Fiduciary Duty and Members of Parliament

by Lindsay Aagaard

There is no job description for a member of parliament. Political scientists, civil servants and politicians themselves have long struggled to define the complex combination of moral and ethical obligations that make up the relationship between constituents and elected politicians. This article examines the concept of responsibility or "duty" as it is owed by members of the House of Commons to constituents. It outlines the concept of a fiduciary relationship and fiduciary duty, and provides a brief summary of how, in law, fiduciary relationships have expanded beyond the original application to trustees and beneficiaries. It also reviews the obligations attached to our elected representatives, and then outlines the case for extending fiduciary duty to elected members of parliament. Finally, it examines the consequences of the application of fiduciary duty, referring specifically to the advantages and disadvantages of such a change. This approach provides an opportunity to probe deeper into the relationship that exists between a member of parliament and a citizen, to look at the foundation of this relationship, and to find – through the concept of fiduciary duty – a minimum, legal threshold of accountability to which all members of parliament must rise.

Fiduciary duty is a concept that evolved from Equity, an area of the law that was once distinct from, but is now combined with the Common Law. Equitable principles and remedies were administered by the old Court of Chancery, and fiduciary duty first appeared in the 1689 English judgment *Walley v.Walley*. As the equitable maxim goes, "equity is equality" and the underlying values of equity are considered to be simple good conscience, reason and good faith. Equity was used to supplement the common law, where the strict application of the existing law would in fact do more *injustice* than justice. In the words of Lord Denning, "equity was introduced to mitigate the rigour of the law". This conception of equity is one which Chief Justice Beverley McLachlin has stated that Canada has embraced with enthusiasm.[1]

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Definition

In its origins, the word "fiduciary" means "trust-like." "Fiduciary duty" is the duty of loyalty that is owed by the powerful party to the vulnerable party when the two are in a fiduciary relationship. The fiduciary relationship can also be characterized as a vehicle used to impose duties on individuals who hold power over the interests of others. As Leonard Rotman writes, "beneficiaries are vulnerable to the misuse or non use of power, and fiduciaries [ought to] act with honesty, selflessness, integrity, fidelity and in the utmost good faith (*uberrima fides)* in the interest of the beneficiary"[2] Fiduciary obligation has been described as a "blunt tool for the control" of discretion and is viewed by many scholars as the way in which social norms or mores are captured within

the law, and the way by which "law transmits its ethical resolve to the spectrum of human interaction."[3] The result of fiduciary law is that obligations, in the form of a standard of conduct, are imposed to regulate the way in which the opportunities that often arise from being in a position of power can be utilized[4].

The Frame Indicia for Fiduciary Relationships

Though the concept of fiduciary duty, stemming from a fiduciary relationship, is one with which courts still struggle, and though it has been described as having an "innate resistance to definition" and an inherent malleability, a guide has been developed through jurisprudence to aid in the determination of at least the institutional category of fiduciary relationships.[5] In *Frame v. Smith* Justice Wilson outlined a "rough and ready" test which captures basic characteristics of the fiduciary relationship. First, the fiduciary must have "scope for the exercise of discretion or power". Second, the fiduciary must be able to unilaterally exercise "that power or discretion so as to affect the beneficiary's legal or practical interests". Third and finally, the beneficiary in a fiduciary relationship must be "peculiarly vulnerable or at the mercy of the fiduciary holding the discretion or power".[6]

This test has been accepted and acknowledged in several important cases that have followed, including *Hodgkinson v. Simms*. In *Hodgkinson* the court acknowledged that the test is most useful when seeking to develop a whole new class of fiduciary relationship. Furthermore, the court clarified that the test consists of important indicia that help us identify the presence of a fiduciary relationship, and should not be taken as spelling out a list of essential ingredients[7].

> ***Can the relationship between a member of parliament and constituents become a new class of fiduciary relationship?***

Once a fiduciary relationship has been found, "equity will then supervise the relationship by holding [the fiduciary] to the fiduciary's strict standard of conduct."[8] This standard of conduct gives substance to the "conceptualization of loyalty" found in the fiduciary doctrine, and demands at least that the fiduciary not act where there is a conflict between the duty to the beneficiary and the interest of the fiduciary, and prohibits the fiduciary from making a profit as a result of being in a fiduciary position. A breach of fiduciary duty is found where there has been "unauthorized conflict or benefit," where fiduciaries privilege their own interests over those of the people they are obligated to serve.[9]

The Application of Fiduciary Duty to Members of Parliament

How could it be argued that a member of parliament is in a fiduciary relationship with his or her constituents? The expansion of "institutional" fiduciary relationships to realms beyond the primary fiduciary relationship of trustee-beneficiary has happened over the course of many years in the Canadian courts. For instance, fiduciary duty was extended by statute to company directors, requiring them to act in good faith and in the best interest of the company, and parents have been found to have a fiduciary obligation to their children in certain respects.

The first question is to whom is the loyalty of a member of parliament owed? There are countless completely expected and unavoidable obligations owed by a member of parliament. Obligations are owed to the riding association, to the party, to supporters, to the country as a whole. For instance, every member of parliament, in becoming a nominee for that party at the beginning of the electoral process, makes a pledge – sometimes implicitly and sometimes explicitly – to follow party rules. Though the appropriate degree of party discipline is a matter of continual debate, the concept of team play and the various "debts" that accompany an elected member to Ottawa are a natural part of our political scene. However, these obligations – large and looming in the day-to-day reality of the lives of members of parliament – are only in addition to at least three other seminal duties at the heart of our democratic system: the duty to the Crown, to the rule of law and to constituents.

To the Crown

Canada's status as a constitutional monarchy is evident in the oath of office sworn by members of parliament at the beginning of every term. As the Queen is the Head of State, parliamentary actions are carried out in her name. However, as Eugene Forsey points out, the authority for those actions flows from the citizens – the constituents – as we will discuss shortly. The oath, contained in the Fifth Schedule of the Constitution, requires that the member "be faithful and bear true allegiance" to the Sovereign, and was implemented in order to guarantee the supremacy of the British Sovereign over anything else.[10] The oath of office is a formal, and essentially mandatory, manifestation of an obligation central to our system of government: the obligation to be faithful to the Sovereign. The presence of the Sovereign in the oath does not mean that loyalty is required to the Queen personally, but rather serves to evoke the Queen as "the symbol of personification of the country, its constitution and tradi-

tions, including concepts such as democracy." As James Robertson writes, elected members are assuming positions of public trust and with the oath of office they promise to conduct themselves "patriotically, and in the best interests of the country.[11]"

This oath is clearly central to Canada's political status as a constitutional monarchy. Nevertheless, it should be noted that the workings of the oath also emphasize the importance of the citizenry. As Robertson writes, *Beauchesne's Rules and Forms of the House of Commons of Canada* states that the object of the oath is to allow members to take their seat in the House[12]. However, in order to take the oath an individual must first be duly elected. It can therefore be argued that it is not the oath itself which bestows on an individual the role of "member of parliament"; rather the oath is what makes it possible for members, after a popular election, to adequately fulfill their duties. After all, without the oath members are not able to sit in the House and are therefore not able to participate in Parliament. The oath is a requisite and logical part of the undertaking of a member of parliament, and the allegiance to the Queen therefore an essential part of the job. But it must be noted that without the oath the elected individual is still considered a representative of his or her constituents.

To the Rule of Law

The importance of the Rule of Law to our society and system of governance has been made clear in several important court cases. In *Reference re Manitoba Language Rights,* a case referred to by influential judgments such as *Reference re Secession of Québec* and *British Columbia v. Imperial Tobacco Canada Ltd.*, the Supreme Court of Canada wrote as follows:

> [The mention of Rule of Law in the preamble to the *Constitution Act,* 1982] is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure" (per *Rand J., Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142). The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest (A.V. Dicey, T*he Law of the Constitution* (10th ed. 1959), at p. 183). It becomes a postulate of our own constitutional order by way of the preamble to the *Constitution Act*, 1982, and its implicit inclusion in the preamble to the *Constitution Act*, 1867 by virtue of the words "with a Constitution similar in principle to that of the United Kingdom".[13]

When members of parliament are elected to the House of Commons, they become participants in, and – in a sense – instruments of, our system of governance. Commitment to upholding the rule of law, to abiding by the regulations imposed on parliamentarians and to generally maintaining and supporting the democratic system by fulfilling the job requirements of representative and responsible democracy are commitments demanded of all elected members of parliament. This duty to the "system" is owed by all members of parliament.

To Constituents

While obligations to the Crown and to the Rule of Law are central and essential, it is in the obligation to constituents where fiduciary law could play a role. The obligation members have to represent the interests of their constituents is truly at the heart of the mandate of a member of parliament. Without constituents to represent there would be no role for MPs to play in our current system of government, there would be no need for an oath of office, there would be no system of representative democracy to uphold, there would be no need for parties to effect change or safeguard the status quo. The obligations members have flow from the power they gain from the citizenry. Though the member is dependent on the electoral power held by the constituents, once elected the constituents are completely dependent upon the member to exercise the power of office in a responsible manner, and in such a way so as to preserve the principles of representative democracy.

What is the duty owed to constituents and how is it fulfilled by a member of parliament? How does a member represent constituents – by doing exactly as constituents wish or by making his or her own assessment on each issue? What are the "interests" of constituents and how would you define what is in the "best interests" of that group? When speaking of a member's duty to represent constituents we encounter immediately the various models of representation possible between members and constituents, each of which in turn informs how the duty is to be fulfilled. That is, how a member chooses to come to a decision on what is in the best interests of his or her constituents is dependent on the model of representation the member chooses to follow.

David Docherty refers to three main models of the representative role: first, the Trustee Model applies to legislators who believe they are sent to Ottawa to exercise their personal judgment on the issues that come before them. Second, the Delegate Model, most often associated with populist politics such as that embodied by the rise of the Reform Party in 1993, asserts that members are delegates of their constituents and are trusted with making decisions in keeping with what a majority of their constituents would prefer. A middle ground is found with the Politico Model, preferred by members who look to their constituents for guidance when possible but believe that guidance is not always possible or preferable.[14]

However, underlying these models of representation and ongoing debates about how constituents should be

represented is an important sentiment. In his book *The Parliament of Canada* Professor C.E.S. Franks quotes a speech by Edmund Burke which Franks characterizes as "the most widely quoted statement in the English language on the functions of an elected representative." Burke stated: "It is [the member's] duty to sacrifice his repose, his pleasures, his satisfactions, to [his constituents']; and above all, ever, and in all cases, to prefer their interest to his own."[15] I envision the underlying duty owed by members – one which I would elevate to the level of fiduciary duty – as that captured by Burke: the duty to represent constituents, in keeping with whatever model of representation the member chooses, in an honest, selfless and transparent manner. Fiduciary duty, the obligation to act in the interests of the beneficiary, can be seen to underscore any of the models of representation. In other words, what the concept of fiduciary duty could do is to ensure that however a member decides to view their job in the scheme of representational government, there are certain underlying duties in place to ensure that the decision making process (not the decision itself) is beyond reproach.

The strictness in the fiduciary approach is necessitated by the centrality in our democratic system of the member's obligation to his or her constituents. The importance of maintaining our democratic system requires that constituents, the 32 million Canadians who are *not* among the 308 sitting in Parliament, have adequate representation. Our system of representative democracy means that that citizens' interests are considered at Parliament only through their elected representative, and it follows that there must be some minimum (which does not entail low or lax) standards for the behaviour of the members of parliament. There are standards in place which seek to guarantee the integrity of the decision making process, but I would argue that adequate representation is best guaranteed by formalizing the accountability structure in keeping with the requirement of a fiduciary relationship. Ultimately, the proper representation of a constituency and its inhabitants should be forefront in the minds of members of parliament *even if only* in the sense that every member should vow to do their job to the highest possible ethical standard, as mandated by fiduciary duty, in order to preserve the sanctity of this relationship.

The Frame Indicia and MPs

How exactly can it be argued that the relationship between a member of parliament and constituents is fiduciary in nature?

The first indicator in the Frame test is that the fiduciary has scope for the exercise of discretion or power. This applies to members of parliament without question. Members have some of the most important discretion and power in the country, as their votes, arguments and participation affect the rules that shape our society. This exercise is an inalienable aspect of the job of a member of parliament, to the point where discretion can be seen as a hallmark of the job of a member of parliament.

The second indicator of fiduciary duty is that the fiduciary is able to unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests. Unilateral exercise of power or discretion can be seen in the way in which members take their individual decisions on legislative issues, for example. This is not unilateral exercise of power in the sense that legislative decisions typically involve all members of parliament, but it is certainly unilateral exercise of the part of the individual member. Though members may feel constrained by their party, they always have the option of voting as they wish, an indicator of their capacity for the exercise of their power and discretion however they see fit. The legislative decisions members make, made through the exercise of power and discretion, can certainly affect the interests of the constituents.

Furthermore, when looking at other examples of the exercise of members' power and discretion we can also look to the work they do directly for their constituents. Be it a passport issue, an immigration issue or a pension issue, constituents come to their members in various positions of difficulty that can be remedied by the exercise of the members' discretion and power. In this sense, even the preliminary decision as to whether or not to help a constituent is an exercise of discretion and power that affects the interests of the beneficiary.

Finally, the beneficiary – the constituents in this case – must be peculiarly vulnerable or at the mercy of the fiduciary holding the discretion or power. The vulnerability of constituents in relation to their members can be seen both theoretically and in everyday reality. In terms of the theory of democratic representation, could there be anything more vulnerable than having to rely on one individual, who likely does not know you personally and who you may not have voted for, to represent your concerns, your interests? To be your sole voice in the institution that makes the laws that govern every aspect of your life? In terms of the more direct reality of the vulnerability of citizens, there are issues that fall squarely into the ambit of federal politicians, such as those related to passports or immigration, where members of parliament can be a citizen's only hope when problems arise, that citizens have to rely on their member to help them with, such as when problems arise with passport or immigration issues.

In the relationship between members of parliament and their constituents we find all three of the *Frame* indicia. It is illuminating to the see this relationship put in the context of this classic fiduciary test, as it serves to highlight the power and discretion members have and to emphasize the power imbalance that exists between the two parties. Seen in this context, the requirements of selfless action and conflict-free decision making are clearly absolute and unequivocal necessities.

> ***I would argue that the relationship between a member of parliament and constituents should become a new class, in the institutional fiduciary category, of fiduciary relationship.***

The category of institutional fiduciary relationships, which includes trustees and company directors, should not be considered closed. As Lionel Smith writes in his commentary on *Hodgkinson v. Simms,* institutional fiduciary relationships arise automatically, as a result of the law, and when an individual enters into an institutional relationship "he or she relinquishes self interest by operation of law, even if not voluntarily." Smith notes that the creation of a new category could be done for "communitarian" reasons, those that are so important as to outweigh the potential harm done to individuals who would find themselves in strictly controlled relationship.[16] The extension of the fiduciary concept to cases involving injuries that are not financial has been called "conceptually sound" by Robert Flannigan, and is in keeping with the finding that parents owe some fiduciary responsibilities to their children or that a doctor has some fiduciary obligations to a patient. In this case, the relationship between a member and his or her constituents is one that requires the utmost loyalty and integrity and appears to have the classic characteristics of a fiduciary relationship as outlined in the *Frame* test. [17]

Existing Support for Fiduciary Duty

An examination of the duties and ethics behind the role of "member of parliament" is especially apt at this point in time, given the defeat of the Liberal government in the wake of the Sponsorship Scandal, and with the adoption of the *Federal Accountability Act* (FAA). With respect to their roles as representatives, members of parliament are subject to the provisions in the *Criminal Code* and the *Parliament of Canada Act*, as well as applicable provisions of the *Elections Canada Act*. The FAA has brought in the *Conflict of Interest Act,* which puts into statute form many of the provisions in the previous code governing the actions of public office holders, though this affects only slightly the code in place to govern the behaviour of regular (i.e. non-ministerial) members of parliament.

This latter code, *The Conflict of Interest Code for Members of the House of Commons (Code),* was reviewed by the Standing Committee on Procedure and House Affairs (PROC) in its 54th report tabled in June 2007 and governs the decision making behaviour of members of parliament. The PROC report represents the latest in over three decades of wrestling with how best to regulate the interests of parliamentarians, a process that started with *Members of Parliament and Conflict of Interest* report tabled in 1973. The PROC report recommends changes to the *Code* with regard to the FAA and the need for further clarity and better interpretation. In all, the *Code* outlines requirements for disclosure, for publication of some of the disclosure information, for recourse to be undertaken in the event of a conflict, and for inquiries into situations that have, or could, compromise a member's credibility. These requirements emulate what would be required of someone hoping to fulfill fiduciary obligations, and a more in-depth study of the appropriateness of these regulations – and whether they meet the high standard required for a fiduciary relationship – could be illuminating.

For our purposes here, it is important to recognize that members are already obligated to take steps to ensure the integrity of their decision making process, and that their duty to make decisions in the interests of those other than themselves and their family is highlighted to a certain degree. Furthermore, the purposes and principles stated in ss.1-2 of the *Code* speak to the importance of maintaining public trust in elected representatives, in ensuring members put the public interest ahead of their personal interests, and emphasize that the interests of members should be subject to strict public scrutiny. These sections embody the purposes and principles I see behind the proposed imposition of fiduciary duty. Of course, my contention is that these principles and purposes can only be appropriately fulfilled with the weight and legal status of the regime of fiduciary duty, but ss.1-2 of the *Code* – and to a large degree the requirements on members in the body of the *Code* – do show that a desire to hold members to a strict, minimum standard of behaviour is present and elaborated quite extensively.

Advantages and Disadvantages

Many possible consequences could flow from the recognition of a fiduciary relationship between members of parliament and their constituents. According to Shepherd, a conflict of interest exists where a fiduciary is

faced with a choice between the interests of the beneficiary and anyone else's interests, including his own. The member would be obligated to make any decisions, whether in caucus meetings, the house, or the office, in a transparent and selfless manner to ensure first that there is not conflict and second that any conflict would be visible and subject to scrutiny. This is the minimum, exacting and essential standard that should be applied to all members however they conceptualize their role (delegate or trustee, for example) and however they choose to interpret the interests of their constituents. The power of a member and the vulnerability of the constituents requires that decisions are made not to further the member or his or her family personally, but rather done strictly in his or her role as a representative. Some of the direct consequences would include the detailed disclosure on the part of the member of parliament of personal financial information, as well as that of close family members. Possible conflicts would have to be disclosed, and if it is impossible for a decision to be made free from any perception of impropriety, there should be a recusal.

The advantages are many, and speak to the need for further consideration of this debate.

First, recognition of a fiduciary relationship between members and their constituents would better emphasize the obligation members possess, flowing from their great power, to behave in a selfless manner. If we believe in the importance of democracy (which we certainly do) and representative government (again, which we do without doubt), we have to do our utmost to ensure that the job of "representative" is conducted with the utmost integrity, honesty and generally ethical behaviour. Though there already are requirements that regulate the conduct of members such as those found in the *Code,* these do not seem formalized enough to do justice to the crucial principles that the requirements are in place to safeguard. As does exist to some extent now, the conflict of interest regime should have as its basis a solid conception of the loyalty, honesty and selflessness central to the duty of a member of parliament. This creates a minimum, yet exacting standard, to underpin the duty of representation taken on by all members upon their election. Unlike the case with the current *Code,* fiduciary duty is accompanied by centuries of jurisprudence and legal philosophy that would lend credence to any modern application to members of parliament, and brings with it the weight of a long standing legal regime which does much to emphasize the importance of the attendant requirements. It would institutionalize the divestment, disclosure and recusal requirements in a way that a *Code* – which can be changed by parliament seemingly at will – could not do.

There are some practical manifestations of a greater emphasis on "selflessness" that I would welcome. Above all, a stricter and more emphasized regime of selflessness and loyalty would reinforce the reality that the job of providing adequate representation to tens of thousands of people does not allow for "constant campaigning", something seen often in minority parliaments. Members are elected to represent their constituents as faithfully as possible for a term. For the health of their continued political career members can always hope that they will make enough widely felt and publicized decisions in the course of their representation of their community to secure their re-election. However, ideally I do not believe there should be an expectation that their own re-election should take even the slightest priority in the course of day-to-day business. Members should help supporters and non-supporters alike, and should make time to meet with various groups even if those groups will not help them politically.

Second, a fiduciary regime would not only highlight the details of the obligations members have to their constituents, but would also highlight the unique and essential role played by members in the grand scheme of things, in our democratic system. A strict, legal obligation on members to divest themselves of inappropriate influences and to recuse themselves where necessary would help the public place greater trust and confidence in their representatives, in the decisions they make and ultimately in government as a whole. Furthermore, fiduciary duty is a way to highlight in the minds of members the obligation of trustworthy representation, and of setting that obligation apart from the many other duties members have. This serves to ensure that constituents receive adequate representation, characterized by a minimum standard of ethical behaviour. This greater emphasis is necessary because amidst the realities their jobs, members could easily lose sight of the role they play in our parliamentary democracy, especially as the House of Commons can at times seem to be an institution in which the effect of one member is quite insignificant indeed. There is no disputing that the demands on a member of parliament are already onerous: constant travel, grueling work days and the need to be incredibly informed on a wide gamut of subjects make the work of an MP daunting. In addition, the scrutiny devoted to the words and actions of members means they are virtually always in the public eye. However, we must emphasize and encourage members to remember the "institutional role" they play, in that they are truly the sole vehicle by which every citizen of majority age is able to participate in the democratic process. By ensuring primarily that decisions are made in an environment that is conflict-free

and transparent, the relationship between constituents and members is also preserved as is befitting of such an important connection.

Third, the imposition of fiduciary duty would safeguard the integrity of the decision making process. In order for the House of Commons to truly be accountable to Canadians, the decisions made by members must be open for appraisal. The decisions themselves must be made public, as they are. However, in order to *evaluate* those decisions – am I being well represented? Was this a decision that should have been made? – Canadians must know not only what the decision was, but also have a window into the decision making process. Though the transcripts of most committee meetings and debates are easily accessed by the public, the discussion surrounding decisions taken in caucus or cabinet meetings will remain out of our grasp. As a result, we must trust that our representatives will be thinking of our interests as they make these decisions behind closed doors, and that they will make a decision in a way that is not influenced by their own self interest or in the interest of anyone other than their constituents. The selfless and exacting standard of conduct required by the member under fiduciary law, who ideally gives up any self-interest for the duration of his or her term, should be seen as being as much a part of the job as voting. That is, the rationale behind the vote is just as important as the action of voting itself. This does not in anyway remove the prerogative of the member to make his or her own decision; the definition of "best interests of a constituency" can be debated eternally and many different rationales justified. The imposition of fiduciary duty would simply stipulate that the interests of the constituency must be served and would emphasize what a member *cannot* do – that is, make a decision in his or her own interest, or the interests of a relative for example.

There are also many disadvantages to a finding of fiduciary relationship between members and constituents. First, it is already difficult to appeal to talented members of the public to run for public office and the imposition of fiduciary obligations would make the job technically even more onerous than it is at the moment. While I believe that this imposition is part of what is required to ensure the job is done correctly, we should consider its effect on the pool of candidates. This would no doubt be highlighted by protests from at least some of the current members of parliament, who would be able to make compelling arguments that they and their families are already required to disclose huge amounts of personal information, much of it for public consumption.

Second, any imposition of fiduciary duty would have to be done carefully and in keeping with the jurisprudence and doctrine that has evolved through the centuries. This alone could prove an impossible task, especially as the difficult nature of fiduciary theory and the struggles our own court has had with the concept are well documented. It is essential that any extension of the institutional fiduciary relationship categories be done on a well founded basis, and this would be challenging to say the least.

Third, there are many logistical issues that would accompany the application of fiduciary duty to members of parliament that may themselves pose too significant a barrier to the very idea. These are similar to the difficulties in administering and monitoring compliance under the existing *Code,* which – though not by name or legal effect – certainly embodies many of the principles and purposes that would accompany the imposition of fiduciary obligations. For instance, could the fiduciary obligation of members be officially created by statute? To do so would be a complicated and messy process, as it would require the careful codification of the minimum standard all members owe to their constituents. The risk of codification of such a complex matter, which involves consideration of historical, philosophical and practical factors, is not only that it could be impossible to do properly and as extensively as necessary, but also that the codification of this aspect of a member's job would have an effect on other aspects as well. Other issues include the determination of who would review the conduct of members, whether the courts would be able to get involved as a matter of course, and what the "punishment" could be for members who breach their fiduciary duty. Would constituents be able to seek remedies?

Furthermore, the privileges possessed by the House of Commons and its members may provide a barrier to the recognition of fiduciary duty, or at least necessitate a "parliamentary specific" application. Though there are legal regimes, such as those pertaining to bribery, which affect members and how they do their job as members of parliament, the imposition of fiduciary obligation could have the effect of removing from the House the capacity to sanction members and generally to regulate its own internal affairs. If the fiduciary regime for members were to evolve by way of jurisprudence, as opposed to statute, it would also raise the issue of parliamentary privilege in the context of judicial review.

Conclusion

Overall, what we need is a concept that can operate to bring the idea of accountability into more concrete terms for members of parliament. Fiduciary duty is just such a concept.

Fiduciary duty is by no means a straightforward, inflexible construct. However, the continuing discussions in the courts and by commentators on the role of fiduciary law, how and when to extend fiduciary duty and the content of that duty, should indicate that we should not close the door on the further extension of fiduciary relationships to the public realm, and to members of parliament in particular. Equity has supported the Common Law when it has been found lacking and, as I envision it, the concept of fiduciary duty could support other notions of responsibility and representation much in the same way that equity has supported the Common Law through the years.

There are serious and acknowledged obstacles to doing this in both the law and parliamentary convention, but the discussion should still take place. By looking at this relationship in greater detail and by examining and setting forth some of its underlying obligations, we can begin a truly considered study of this important relationship. Overall, I believe that members of parliament have a great commitment to their jobs, and to their constituents. The recognition of a fiduciary relationship will only help strengthen, emphasize and protect this essential relationship in keeping with its essential place in our democratic system. Moreover, it helps guarantee that this relationship – one that has a power imbalance and discretionary power over a vulnerable party at its core – will remain one in which citizens can rest their utmost faith.

Notes

1. Leonard Ian Rotman, *Fiduciary Law,* (Toronto: Carswell, 2005) at 13; Rt. Hon. Beverley McLachlin, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective", in Donovan W.M. Waters Ed., *Equity, Fiduciaries and Trusts* (Toronto: Thompson Canada Limited, 1993) 37 -55 at 39.
2. Lionel Smith, "Case Commentary on *Hodgkinson v. Simms*", (1995) 74 *Canadian Bar Review* 714 at 730. [Smith]; Rotman, *supra* note 1 at 2,18,19.
3. Rotman, *supra* note 1 at 153, 2.
4. P.D. Finn, "The Fiduciary Principle", in T.G. Youdan Ed., *Equiry, Fiduciaries and Trusts* (Toronto: Thompson Canada Limited, 1989) 1 – 56 at 2. [Finn].
5. Smith, *surpa* note 2 at 717. Rotman, *supra* note 1 at 2, 6.
6. *Frame v. Smith* [1987] 2 S.C.R. 99 at para. 60. [*Frame v. Smith*].
7. *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377 at 409.
8. *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 384, quoting Ernest Weinrib in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1 at 7.
9. Matthew Conaglen, "The nature and function of fiduciary loyalty", (2005) 121 L.Q.R. 452 at 459 – 460.
10. Eugene Forsey, *How Canadian Govern Themselves,* 6th ed. (Her Majesty the Queen in Right of Canada, 2005) 1.
11. The oath reads: "I, A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria. Note: the name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with Proper Terms of Reference thereto."; James Robertson, "Oath of Allegiance and the Canadian House of Commons," (Library of Parliament, Revised September 2005) at 16,17.
12. Robertson, *ibid* at 3.
13. *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at para. 63.
14. David C. Docherty, *Mr. Smith Goes to Ottawa: Life in the House of Commons*, (UBC Press: Vancouver, 1997) 143- 144. See also Jack Stilborn, "The Roles of Members of Parliament in Canada: Are They Changing?" (Library of Parliament, 31 May 2002) at 16 – 17.
15. C.E.S. Franks, *The Parliament of Canada,* (University of Toronto Press, Toronto, 1987) p. 57.
16. Smith, *supra* note 2 at 725.
17. Robert Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83 *Canadian Bar Review* 35 at 72; *M(K) v. M(H)* [1992] 3 S.C.R. 6; *Norberg v. Wynrib*, [1992] 2 S.C.R. 224.