was entrusted to the holder, not the less because he may be acting ostensibly for the authorized purpose. Probably most of the recognized grounds of invalidity could be brought under this head: the introduction of illegitimate considerations, the rejection of legitimate ones, manifest unreasonableness, arbitrary or capricious conduct, the motive of personal advantage or the gratification of personal ill-will.⁵¹

50. [1956] 1 AC 736 HL (Eng).

51. *Ibid* at 767–68.

In the same vein, in the foundational Canadian case of *Roncarelli v Duplessis*, the defendant Premier of Quebec had ordered the permanent revocation of the plaintiff's liquor licence in order to punish him for furnishing bail for his fellow Jehovah's Witnesses (who had been arrested for distributing leaflets that were considered offensive to the province's largely Roman Catholic population).⁵² In concluding that the Premier's actions amounted to bad faith, Rand J wrote:

[T]he grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.⁵³

Similar language has been used to explain the courts' supervision of fiduciary discretion. Although the courts generally will not second-guess a fiduciary's decisions, they will interfere if the evidence shows that the fiduciary exercised his discretion in bad faith.⁵⁴ For example, in *Fox v Fox Estate*, the Ontario Court of Appeal removed an executrix who had exercised a power of encroachment in bad faith because she was motivated by disapproval of her son's (the beneficiary's) marriage outside the Jewish faith.⁵⁵ Justice Galligan explained that bad faith was broader than the traditional concept of fraud on a power, and included decisions

52. [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli* cited to SCR].

53. *Ibid* at 140.

54. See *Gisborne v Gisborne* (1877), 2 App Cas 300 HL (Eng); *Klug v Klug*, [1918] 2 Ch 67 (Div); *Re Hastings-Bass*, [1975] Ch 25 (CA).

55. (1996), 28 OR (3d) 496, 88 OAC 201 (CA). The power of encroachment was exercised in favour of the testator's grandchildren. The Court acknowledged that it would be legitimate to exercise the power if motivated by concern for the children's welfare. However, the trial judge had found that the primary motivation for exercising the power was to deny the son his inheritance because he had married a Gentile. *Ibid* at para 7.

that were influenced by extraneous matters.⁵⁶ Accordingly, the executrix's exercise of discretion was set aside.

To the same effect, while the courts will not generally dictate how a public officer should exercise his discretion, they will reverse a decision made in bad faith. This occurred in the American case of *Driscoll v Burlington-Bristol Bridge Co*, where the Bridge Commissioners failed to exercise independent judgment in the sale of two bridges.⁵⁷ Describing their office as a public trust, and indicating that the "administration of government ought to be directed for the good of those who confer and not of those who receive the trust",⁵⁸ Freund J of the New Jersey Superior Court rescinded the transaction and ordered the commissioners to account for their receipts and disbursements.⁵⁹ Significantly, Freund J treated the Commissioners in the same manner as "true" trustees, explaining, "Public officers are obligated, *virtute officii*, to perform their duties honestly, faithfully, and to the best of their ability, and to bring to the discharge of their duties that prudence, caution and attention which careful men usually exercise in the management of their own affairs."⁶⁰ This reasoning applies the same standard of conduct to public officers that applies to private law trustees.⁶¹

As with the standard of care, the notion of bad faith is described almost identically in public law and fiduciary law. In an influential article on private law controls on the exercise of trustees' discretion,⁶² Maurice Cullity categorized the various criteria that might be encompassed within the notion of bad faith. These include: acting for a purpose that is extraneous to that for which the power was conferred; failing to consider whether to exercise discretion, based on a review of all relevant matters; deciding in an arbitrary manner; taking irrelevant considerations into account; making a decision that is so unreasonable "that no reasonable

56. Interestingly in terms of the public/private overlap, Galligan JA was also willing to set aside the exercise of discretion on the basis that it was contrary to public policy to base such a decision on the grounds of race or religion. *Ibid* at para 18.

57. 77 A (2d) 255 (Super Ct NJ 1950).

58. *Ibid* at 265.

59. *Ibid* at 272.

60. *Ibid* at 265–66.

61. See *Fales v Canada Permanent Trust Co* (1976), [1977] 2 SCR 302, 70 DLR (3d) 257.

62. Maurice Cullity, "Judicial Control of Trustees' Discretions" (1975) 25:2 UTLJ 99.

man could have arrived at [it]”;⁶³ acting imprudently; and not treating beneficiaries with an even hand. Courts have also said that they will intervene where a fiduciary exercises a power “capriciously”, that is, for reasons that “could be said to be irrational, perverse or irrelevant to any sensible expectation of the settlor”.⁶⁴ This list overlaps substantially with the limitations on the exercise of discretion by public officers, as demonstrated in the *East Elloe* and *Roncarelli* cases discussed above.

In this respect, James Spigelman CJ of the Supreme Court of New South Wales, writing extrajudicially in 1999, called for the recognition of what he termed “institutional law”, that is, a set of rules which would apply to the exercise of power by various bodies, whether public officers, private fiduciaries, corporations or trade unions.⁶⁵ In that regard, he noted the similarities between administrative and fiduciary decision making:

In both cases something like what equity calls a “fraud on a power” is involved. In both public law and equity, powers granted for a particular purpose can only be exercised for that purpose and not to achieve some collateral purpose. Also, in both cases, powers must be exercised *bona fide* for the persons or objects for whom or which the power was conferred. Finally, in both cases powers must be exercised rationally, without reference to irrelevant considerations and within bounds of reasons.⁶⁶

In addition to proper purpose, fiduciary duties and public duties overlap in the sense that they require a fiduciary or public official to consider various interests when exercising discretion. Just as a trustee must treat beneficiaries with an even hand,⁶⁷ a public officer must consider the interests of affected parties as well as the broader public interest. Failure to do so is a breach of fiduciary duty or the duty of reasonableness, as the case may be. As Sossin explains,

[A]dapting an equitable or fiduciary model to administrative decision making requires a similar concern . . . for the public interest that public officials must uphold. Reasonableness in discharging a public trust requires taking the interests of affected parties, especially vulnerable parties, . . . into consideration when determining the public interest. The extent

63. *Ibid* at 117.

64. See *Re Manisty's Settlement* (1973), [1974] 1 Ch 17 at 26.

65. The Honourable JJ Spigelman, “Foundations of Administrative Law: Toward General Principles of Institutional Law” (1999) 58:1 Aust J Pub Admin 3.

66. *Ibid* at 9.

67. See *Boe v Alexander* (1987), 15 BCLR (2d) 106, 41 DLR (4th) 520 (CA). See also Finn, *Fiduciary Obligations*, *supra* note 18.

to which the discretion can be justified on this basis is the extent to which it may be said to be reasonable.⁶⁸

However, the Canadian judiciary has generally held that the state's obligation to consider the public interest means that fiduciary duties owed to private individuals will be rare. In *Harris v Canada*,⁶⁹ which was cited with approval in *Elder Advocates*,⁷⁰ Dawson J saw the need to balance interests as a factor that weighed against the recognition of a fiduciary duty owed by public officers, as it would put them in an "untenable position".⁷¹ She explained, "A fiduciary relationship is unlikely to exist where that would place the Crown in a conflict between its responsibility to act in the public interest and the fiduciary's duty of loyalty to its beneficiary."⁷² This would suggest that a fiduciary can only be loyal to one beneficiary (or one class of beneficiaries), a suggestion that Fox-Decent has severely criticized. He has argued that a public officer must balance the public interest against the interests of individuals, just as a trustee must treat multiple beneficiaries with an even hand.⁷³ Fox-Decent explains:

[T]he content of the duty in these cases is not loyalty to a particular beneficiary at the expense of other beneficiaries, but rather fairness and reasonableness. Adherence to these principles . . . is consistent with—and demanded by—the over-arching fiduciary obligation owed by public decision-makers to both the public at large and the individuals immediately affected by their decisions.⁷⁴

This balancing of individual and public interests has particular application to the misfeasance tort, as discussed below.

Misfeasance in a public office also prohibits a public officer from misusing her powers to promote the interests of a third party, if the foreseeable result is harm to the plaintiff. This was explicitly decided in *Bourgoin v Ministry of Agriculture, Fisheries and Food*, where a group of French turkey producers sued the Ministry for revoking their licence to

68. Sossin, *supra* note 46 at 168.

69. *Supra* note 39.

70. *Supra* note 32 at para 44.

71. *Harris*, *supra* note 39 at para 192.

72. *Ibid* at para 178.

73. See *Sovereignty's Promise*, *supra* note 31 at 158–59.

74. *Ibid* at 159.

import turkeys into the United Kingdom.⁷⁵ This revocation was later found to be *ultra vires* for contravening European Economic Community law, and the plaintiffs sued for the economic losses they had suffered (particularly from the exclusion of French turkeys during the lucrative Christmas season). The Ministry acknowledged that its motivation had been to protect English turkey producers from competition, and that this was not a legitimate consideration for invoking its powers. However, it argued that the mental element of “targeted malice” was lacking: though acting for improper purposes, the defendant had not sought to inflict harm on the plaintiffs. The Court of Appeal defined the requisite mental element more broadly, accepting the reasoning of Mann J, below:

There is no sensible distinction between the case where an officer performs an act which he has no power to perform with the object of injuring A . . . and the case where an officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the foreseeable and actual consequence of injury to A.⁷⁶

According to *Bourgoin*, then, the requirement of bad faith can be satisfied by showing that the officer knowingly exceeded her powers with the object of benefitting a third party, and that harm to the plaintiff was a foreseeable consequence.

Finally, just as a fiduciary cannot make decisions out of self-interest, neither can a public officer exercise discretion in a way that pursues her own personal ends. To take an extreme example, a public officer cannot accept a bribe in exchange for making a particular decision.⁷⁷ Less extreme examples can be found in the misfeasance jurisprudence. For instance, in *Elliott v Chief Constable of Wiltshire*, the Chief Constable released information to the plaintiff’s employer about the plaintiff’s criminal record, resulting in his dismissal.⁷⁸ The plaintiff was a journalist who had been investigating a story about the misconduct of a senior police officer. Although the Court found that the Chief Constable had the power to release information about a person’s criminal record when it was in the public interest, the defendant in *Elliott* had released information about the plaintiff for the purposes of preventing publication of a news story

75. *Supra* note 13.

76. *Ibid* at 740, Oliver LJ concurring at 777.

77. See *Reid*, *supra* note 25.

78. [1996] Times Law Reports 693 (Ch D).

criticizing the police. This preference for his own professional self-interest was outside the scope of his powers, and was therefore an unlawful act for the purposes of the misfeasance tort.

Thus, whether public fiduciary obligations are seen as real or metaphorical, there is undoubtedly an overlap between the principles that apply to public decision making and those that apply to the exercise of fiduciary discretion. The following discussion explores that overlap in two complementary ways. First, it uses the established principles of misfeasance in a public office to respond to common criticisms of arguments in favour of public trusts, particularly that those trusts are not enforceable. Second, it uses the model of public fiduciary obligations to flesh out some uncertain areas of the misfeasance tort.

II. How Misfeasance in a Public Office Can Contribute to an Understanding of Public Fiduciary Duties

Whether public fiduciary obligations are taken in a practical or metaphorical sense, their implications have not been particularly well laid out. A frequent criticism of the notion of public fiduciary duties is that they are unenforceable because they seldom have an identifiable “beneficiary”. In other words, just as trusts can fail for lack of an enforcer,⁷⁹ it may be argued that there can be no public fiduciary duties because there is no one to enforce them.⁸⁰

The misfeasance tort provides a means for enforcing notional public fiduciary duties by allowing a cause of action by any person who is harmed by a bad faith breach of those duties. Finn notes the importance of this function: “unless civil liability in damages was also to be imposed in favour of a person actually injured by misconduct, officials would have been relieved of personal responsibility for their actions at the very point where the trust principle had its greatest salience for the injured citizen”.⁸¹ Granted, this is a form of negative enforcement, that is, the

79. See *Re Astor's Settlement Trusts*, [1952] 1 Ch 534.

80. See generally EJ Criddle, “Fiduciary Foundations of Administrative Law” (2006) 54:1 UCLA L Rev 117 (where the author defends the notion of public fiduciary obligations from this criticism).

81. “The Forgotten Trust,” *supra* note 20 at 147–48.

misfeasance tort does nothing to facilitate the prospective enforcement of a public fiduciary obligation, but only allows it to be enforced after it has been breached and harm has been caused.⁸² However, this is not entirely dissimilar from the enforcement of more traditional fiduciary obligations. For example, while a beneficiary can seek a declaration or injunction to prevent a breach of trust,⁸³ the courts tend to interfere as little as is necessary in the particular circumstances and will not instruct trustees how to exercise their discretion.⁸⁴

Although fiduciary duties are typically not enforced prior to breach, the threat of strict consequences can serve to deter fiduciaries from breaching their obligations. In particular, a fiduciary who has profited from a breach of loyalty will have to disgorge that profit, even if it amounts to a windfall to the beneficiary in that there would have been no profit but for the fiduciary's breach. This famously occurred in *Boardman v Phipps*, where the fiduciaries were forced to disgorge their personal gains even though the trust was incapable of purchasing the relevant shares, the fiduciaries acted in good faith, and the trust benefitted from the fiduciaries' breach.⁸⁵ The strict application of fiduciary obligations and the disgorgement remedy are meant to serve a deterrent function and remove any temptation for fiduciaries to breach their duties. As explained by Binnie J in *Strother v 3469240 Canada Inc*, stripping a fiduciary of his profits "teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary."⁸⁶

The tort of misfeasance in a public office serves a similar deterrent function for public officers. That misfeasance is one of the few torts that can uncontroversially lead to an award of punitive or exemplary damages can be traced back to *Ashby v White*, where Holt CJ said that

82. See generally *Watkins*, *supra* note 4.

83. AH Oosterhoff et al, *Oosterhoff on Trusts: Text, Commentary and Material*, 7th ed (Toronto: Carswell, 2009) at 1285.

84. See e.g. *Tempest v Lord Camoys* (1882), 21 Ch D 571 at 578, Jessel MR.

85. (1966), [1967] 2 AC 46 HL (Eng) [emphasis in original].

86. 2007 SCC 24 at para 77, [2007] 2 SCR 177. Bruce Feldthusen has argued that punitive damages should also be available in some cases, in addition to disgorgement of profits, since "merely stripping the profit from deliberate wrongdoing is arguably not punitive at all". Bruce Feldthusen, "Punitive Damages: Hard Choices and High Stakes" [1998] NZL Rev 741 at 763.

“[i]f publick officers will infringe men’s rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences.”⁸⁷ Chief Justice Holt’s view has been endorsed in recent years. In *Kuddus v Chief Constable of Leicestershire Constabulary*, exemplary damages were accepted as an appropriate remedy for misfeasance in a public office.⁸⁸ Lord Hutton, explaining the imposition of exemplary awards in cases of abusive conduct by military or prison officers, commented that they serve “to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times”.⁸⁹

The availability of exemplary damages for misconduct by public officers is generally consistent with the concept of public fiduciaries. In the leading case of *Rookes v Barnard*, Lord Devlin said that “oppressive, arbitrary or unconstitutional actions by the servants of the government”⁹⁰ were among the limited categories of cases in which exemplary damages would be available, because “the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service”.⁹¹ The potential for exemplary damages reduces the incentive a public officer may have to use his power for personal gain rather than putting the best interests of the people first.

Of course, the comparison between disgorgement for breach of fiduciary duty and exemplary damages for misfeasance in a public office has one main weakness, in that misfeasance is not actionable unless it results in material damage. The requirement of material damage was established in *Watkins*, where the plaintiff, a prison inmate, sued several prison officers who had opened and read his legal correspondence contrary to prison regulations.⁹² The plaintiff did not suffer any financial or other loss

87. *Supra* note 1 at 137.

88. (2001), [2002] 2 AC 122 HL (Eng).

89. *Ibid* at para 79.

90. [1964] AC 1129 at 1226 HL (Eng).

91. *Ibid*. This categorical approach to exemplary damages has been rejected in other jurisdictions. See *Uren v John Fairfax & Sons Ptd Ltd* (1966), 117 CLR 118 (HCA); *Taylor v Beere*, [1982] 1 NZLR 81 (CA); *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595. Nevertheless, there has been little doubt in those jurisdictions that exemplary damages should be available for the oppressive actions of government officers.

92. *Supra* note 4 (the Lords rejected the Court of Appeal’s suggestion that interference with constitutional rights should be a branch of misfeasance that is actionable per se).

as a result of this misconduct. Although Lord Bingham acknowledged the availability of exemplary damages where compensatory damages would be insufficient to deter repetition of the abusive conduct, he regarded it as inappropriate for tort law to be “an instrument of punishment in cases where there is no material damage for which to compensate”.⁹³ In fiduciary law, on the other hand, a defendant may be forced to disgorge his profits even where the plaintiff has benefitted from the breach of fiduciary duty.⁹⁴ Thus, the perceived need to deter public officers through damages seems weaker than the need to deter fiduciaries. There are several plausible reasons for this, particularly the availability of other remedies (e.g., judicial review, professional discipline and removal from office). Further, in situations where the breach of a conventional fiduciary duty brings neither loss to the plaintiff nor profit to the fiduciary (as in a case of unfair dealing where the purchaser paid fair market price), the appropriate remedy is most likely rescission of the transaction. In other words, in both the conventional fiduciary context and the context of misfeasance in a public office, the lack of material harm (or profit) will often rule out damages as a remedy.

In summary, while misfeasance in a public office does not contribute substantially to the conceptual understanding of public fiduciary duties, it can make a very practical contribution by providing a remedy for breach of such duties. This is particularly true in cases where there is a clear “beneficiary” of a public duty (i.e., an individual who will foreseeably suffer harm to material interests if a public fiduciary duty is breached).

III. How the Principles of Fiduciary Law Can Help to Define the Scope of Misfeasance in a Public Office

On the flip side, viewing misfeasance in a public office through the lens of fiduciary law may help resolve certain doctrinal and policy issues that currently surround the tort. In particular, it may help to define the appropriate scope of the tort in terms of potential defendants, the types of duties and misconduct that are capable of grounding an action, and

93. *Ibid* at para 26.

94. See *Boardman v Phipps*, *supra* note 85.

whether the plaintiff should be required to establish a pre-existing right or duty in order to bring an action.

A. Who Qualifies as a Public Officer for the Purposes of the Tort?

Misfeasance in a public office is available against a limited range of defendants known as “public officers”. In most cases, the defendant’s status as a public officer is not contentious.⁹⁵ However, it is not clear whether certain statutory officers, Crown agencies and lower ranking employees qualify as defendants, or what types of official conduct can form the basis of a misfeasance claim. These questions can perhaps be resolved if we focus on the fiduciary-like aspects of public office.

A century ago in *R v Whitaker*, Lawrence J provided the much-quoted description of a public officer as one “who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer.”⁹⁶ This definition seems remarkably broad and is perhaps inappropriate in the modern welfare state. The state now provides a host of services that were once performed by private entities, but clearly not every public employee will be considered an “officer” for the purposes of the misfeasance tort. As Finn has explained, “public employees with minimal public responsibilities” ought to be saved from “the heavy consequences attaching to office holding”.⁹⁷ Similarly, Macfarlan JA of the New South Wales Court of Appeal has warned,

If the tort were not limited to the abuse of public powers and authorities, its scope would be wide indeed. There would be the potential for a multitude of actions to be brought by members of the public in relation to the conduct by public servants and public contractors for their day to day duties.⁹⁸

95. See *Leerdam v Noori*, [2009] NSWCA 90, Spigelman CJ (“[i]n almost all cases the answer will be obvious” at para 3).

96. [1914] 3 KB 1283 at 1296–97. See also *Henly v Lyme Corporation* (1828), 130 ER 995, Best CJ (“[e]veryone who is appointed to discharge a public duty, and receives compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer” at 107).

97. PD Finn, “Public Officers: Some Personal Liabilities” (1977) 51:4 Austl LJ 313 at 314.

98. *Leerdam v Noori*, *supra* note 95 at para 109.

Thus, for example, both teachers⁹⁹ and social workers¹⁰⁰ have been found not to be public officers for the purposes of the tort.¹⁰¹

One way to limit the scope of “public office” is to define the types of official conduct that can form the basis of a misfeasance claim. As one author has explained, a public office entails such things as tenure, duration, and payment, and requires that misfeasance claims arise out of the exercise of statutory *powers* or ancillary common law *powers*.¹⁰² Another author has suggested that a public officer be defined as “any official or body who is charged with performance of a duty in which the public are interested *and which involves public confidence and trust*”.¹⁰³ Finally, in *Three Rivers*, Lord Steyn said that “[t]he rationale of the tort [of misfeasance in public office] is that in a legal system based on the rule of law *executive or administrative power* ‘may be exercised only for the public good’ and not for ulterior and improper purposes.”¹⁰⁴

All of these definitions suggest that misfeasance in a public office should be limited to defendants who exercise some sort of discretion or power, similar to that exercised by private law fiduciaries. In these situations, the individual citizen is particularly vulnerable to the public officer’s discretion, and there is an obligation to exercise it in good faith and for proper purposes only. Moreover, if we consider public fiduciary duties as being rooted in the concept of popular sovereignty, we would limit the definition of public officer to those who exercise functions on behalf of the public (in other words, where the public has notionally transferred

99. See *Henderson v Bakhtaria*, [2001] QSC 370; *Chan v Sellwood*; *Chan v Calvert*, [2009] NSWSC 1335.

100. On the basis that their duties are not owed to the public at large. See *E v K*, [1995] 2 NZLR 239 (HC).

101. There is also a line of historical American cases indicating that those performing manual or clerical labour are not public officers, even though they may perform “public” functions and receive a salary from the public purse. See e.g. *Throop v Langdon*, 40 Mich 673 (1879) (chief clerk in city assessor’s office); *Tillquist v Department of Labour and Industry*, 12 NW 2d 512 (Minn Sup Ct 1943) (district boiler inspector); *Mason v City of Los Angeles*, 20 P 2d 84 (Cal App 2 Dist 1933) (firefighter).

102. See Robert J Sadler, “Liability for Misfeasance in a Public Office” (1992) 14 Syd L Rev 137 at 143.

103. RC Evans, “Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office” (1982) 31:4 ICLQ 640 at 646 [emphasis added].

104. *Supra* note 2 at 190, citing *Jones v Swansea City Council*, [1990] 1 WLR 54 at 85 (CA Eng), Nourse LJ [Jones] [emphasis added].

authority to the officer to make certain decisions). This would exclude those performing clerical or manual tasks, for example, but would likely include those making licensing or regulatory decisions.

One line of cases has defined “public office” in terms of the functions performed by the defendant, rather than in terms of the office itself.¹⁰⁵ In *Calveley v Chief Constable of the Merseyside Police*, the House of Lords held that an action for misfeasance in a public office was not available against a police officer who performed an internal investigation and reported on a civilian complaint against a fellow officer.¹⁰⁶ After explaining that misfeasance “must at least involve an act done in the exercise or purported exercise by the public officer of some power or authority with which he is clothed by virtue of the office he holds”, Lord Bridge summarily concluded that “the mere making of a report is not a relevant exercise of power or authority by the investigating officer”.¹⁰⁷ Lord Bridge’s reasoning reflects what Peter Cane described as the Diceyan notion that “as far as possible the individual citizen and government officials ought to be equal before the law and treated alike in like circumstances”.¹⁰⁸ As Cane noted, Dicey saw no real distinction between government activity and private activity: “[W]hat matters for questions of legal liability is the nature of the activity, not the identity of the person or body conducting it”.¹⁰⁹

105. See e.g. *Dunstan v Human Rights and Equal Opportunity Commission (No 2)*, [2005] FCA 1885 at para 278 (Austl), Mansfield J (where the Court suggested that the internal management of employees in a government agency was not a public function capable of supporting a claim in misfeasance); *Pemberton v Attorney-General*, [1978] Tas SR 1 (dismissal of teacher by Director-General of Education not a public function); *Elliott v Canadian Broadcasting Corporation* (1994), 16 OR (3d) 677, 108 DLR (4th) 385 (Gen Div), aff’d on other grounds (1995), 25 OR (3d) 302, 125 DLR (4th) 534 (CA) (CBC’s broadcasting functions part of its private aspect); *Keene v British Columbia*, 2005 BCSC 1547, [2006] BCWLD 367 (Director of Child Welfare exercising private functions when serving as guardian for children under his care).

106. [1989] AC 1228 HL (Eng).

107. *Ibid* at 1241. See also *New Zealand Defence Force v Berryman and Berryman*, [2008] NZCA 392. The Court found that there was no action in misfeasance against an officer who testified at an Army Court of Inquiry. The testimony was not a public function and the officer “was just a witness like any other witness”. *Ibid* at para 74.

108. Peter Cane, “Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept” in John Eekelaar & John Bell, eds, *Oxford Essays in Jurisprudence*, 3d series (Oxford: Clarendon Press, 1987) 57 at 61.

109. *Ibid*.

However, the English Court of Appeal took a different approach in *Jones v Swansea City Council*.¹¹⁰ That case involved an allegation that municipal councillors had maliciously reversed a council decision that had allowed the plaintiff, who rented retail premises owned by the council, to use the premises as a club. The council argued that these allegations could not support a claim for misfeasance because they related to the exercise of the council's "private" functions as landlord. Lord Justice Nourse forcefully asserted that there was "no foundation" for the distinction between the so-called private and public functions performed by a municipality: "It is not the nature or origin of the power which matters. Whatever its nature the power may be exercised only for the public good. It is the office on which everything depends."¹¹¹

The approaches in both *Calveley* and *Jones* have apparent justifications in the concepts of public fiduciary obligations. In explicitly saying that all functions performed by public officers must be performed only for the public good, *Jones* reflects a very robust version of popular sovereignty. By contrast, *Calveley* takes a more nuanced approach to public fiduciary obligations, and separates out those functions that are performed on behalf of the public (and which can thus be subject to public fiduciary obligations) from those that are more akin to private functions. This recognition that an officer may have both fiduciary and non-fiduciary obligations is consistent with the conventional private law of fiduciaries. In particular, it is often stressed that not every duty owed by a fiduciary is a fiduciary duty.¹¹² For example, a lawyer who misses a limitation period has been negligent, but has not breached her fiduciary duty of loyalty to the client. Similarly, *Calveley* suggests that not everything done by a public officer is a "public" function or one giving rise to a public fiduciary obligation. In this vein, public officers who are engaged in functions like contract formation, human resources or property management may be liable for breach of contract or negligence, but not for misfeasance in a public office. Just as not every wrong by a fiduciary is a breach of fiduciary duty, not every wrong by a public officer amounts to an abuse of office.

110. *Supra* note 104, rev'd [1990] 1 WLR 1453 HL (Eng).

111. *Jones*, *supra* note 104 at 85. See also *ibid*, Slade LJ ("it is not the juridical nature of the relevant power but the nature of the council's office which is the important consideration. It is the abuse of a public office which gives rise to the tort" at 71).

112. See e.g. *Bristol & West Building Society v Mothew* (1996), [1998] Ch 1 at 16; *Galambos v Perez*, 2009 SCC 48 at paras 36–37, [2009] 3 SCR 247.

An interesting puzzle here is the status of public prosecutors, who are treated differently for the purposes of misfeasance in a public office depending on the jurisdiction. The Australian courts have taken a relatively restrictive view and appear to confine potential misfeasance defendants to those who closely resemble fiduciaries. This was especially evident in *Cannon & Rochford v Tache & Ors*, a 2002 decision of the Court of Appeal in Victoria.¹¹³ The plaintiff, who had been convicted of rape, sued various police officers and lawyers for allegedly conducting an unfair trial. In particular, he claimed that the lawyers who were contracted to prosecute him failed to disclose evidence that might have assisted in his defence. The defendants successfully argued that they were not public officers with respect to misfeasance, based primarily on the fact that they did not possess any powers to be exercised for the public good, but only carried out certain duties to the court. The Court of Appeal, referring to many authorities, stressed that the misfeasance tort is based on the exercise of a *power* held by a public officer for ulterior or improper purposes.¹¹⁴ The Court of Appeal went on to explain that the performance of duties in which the public has an interest is not a sufficient basis on which to ground the misfeasance tort. Accordingly,

[A] position or office which involves the discharge of a prosecutorial function . . . may be said to involve the discharge of public duties or responsibilities in which the public has an interest in that the representation of the State in the prosecution of an accused is involved, giving rise to other duties . . . But . . . a prosecutorial function does not in our view carry with it any relevant power so that it could not be properly said of a prosecutor appearing at a trial that he or she occupies a public office for the purposes of the tort.¹¹⁵

The Court in *Cannon* concluded that the misfeasance tort requires “the misuse or abuse by the holder of a public office of a relevant *power* which is an incident of the office”.¹¹⁶ It tied this to the tort’s decidedly fiduciary-like rationale: powers are granted to public officers for the benefit of the public, and therefore should not be used for improper purposes. Thus, although a prosecutor may have an “obligation to act fairly” and a “duty of disclosure”, breach of such duties does not give rise

113. [2002] VSCA 84.

114. See *ibid* at para 33ff.

115. *Ibid* at para 54.

116. *Ibid* at para 40 [emphasis added].

to a successful misfeasance claim. The Court noted that these duties did not emanate from any statutory power and, in any event, were duties owed to the court rather than to the accused or to the public.¹¹⁷

This contrasts with the position in Canada, where prosecutors have been considered public officers for the purposes of the misfeasance tort. For example, in *Milgaard v Kujawa*, the Saskatchewan Court of Appeal refused to strike out a misfeasance claim against Crown prosecutors who had failed to disclose to the accused, or actively suppressed, potentially exculpatory information.¹¹⁸ The Court's judgment focused on the extent of prosecutorial immunity rather than on the elements of any particular tort. Nevertheless, the Court opined that a claim for abuse of office was potentially available and would not be affected by prosecutorial immunity. The Court explained:

Mr. Milgaard has alleged that the prosecutors conspired to and did intentionally and with malice breach their duty to disclose information which tended to exculpate him, for the purpose of harming him. Were he to succeed in proving these allegations, they would constitute exactly the kind of fraud on the law, the kind of abuse of the law, the kind of improper purpose or motive, and the kind of excess of authority, that the Supreme Court has said should not be protected by immunity.¹¹⁹

In speaking of prosecutorial bad faith, this passage reflects the same type of abuse of discretion (i.e., the presence of an improper purpose or motive) that can invalidate the decision of a private law fiduciary.

How can the principles of fiduciary law help to resolve this apparent divergence between the Australian and Canadian law? Courts in both countries seem to agree that misfeasance in a public office should be limited to the abuse of power by a public officer, especially when the officer knowingly exceeds his authority or exercises discretion for an improper purpose or motive. Both *Cannon* and *Milgaard* also involved the breach of a prosecutor's obligation to disclose information to the accused that may have been relevant to his defence. The two cases reached

117. *Ibid* at para 56. See also *Leerdam v Noori*, *supra* note 95 (where solicitors acting on behalf of the Minister of Immigration and Multicultural and Indigenous Affairs were found not to be public officers).

118. (1994), 118 DLR (4th) 653, 123 Sask R 164 (CA) [cited to DLR]. In one of Canada's most notorious miscarriages of justice, Mr. Milgaard spent 22 years in prison for murder before a new trial was ordered and ultimately stayed by the Attorney General.

119. *Ibid* at 663, citing *Nelles v Ontario*, [1989] 2 SCR 170 at 211, 60 DLR (4th) 609.

different conclusions on whether public prosecutors exercise relevant powers and on whether the duty of disclosure is owed to the public, to individual citizens or only to the courts. In *Cannon*, the Court confined its consideration to a rather narrow range of prosecutorial duties that help to ensure a fair trial, such as providing the names, statements and any prior convictions of material witnesses. These duties are not enumerated in any statute, but have been developed by judges over time. They are part of a prosecutor's "responsibilities" or "functions", and remedy for their breach is limited to professional discipline or to quashing a conviction. They are not seen as duties owed to the accused or to the general public, and an accused cannot claim damages for their breach. Moreover, since an Australian prosecutor is a member of the bar contracted to represent the Crown, he or she is entitled to act as the Crown's advocate and need not represent the public interest in a neutral or disinterested fashion.

Conversely, in *Milgaard*, the Saskatchewan Court discussed the duty of disclosure in light of *R v Stinchcombe*, where the Supreme Court of Canada expressly described it as a public duty.¹²⁰ *Stinchcombe* had even described the prosecutor's duty in trust-like terms: "[T]he fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done".¹²¹ Thus, the Canadian courts seem more likely to view the duty of disclosure in the nature of a fiduciary duty based on what appears to be a particular view of popular sovereignty. Prosecutors are given the power to gather and present evidence on behalf of the public, and the public is interested in seeing that justice is done, not necessarily in securing a conviction. This may help explain why the Canadian courts are willing to see the breach of a prosecutor's duty of disclosure as potentially grounding a misfeasance claim. Moreover, because the accused is particularly vulnerable to the exercise of prosecutorial discretion and has significant interests at stake, he or she serves as an ideal "enforcer" of the prosecutor's public fiduciary duty.

120. [1991] 3 SCR 326 at 336, 120 AR 161 (the Court found that the duty of disclosure was an aspect of the accused's right to make full answer and defence, both found in the common law and enshrined in section 7 of the *Canadian Charter of Rights and Freedoms*).

121. *Ibid* at 333.

B. What Types of Misconduct Can Ground an Action?

The tort of misfeasance in a public office requires that the defendant commit some deliberately unlawful act. Successful claims have generally been against public officers who have acted *ultra vires*¹²² or have violated the requirements of procedural fairness or natural justice.¹²³ However, there is no broad agreement on what other types of misconduct can form the basis of an action. In particular, while some courts have held that any type of unlawful conduct (including breach of a statutory duty) is sufficient, others have taken the position that the tort should be limited to abuses of executive or administrative power.

That issue was squarely presented in the Canadian case of *Odhavji Estate*.¹²⁴ The defendant police officers had been involved in the fatal shooting of an unarmed robbery suspect. The Special Investigations Unit (SIU) investigated the matter, and instructed the officers to remain segregated prior to questioning and to submit their shift notes, on-duty clothing and blood samples. The officers allegedly failed to comply with the SIU's instructions, contrary to the requirement in the *Police Services Act* that they cooperate fully. Among the tort claims brought by the family of the shooting victim was a claim for misfeasance in a public office.¹²⁵ The plaintiffs alleged that the officers' failure to cooperate with the SIU investigation deprived them of closure into the victim's death and undermined their confidence in the police.

The majority of the Ontario Court of Appeal granted the defendant officers' application to strike the claim on the basis that the defendants had only committed a breach of statutory duty, and had not abused their power, authority or discretion. The main thrust of the majority's decision is as follows:

Although it is common ground that the defendants . . . are public officers, they were not engaged in the exercise of a power during the time the S.I.U. was conducting its investigation

122. See e.g. *McGillivray v Kimber* (1915), 52 SCR 146, 26 DLR 164; *Farrington v Thomson and Bridgland*, [1959] VR 286 (SC); *Northern Territory of Australia v Mengel* (1995), 185 CLR 307 (HCA) [Mengel].

123. See e.g. *O'Dwyer*, *supra* note 12 (failure to grant plaintiff a hearing); *State of South Australia v Lampard-Treverrow*, [2010] SASC 56 (denial of right to be heard).

124. *Supra* note 3.

125. RSO 1990, c P.15, s 113(9).

of the shooting of Manish Odhavji. At most, they were under a statutory obligation to “co-operate” fully with the S.I.U. in the conduct of the investigation as required by s. 113(9) of the *Police Services Act* In the language of the law Lords in *Three Rivers*, they were not the recipients of an executive or administrative power by which they were required to make decisions affecting members of the public. They were not in the position of a public official to whom a power is granted for a public purpose who exercised the power for his or her own private purposes. The most that can be said . . . is that they failed to comply with the duties imposed on them by s. 113(9) of the Act.¹²⁶

This language is distinctly fiduciary, and seems to rest on a notion of popular sovereignty. The majority sought to limit the scope of misfeasance to situations where a public officer exercised some discretionary power on behalf of the public (i.e., where the public had granted the officer authority to make decisions on the public’s behalf). In this respect, the Court of Appeal’s approach was consistent with the decisions discussed in Part III-A, above. Although police officers might exercise some of their functions in a public fiduciary capacity (e.g., when making an arrest¹²⁷), that would not seem to be true of their participation in an STU investigation. Where such an investigation involves allegations of misconduct against them, it seems fair to suggest that they may, at least to an extent, take their own interests into account.¹²⁸

However, the Supreme Court of Canada unanimously allowed the plaintiffs’ appeal and permitted the misfeasance claim against the police officers to proceed. Justice Iacobucci, for the Court, concluded that the tort was not limited to the abuse of statutory or prerogative powers, but was “more broadly based on unlawful conduct in the exercise of public functions generally”.¹²⁹ Justice Iacobucci concluded that

there is no principled reason . . . why a public officer who wilfully injures a member of the public through intentional *abuse* of a statutory power would be liable, but not a public

126. *Odhavji Estate v Woodhouse* (2000), 52 OR (3d) 181, 194 DLR (4th) 577 (CA), Borins JA.

127. See *Tomkinson v Weir & Anor*, [1999] WADC 79, aff’d [2001] WASCA 77.

128. Justice Iacobucci acknowledged as much when he suggested that the officers’ conduct would not have been deliberately unlawful if their duties conflicted with their constitutional rights, such as the privilege against self-incrimination. *Odhavji Estate*, *supra* note 3 at para 27.

129. *Ibid* at para 17.

officer who wilfully injures a member of the public through an intentional *excess* of power or a deliberate failure to discharge a statutory duty.¹³⁰

Although the issue in *Odhavi Estate* was framed as a comparison of powers and duties, the key to Iacobucci J's reasoning, and the clearest link to fiduciary concepts, lies in the concept of wilful injury. A defendant who uses a public office to harm a citizen is acting in bad faith or for an improper purpose. This is true whether the harm is caused by the abuse of a power or by the breach of a duty. For instance, in *Elliott*, the defendant Chief Constable had the power to release information about a person's criminal record when it was in the public interest, but because he had done so for the purpose of preventing the publication of a news story criticizing the police, he had acted outside the scope of that power.¹³¹

Indeed, a public officer who acts for the purpose of harming a citizen will also satisfy the "malice" requirement of the misfeasance tort. As Iacobucci J explained in *Odhavji Estate*:

[T]he fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort [deliberately unlawful conduct and malice], owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public.¹³²

This is similar to the approach taken by fiduciary law, particularly in the way that it reviews the discretion of trustees. It should be recalled that in *Fox v Fox Estate*, an executrix's exercise of the power of encroachment, which would have been a legitimate exercise of power if done for a proper purpose, was set aside by the Ontario Court of Appeal because it was motivated, improperly, by the disapproval of her son's marriage to a Gentile.¹³³ So the power versus duty distinction may not be the real issue in *Odhavji Estate*; rather, as Iacobucci J suggested, it is the wilful harm that determines the scope of liability.

Another way that fiduciary principles can help us to evaluate the appropriate scope of the misfeasance tort is to consider whether a public power or duty has an identifiable "beneficiary" who could be harmed by

130. *Ibid* at para 30 [emphasis in original].

131. *Supra* note 78.

132. *Supra* note 3 at para 23.

133. *Supra* note 55.

its misuse, or, in the language of *Elder Advocates*, whether the plaintiff has a “legal or significant practical interest” that can be affected by the exercise of power.¹³⁴ The licensing cases provide an obvious example of this: if a public officer takes improper considerations into account or fails to observe administrative fairness, a licensee or licence applicant stands to suffer financial loss.¹³⁵ The licensee can thus act as an “enforcer” of the officer’s public fiduciary obligations. This applies whether the function in question is a power or a duty. For instance, in the somewhat bizarre case of *McMaster v The Queen*, a prison officer refused to provide the plaintiff inmate with properly fitting shoes.¹³⁶ This was in violation of a directive from the Correctional Service of Canada, by which every inmate was entitled to one new pair of running shoes each year. The plaintiff quite obviously stood to suffer harm from this breach of duty. He successfully sued for six thousand dollars for a knee injury he sustained after his old shoes gave out. As the “beneficiary” of the duty to provide properly fitting shoes, McMaster was able to enforce that duty through a misfeasance claim.

Treating the beneficiary as enforcer in this way helps to explain another grey area in the tort of misfeasance in a public office: whether an action can lie for the exercise of Crown prerogative. The Commonwealth courts have found that matters like entering into treaties, declaring war, appointing Ministers and conducting foreign policy are non-justiciable; however, matters that alter a person’s rights or obligations, or deprive him or her of certain advantages or benefits, are amenable to review by the courts.¹³⁷ The latter category includes such matters as issuing and revoking passports. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*, O’Connor LJ described the prerogative power over passports as “an area where common sense tells one that, if for some reason a passport is wrongly refused for a bad reason, the court should be able to enquire into it”.¹³⁸ Just as with other powers and duties, a prerogative

134. *Supra* note 32 at para 51.

135. See e.g. *Roncarelli, supra* note 52 (liquor licence); *O’Dwyer, supra* note 12 (licence as horse racing official).

136. *Supra* note 15.

137. See e.g. *Council of Civil Service Unions v Minister for the Civil Service* (1984), [1985] 1 AC 374 HL (Eng).

138. [1989] 2 WLR 224 at 228 (CA). See also *Kamel v Canada (Attorney General)*, 2009 FCA 21, [2009] 4 FCR 449 [*Kamel*].

power that can directly affect an individual's rights or obligations may form the basis of a misfeasance claim.¹³⁹ It is in these situations that the plaintiff most closely resembles the "beneficiary" of the officer's public fiduciary obligation.

Viewed through the lens of fiduciary law, the outcome in *Odhavji Estate* seems somewhat incongruous. As discussed below, the plaintiffs claimed that the police officers' failure to cooperate with the SIU investigation deprived them of closure into their son's death and diminished their faith in the police force. These are rather vague and indirect harms, and do not seem to be linked to any legally protected rights, interests or obligations. According to the Supreme Court in *Elder Advocates*, "It is not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security. The interest affected must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement."¹⁴⁰ A fiduciary analysis would therefore suggest that the plaintiffs in *Odhavji Estate* did not have a sufficient interest to ground a claim. Further, as discussed below, the duty to cooperate with an SIU investigation is not a duty that is owed to anyone in particular, but is a duty owed to the public at large. While SIU investigations serve a public function, the roles of individual officers under investigation do not seem to have a public fiduciary aspect: the officers do not act "on behalf of the public". Thus, although *Odhavji Estate* can help to define the scope of liability through the concept of wilful harm, it is inconsistent with other cases on public fiduciary duties.

In summary, a fiduciary analysis helps to focus the question of what sorts of misconduct can form the basis of a misfeasance claim on the *effects of the particular misconduct on the particular plaintiff*. First, if the public

139. See *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 FCR 267 (which involved a misfeasance claim for failure to issue an emergency passport to allow the plaintiff, who had been exiled in Sudan, to return to Canada). See also Erika Chamberlain, "Abdelrazik: Tort Liability for Exercise of Prerogative Powers?" (2010) 18:3 *Const Forum* 119.

140. *Supra* note 32 at para 51 [emphasis in original]. The Court gave examples of sufficient interests as "property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person". *Ibid.* See also *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2012 SCC 71 at paras 138–41, [2012] 3 SCR 660 (where the Court found that the claimants' alleged interest in a prescribed contribution rate to their pension plan was not a sufficient private law interest to ground a fiduciary duty).

officer acted with targeted malice toward the plaintiff, there can be a successful claim because individuals should not be subject to such deliberate abuses of power. In such cases, it does not matter whether the officer was exercising a power or a duty, or even if the officer's actions were lawful on their face. Second, a claim will lie if the officer's misconduct affects the plaintiff's legal or significant practical interests. This is consistent with the Supreme Court's decision in *Elder Advocates*, with the cases on Crown prerogative, and with the requirement of material damage set out in *Watkins*. Moreover, by focusing on the individual plaintiff's vulnerability to the officer's exercise of power or duty, we can shed light on the distinction between duties owed to individuals and duties owed to the public at large.

C. Does it Matter Whether the Duty Was Owed to Particular Individuals or to the Public at Large?

The final unresolved issue in the jurisprudence on misfeasance in a public office is whether plaintiffs should be required to establish some pre-existing right (or that the officer owed a duty to them in particular), or whether it is sufficient that the public officer has violated some duty owed to the public at large.¹⁴¹ In *Tampion v Anderson*, the Supreme Court of Victoria explained that “a plaintiff plainly must not only show damage from the abuse; he must also show that he was the member of the public, or one of the members of the public, to whom the holder of the office owed a duty not to commit the particular abuse complained of”.¹⁴² Conversely, in *Three Rivers*, Lord Steyn wrote that no antecedent right was required “beyond the right not to be damaged or injured by a deliberate abuse of power by a public officer”.¹⁴³ On this reasoning, if a public officer commits an unlawful act and the plaintiff suffers material harm, the plaintiff would have sufficient “standing” to bring an action for misfeasance in a public office.

The implications of this uncertainty were played out in *Odhavji Estate*, where the plaintiffs claimed in misfeasance for the lack of a thorough

141. See generally Chamberlain, “The Need for a ‘Standing’ Rule”, *supra* note 7.

142. [1973] VR 715 at 720 (SC). Mengel, *supra* note 122 at para 10, Brennan J (where this requirement was rejected).

143. *Supra* note 2 at 193, citing *Three Rivers District Council and others v Bank of England (No 3)*, [1996] 3 All ER 558 at 584, Clark J.

internal investigation into the shooting death of Manish Odhavji. In an earlier Ontario Court of Appeal case, *Norris v Gatien*, the Court had struck out an action alleging that there had been a negligent investigation into a fatal crash between a police officer and a cyclist.¹⁴⁴ The Court held that the plaintiffs (the cyclist's family members) had no legal interest in the investigation or prosecution of the police officer:

[T]hat investigation and prosecution were matters of public law and public interest. Nor had the plaintiffs any legal interest in the disciplinary proceedings taken against [the officer]. Had [he] been convicted on either or both charges, the plaintiffs, or some of them, may have derived some personal satisfaction from that conviction. That satisfaction, however, would have been a purely personal matter; it would have no reality in law.¹⁴⁵

Using the language from *Elder Advocates*, a private citizen would not have the necessary "pre-existing distinct and complete legal entitlement" to an internal or criminal investigation into police misconduct to ground a fiduciary duty.¹⁴⁶

However, in *Odhavji Estate*, the Supreme Court was not troubled that the plaintiffs had no legally recognized right to a thorough internal investigation into the death of Manish Odhavji. Nor was the Court concerned that the duty allegedly breached by the defendants (the statutory duty to cooperate with the internal investigation) was not a duty owed to the plaintiffs in particular.¹⁴⁷ The plaintiffs in *Odhavji Estate* were allowed to base their misfeasance claim on the breach of a duty owed to the public at large. Whether this is consistent with the notion of public fiduciary duties depends on whether we view such duties as rooted in popular sovereignty or in the narrower framework set out by the Supreme Court in *Elder Advocates*.

If public fiduciary obligations are indeed based on popular sovereignty, it would seem that any duty owed to the public at large could potentially form the basis of a misfeasance action. Indeed, in some respects, internal investigations into police misconduct seem like a good example of the public entrusting the SIU with the authority to carry out investigations in

144. (2001), 56 OR (3d) 441, 151 OAC 394 (CA) [cited to OR].

145. *Ibid* at para 18. See also *Garrett v Attorney General*, [1993] 3 NZLR 600 at 608 (HC), Anderson J, aff'd on other grounds, [1997] 2 NZLR 332 (CA).

146. *Supra* note 32 at para 51.

147. See Chamberlain, "The Need for a 'Standing' Rule", *supra* note 7 at 232.

the public's interest. These agencies are typically established to promote accountability and transparency with respect to harms caused by police. The plaintiffs, as long as they could prove material damage,¹⁴⁸ became the "enforcers" of the public duty to cooperate with an SIU investigation. On this analysis, the reasoning in *Odhavji Estate* seems relatively consistent with the notion of public fiduciary obligations. The misfeasance claim would provide some measure of deterrence against failing to comply with that duty.¹⁴⁹

On the other hand, if public officers owe fiduciary obligations only to beneficiaries whose specific legal interests are at stake in the officers' decisions, *Odhavji Estate* would seem to have been wrongly decided. For example, an applicant for a licence has a definite interest in a licensing authority's decision in a way that members of the general public do not. If the licensing authority exercises its discretion on irrelevant considerations, the applicant has a private law claim, just as a beneficiary does if a trustee exercises her discretion capriciously. An internal investigation into police misconduct, however, does not involve a clear "beneficiary" in the same way as a licensing decision. The plaintiffs in *Odhavji Estate* were not particularly vulnerable to the officers' actions, nor did they have any legal or significant practical interest at stake. Although the plaintiffs were personally interested in the outcome, the only legal interests were those of the public at large.

Some questions remain to be addressed. If an officer owes duties to an individual (in which case the notional fiduciary obligation may be enforced by that individual), would they conflict with the officer's duties to the general public? Would this create difficulties for the public fiduciary analysis? In *Harris*, which pitted individual taxpayers who sought an advance ruling from the responsible Minister about the tax consequences of moving assets out of Canada against the larger body of all other taxpayers, Dawson J concluded that the answer was yes.¹⁵⁰ Justice Dawson refused to recognize a public fiduciary obligation to taxpayers because it would place the Minister "in the untenable position of trying

148. Which may be a difficult task, given the indirect nature of the plaintiffs' harms in *Odhavji Estate*. *Supra* note 3.

149. Of course, one could make a distinction between those entrusted with conducting the SIU investigation from those who are being investigated. The former are much more clearly performing a function on behalf of the public.

150. *Supra* note 39.

to reconcile potentially conflicting duties of loyalty owed to both a particular taxpayer requesting an advance ruling and the larger group of taxpayers who . . . would often be best served by a refusal to rule or by a negative ruling".¹⁵¹

Fox-Decent disapproves of the decision in *Harris*, arguing that duties to the public and to individuals are not anathema to one another.¹⁵² The public officer need not be "loyal" to the individual in the typical fiduciary sense, but must only act fairly and reasonably and for proper purposes. Put another way, the public interest is a proper or "relevant" consideration even when a decision affects the legally protected interests of individuals. This is borne out in the misfeasance jurisprudence. For instance, as long as it is done reasonably and on the basis of relevant considerations, the Minister of Foreign Affairs is allowed to refuse to issue a passport in the interests of national security.¹⁵³ Similarly, it was not "deliberately unlawful" for a municipality to make zoning decisions adverse to private interests based on a belief that the relevant land should be used as parkland.¹⁵⁴ Just as a trustee must use an "even hand" among beneficiaries when exercising discretion, a public officer ought to consider both individual interests and the public interest when exercising her powers.

Finally, given that misfeasance actions do not depend on finding a "true" trust or fiduciary relationship, and can therefore rely on metaphorical or political conceptions of public trust, the fact that a public officer must take the public interest into account is not fatal to such an action. Indeed, it would be rare to find that a public officer who considered the public interest acted with the deliberate unlawfulness and malice necessary to prove misfeasance.

Conclusion

Whether taken literally or metaphorically, the concept of public fiduciary duties can make an important contribution to the analysis of

151. *Ibid* at para 192.

152. *Sovereignty's Promise*, *supra* note 31 at 159ff.

153. See *Kamel*, *supra* note 138.

154. See *First National Properties Ltd v McMinn*, 2001 BCCA 305, 198 DLR (4th) 443, Newbury JA ("land use and environmental protection are surely not purposes extraneous or foreign to municipal governments" at para 45).

the developing tort of misfeasance in a public office. That concept helps to define which officers may be liable for misfeasance and for what types of misconduct. More specifically, it focuses attention on what powers can be considered to have been effectively delegated by the public to an officer and therefore have to be exercised in the public interest. The concept of public fiduciary duties also identifies those actions of a public officer that have a notional “beneficiary” whose legal interests are affected, and who therefore has standing to sue for misfeasance if the actions are not carried out properly. Finally, the trust law concept of even-handedness helps to explain how a public officer can balance the interests of affected individuals and the general public when exercising discretion. Because the tort of misfeasance in a public office is a hybrid of tort law and administrative law, it demonstrates and draws on the overlapping principles that govern discretionary decision making in both private and public law. As the tort develops, it is hoped that concepts from fiduciary law can help not only to determine the appropriate scope of the tort, but also to provide a theoretical underpinning that it has lacked so far.

