Fiduciary Duty and Members of Parliament

Winner of the Institute On Governance’s
2007 Alf Hales Research Award

by Lindsay Aagaard
Parliamentary Intern
2006-2007
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Alf Hales Research Award

In recognition of the valuable educational experience that the Parliamentary Internship Programme provides, the Institute On Governance created The Alf Hales Research Award in 1999. The award, which seeks to promote research excellence and young people's understanding of governance issues, is handed out annually to the best Intern essay on a particular aspect of the Parliamentary system. The 2007 winning paper, *Fiduciary Duty and Members of Parliament*, by Lindsay Aagaard, reflects the originality and spirit that Alf Hales demonstrated when he created the Programme 30 years ago.

Lindsay Aagaard was one of ten interns chosen to participate in the Parliamentary Internship Programme during the 2006-2007 academic year. Ms. Aagaard holds a BA (Hons.) in Political Studies from Queen's University and is currently completing her final year of the joint civil and common law program at McGill University. In addition, she is involved in Laskin Moot, the Women's Caucus, and Shield of Athena - a centre for victims of domestic violence. Ms. Aagaard’s experience as a research assistant is extensive, and includes working for Dr. Sharon Sutherland's submission to the Gomery Inquiry, the Canada School of Public Service, the Epilepsy York Region, and a Toronto area M.P.P at Queen's Park.
Explanatory Note

I was motivated to write this paper by a couple of factors: first, working in parliament during a minority government situation, during the session in which the Federal Accountability Act came into force, and having the opportunity to attend the Standing Committee on Procedure and House Affairs during my first allocation. This relationship was something I had thought of a lot during my undergraduate studies in political science, and in my view the ability to fulfill the job of a member of parliament is dependent on many things including the procession of “clean hands” and a strict adherence to conflict of interest rules. Second, the concept of fiduciary duty – the utmost expression of mandated loyalty – is one which I have found greatly intriguing during my law studies, one which on the surface has some interesting (if only fleeting) application to members of parliament.

I therefore looked upon this paper as a great opportunity to do a broad survey of the issues that would be involved if one were to attempt to find a fiduciary relationship between members of parliament and their constituents. This was also an opportunity to learn about fiduciary duty – if only to further deepen my initial understanding that it is a complex subject indeed. Many issues, such as parliamentary privilege, that I address only briefly here, I realise full well could be the subject of a paper on their own. Overall, I am delighted to have had the opportunity to explore several issues that are of great interest to me, and I hope to use this as the start of an ongoing dialogue and study of this issue.

I also must thank Professor Lionel Smith, Professor Evan Fox-Decent and Professor Roderick Macdonald for their help in the early stages of this paper. The opportunity to speak with them about various aspects of this topic was enormously helpful and formative to this project. Finally, and very importantly, thank you to Gregory Tardi, Senior Parliamentary Counsel (Legal), for his encouragement and insight on this topic.
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Introduction

The Hon. Bill Graham, a respected federal Liberal politician with years of experience in both government and opposition, announced on Tuesday June 19, 2007 that he would be stepping down as the representative for Toronto Centre. In a heartfelt speech to the House of Commons, Mr. Graham recounted tales from his years in Parliament, pleaded for civility and respect between members and remarked: “I believe everyone in the House carries within him or her the desire to serve our country and, whether one has that desire or not, the capacity to affect the future lives of every citizen of this great land, and to some extent others around the globe.”

This last comment speaks to the tremendous power that lies at the heart of the job of “member of parliament”, and it also leads immediately to consideration of the duty to constituents that must accompany that loan of power. Regardless of what motivated a person to put forward their candidacy for public office, once in Parliament that individual is entrusted with a unique role wherein he or she has the capacity, as Mr. Graham stated, to touch the lives of Canadians across the country. The hundreds of politicians sitting in Parliament on June 19th heard Mr. Graham’s words and likely nodded in solemn agreement; that power is acknowledged in nomination meetings around the nation by the pledge to fulfill the attendant duty to serve constituents with the utmost integrity. However, the content of that duty is a complex combination of moral and ethical obligations that political scientists, civil servants and politicians themselves have long struggled to define.

What exactly are the responsibilities and obligations that accompany the job of “member of parliament”, that powerful position about which Mr. Graham was speaking? To who are those obligations owed, and what are the contents of these obligations?

What I intend to examine with this paper is the concept of responsibility or “duty” as it is owed by members of the House of Commons to their constituents. Specifically, I wish to test the idea that members of parliament could be considered to be in a fiduciary relationship with the constituents they represent. The concept of fiduciary duty could complement and underscore existing theories of representation; it is not a model of representation of such, or a theory of desired action, but rather a way of encapsulating and emphasizing the honesty, integrity and ethical manner in which decisions of members of parliaments must be made. The utility in this exercise comes from the 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. To constrain to some degree what is meant to be a wide-ranging survey of the subject, I will be speaking specifically of the Canadian federal parliament and the members elected to this institution. Furthermore, I will be speaking of the duties owed by these members in their capacity as members of parliament and not as Ministers, Secretaries of State or Parliamentary Secretaries.

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The paper that follows is divided into three parts: I will first outline the concept of a fiduciary relationship and fiduciary duty, and provide a brief summary of how fiduciary relationships have expanded beyond the original sole application to the relationship between trustees and beneficiaries; second, I will review the obligations attached to our elected representatives and then outline the preliminary case for extending fiduciary duty to elected members of parliament; finally, I will examine the consequences of the application of fiduciary duty, referring specifically to the advantages and disadvantages of such a regime.

Overall it is my goal to conduct a broad survey of the concept of fiduciary duty as potentially applied to members of parliament, and to highlight the importance of keeping the concept of honesty, integrity and ethical behaviour at the forefront of any consideration of the role or job description of an elected parliamentarian. Indeed, it is not enough to simply impress upon members and constituents that there is an informal duty in this regard; with fiduciary duty we are able to ground the underlying obligation to act in the interests of the constituents in a long standing legal concept that requires integrity of the highest order.

Part 1: The Theory of Fiduciary Duty

The History of the concept of Fiduciary Duty

To understand the notion behind the fiduciary duty it is useful to look at how it became a part of our current Common Law. Fiduciary duty is a concept that evolved from Equity, an area of the law that was once distinct from, but is now subsumed within, 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 designed 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 our current Chief Justice Beverley McLachlin has stated that Canada has embraced with enthusiasm.

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2 Leonard Ian Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at 13. [Rotman]
3 *Ibid.* at 156.
**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 with power over the interests of others. As Rotman writes, “beneficiaries are vulnerable to the misuse or non use of power, and fiduciaries [ought to] act with honestly, selflessness, integrity, fidelity and in the utmost good faith (uberrima fides) in the interest of the beneficiary.” Fiduciary obligation has been described as the “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.” The result of fiduciary law is that obligations, in the form of a standard of conduct, are imposed in order to regulate the way in which the opportunities that often arise from being in a position of power can be utilized.

**The Imposition of Fiduciary Duty**

The Three Categories of Usage

Fiduciary duty exists in the context of a fiduciary relationship. Characterizing something as a “fiduciary relationship” is a way of describing the nature of a relationship, and endowing it with certain characteristics. In *Lac Minerals Ltd. v. Corona International Resources Ltd.* Justice LaForest enumerates three uses of the term “fiduciary”, a piece of doctrine he picked up again in the majority judgment in *Hodgkinson*. First, there are those that arise as a matter of course, almost automatically, that have “as their essence discretion, influence over interests and inherent vulnerability.” This includes certain classes of relationships - such as trustee-beneficiary, agent-principal and parent-child - and is what Professor Smith refers to as institutional fiduciary relationships as the mere presence of these relationships “gives rise to fiduciary obligations.” The second category of fiduciary relationships are those that are not pre-existing, recognized categories of fiduciary relationships, but rather those which arise as a result of the facts of a given situation. Here the technique suggested is not to employ the Frame test but rather to look

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8 Rotman, *supra* note 2 at 2, 18.
9 Rotman, *supra* note 2 at 19.
11 Finn, *supra* note 7 at 2.
13 *Hodgkinson, supra* note 12 at 409.
14 Smith, *supra* note 6 at 717. It should also be remembered that not every duty that arises in the dealing of two parties in a fiduciary relationship should be considered a fiduciary duty. (See for example, Rotman, *supra* note 2 at 13).
15 *Lac Minerals Ltd., supra* note 12 at 646.
at the reasonable expectations of the parties. The third usage described is the instrumental usage of fiduciary duty. Here Professor Smith agrees with what he refers to as LaForest’s “deprecation” of this usage, as the term “fiduciary” is employed in this particular usage solely to secure the consequences that come with such an invocation, rather than as a result of logical or theoretical continuity.

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. In Frame v. Smith, Justice Wilson outlined a “rough and ready” test which outlines 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.

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 – one which falls into the first category of usage, the institutional 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.

Consequences of the Imposition of Fiduciary Duty
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.” 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

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16 Hodgkinson, supra note 12 in LaForest J’s opinion. But also note debate over the suggested technique: see for example Smith, supra note 6 and Robert Flannigan, “The Boundaries of Fiduciary Accountability” (2004) 83 Canadian Bar Review 35 at 74-76. [Flannigan]; See also note 52.
17 The Supreme Court of Canada’s criticism of the instrumental usage of fiduciary relationships is articulated in Lac Minerals Ltd., supra note 12 at 649. The Court wrote: “in this sense, the label fiduciary duty imposes no obligations, but rather is merely instrumental or facilitative in achieving what appears to be the appropriate result… This is a misuse of the term.”
18 Rotman has written that much of the existing jurisprudence involving fiduciary duty “lacks a principled foundation”. Rotman, supra note 2 at 20.
19 Ibid. at 2.
20 This malleability is a characteristic of fiduciary relationships that Rotman writes gives the concept the ability to be adapted to individual situations. Rotman, supra note 2 at 6.
22 Ibid. at para. 60.
23 Hodgkinson, supra note 12 at 409.
beneficiary and the interest of the fiduciary, and prohibits the fiduciary from making a profit as a result of being in a fiduciary position.25 A breach of fiduciary duty is found where there has been “unauthorized conflict or benefit,” where they privilege their own interests to those they are obligated to serve.26

**Looking forward: 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,27 and parents have been found to have a fiduciary obligation to their children in certain respects.28 Ultimately, and as will be expanded upon below, I would say that the relationship between a member of parliament and constituents could become a new class of fiduciary relationship.

**Part 2: Fiduciary Relationship as Applied to Members of Parliament**

From what we have just seen, a fiduciary relationship is a highly unique relationship, found in certain factual or statutorily mandated situations, and carries with it a duty of selflessness and “undivided loyalty.”29 Fiduciary duty is a concept enormously complex in application, but the exercise of applying it to members of parliament is both intriguing and illuminating. I will start this section by reviewing the obligations held by a member of parliament, highlighting the importance of the duty owed to the constituents, and outlining what at least a portion of what that duty entails. Though there are many important duties, that owed to the citizens the member has been charged with representing is the one on which I will concentrate and is the one to which I believe fiduciary obligations could attach. I will then demonstrate how fiduciary duty could be applied to members of parliament using the Frame indicia, and highlight places where support for the application of fiduciary duty to members can be found.

**Members of Parliament: Their Obligation to their Constituents**

**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

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26 Flannigan, supra note 16 at 37-38.
29 Finn, supra note 7 at 4. The other standards are unconscionability and good faith, in both of which one party is able to act in a self interested manner without violating the standard.
country as a whole. For instance, every member of a party, 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 obligations of a member of parliament to the Crown, to the rule of law and to constituents are discussed briefly below, and the importance of the latter obligation – one to which I propose fiduciary law apply – duly emphasized.

The Obligation 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. 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 traditions, 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.”

This oath is clearly central to Canada’s political status as a constitutional monarchy. However, 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. 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

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30 I would define “supporters” as those who voted for the member or who helped with the campaign, whereas “constituents” includes both supporters and non-supporters.
31 This oath is administered by the Clerk of the House of Commons. More information on the oath and its administration can be found at the website of the Clerk of the House of Commons <http://www.parl.gc.ca/sites/HoCClerk/ClerkOffice-e.htm >
32 Eugene Forsey, How Canadian Govern Themselves, 6th ed. (Her Majesty the Queen in Right of Canada, 2005) 1. [Forsey].
33 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.”; See also James Robertson, “Oath of Allegiance and the Canadian House of Commons,” (Library of Parliament, Revised September 2005). [Robertson].
34 Ibid. at 17.
35 Ibid at 16.
36 Ibid. at 3.
oath is what makes it possible for members – there 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. I view the oath as 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.

The Obligation to the Constitution and 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 Quebec 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, The 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”.”

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 the 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 is a commitment demanded of all elected members of parliament. This duty to the “system” is beholden to all members of parliament.

The Obligation to Constituents

The obligations to the Crown and to the Rule of Law are central and essential, but it is on the obligation to constituents that I wish to concentrate as it is here I believe 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 to play in parliament, 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

40 Manitoba Language Rights, supra note 37 at para. 63.  
41 The duty to uphold our democratic system bestowed upon an individual by virtue of his or her participation therein is by no means unique to a member of parliament. Senators, Public servants and appointed officials, for example, all have a similar obligation.  
42 Thank you to Gregory Tardi for highlighting and providing insight into this important obligation.
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 they wish or by making their 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 classic conceptions of 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 upon 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 is not always possible or preferable. 

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 their [his constituents’]; and above all, ever, and in all cases, to prefer their interest to his own.” 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 by which that member has chosen to abide, in an honest, selfless and transparent manner. Fiduciary duty, the content of which is to act in the interests of the beneficiary, can be seen to underscore any of the models of representation. In

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43 “Representative Democracy: A democracy in which the public will is expressed and defined by representatives who are elected by the people directly.” Definition provided in Peter Aucoin, Jennifer Smith, Geoff Dinsdale, Responsible Government: Clarifying Essentials, Dispelling Myths and Exploring Change, (Canadian Centre for Management Development, 2004) 93.

44 The trustee model, no doubt so named for the power of unilateral action reposed in the trustee in the classic fiduciary relationship between a trustee and beneficiary, would by no means have to be the model adopted by members should a fiduciary duty be imposed between them and their constituents. Remember that the fiduciary duty would underpin any model of representation by providing minimum standards of action. However, the imposition of fiduciary duty could address some of the criticisms of the trustee model. Whereas the trustee model can seem to advocate a style of representation that risks being out of touch with the constituency, fiduciary duty ensures that members are always subservient to the interests of the beneficiary in that personal interests – including self promotion – must be to a large extent banished.


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.

This 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 necessitates that the 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’ interest 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 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 Application of Fiduciary Duty to Members of Parliament

The Indicia from Frame v. Smith

How exactly can it be argued that the relationship between a member of parliament and constituents is fiduciary in nature? What first drew me to this idea were the similarities between the indicia of an institutional fiduciary relationship as laid out in the test developed in Frame v. Smith and the reality of the relationship between a member and his or her constituents.

To begin, the first indicator 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 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

47 As will be discussed below, my conception of “adequate representation” for the purposes of this paper is a minimum ethical standard by which all decisions are made. Representation is adequate, then, when the member makes decisions in the best interest of his or her constituents (however he or she chooses to define that, based on model of representation he or she works by) in an honest, selfless and transparent manner.
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 aided 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.

Ultimately, 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, individual 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? I would argue not. In terms of the 
more direct reality of the vulnerability of citizens, there are issues that fall squarely into the 
ambit of federal politicians 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 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.

As was mentioned earlier, 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 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 should 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. The extension of fiduciary relationship to cases involving injuries that are not 
financial has been called “conceptually sound” by Robert Flannigan, and is found in the finding 
that parents are in a fiduciary relationship with their children or that a doctor has some 
fiduciary obligations to a patient. In this case, the relationship between a member and his or

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48 See Lac Minerals Ltd., supra note 12 at 597 and 645, where this assertion, as contained in both Frame, supra note 21 at 136 and Guerin, supra note 24 is quoted with approval.
49 Smith, supra note 6 at 725.
50 Ibid. Smith references M(K) v. M(H) [1992] 3 S.C.R. 6; Flannigan, supra note 16 at 72.
51 This was the minority judgment in Norberg v. Wynrib, [1992] 2 S.C.R. 224. Flannigan, supra note 16 at 71.
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.  

Existing Support for Fiduciary Duty

Before turning to the potential advantages and disadvantages of the recognition of fiduciary obligations on members in the final part of this paper, we should consider the support that exists for such a level of imposition.

Existing Regulations

An examination of the duties and ethics behind the role of “member of parliament” is especially apt at this point in time, in the midst of the 39th Parliament, given that this current session commenced following the defeat of the Liberal government in the wake of the Sponsorship Scandal, and with the tabling 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. Most recently, the Conflict of Interest Act, enacted by the FAA, has come into force and 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 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 both in keeping with changes necessitated by the FAA and also changes needed 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

52 I acknowledge, as articulated in Flannigan, supra note 16 at 75 - 76, that “Supreme Court jurisprudence reveals what appears to be a long-standing competition amongst the judges to produce a workable abstract test for the application of fiduciary accountability,” Flannigan discusses the various “vulnerability”, “power”, “discretion”, “reasonable expectations” tests that appear to have been used. Other ways of determining the existence of fiduciary obligations are proposed in doctrine. Professor Fox-Decent elaborates upon what is to him the better test to find fiduciary duty arising from factual circumstances - instead of looking to the reasonable expectations Fox-Decent prefers to look at “the nature of the exercise of the power and to the circumstances of its application”. [Evan Fox-Decent, The Fiduciary Nature of State Legal Authority (2005), 31 Queen’s L.J. 259 at footnote 22. [Fox-Decent]] I have used the Frame indicia for the purposes of this article, but any further consideration must also consider how the application of fiduciary duty to members (in relation to their constituents) would work with any other tests outlined in the jurisprudence.


54 For instance, as the FAA created the position of Conflict of Interest and Ethics Commissioner to replace that of Ethics Commissioner, the wording in the Code had to be changed to reflect this development. The FAA does, however, contain provisions that affect regular members, notably clause 99 which deals with trusts established for all members.

55 For full chronology, see Margaret Young, “Conflict of Interest Codes: A Long Road”, (Library of Parliament, 10 March 2006).
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 their representatives, in ensuring members put the public interest ahead of their personal interests, and that the interests of members be subject to strict public scrutiny. These sections embody very closely 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.

Further support
The notion of fiduciary duty in public life is not unknown, though the extent of its application is far from certain. However, as the examples below illustrate, there is enough evidence to prevent us from dismissing outright the idea of fiduciary relationships between members and citizens.

First, the fiduciary relationship between the Crown and Aboriginal peoples was well established in Guerin v. R. This embodiment of fiduciary duty has been reiterated in subsequent cases and the trust-like relationship, the honour that is at stake in the fulfillment of the attendant duties, and the heavy burden such a relationship entails have all been emphasized. What triggered the finding of a fiduciary duty in this case? It was the requirement that the Crown use its discretion to make decision in the best interest of Aboriginal people. There is certainly a distinction between the state, or the Crown, and a member of parliament, but much can still be learned from this use of fiduciary duty and interpretation of discretion.

Second, Professor J.C. Shepherd has written about his preferred division of the different types of fiduciary relationship into three categories: property holders, representatives and advisers. Shepherd writes that the second category – the classic agent-principle scenario – has included public officials such as municipal officials, and cites cases in which municipal officials have

56 My initial impression is that they are not strict enough.
57 Guerin, supra note 24. The relationship stems form the Royal Proclamation of 1763 when the responsibilities were taken on by the Crown. The Fiduciary duty is considered breached when the land is surrendered improperly or when the discretion invested in the Crown is improperly utilized.
60 Guerin, supra note 24 at 384. As stated in Flannigan, the discretion held by the Crown as a result of the Royal Proclamation transformed “the Crown’s obligation into a fiduciary one”. Flannigan, supra note 16 at 62.
61 Shepherd, supra note 7 at 21.
62 Shepherd acknowledges that Professor Finn disagrees.
been found to have fiduciary duties. Shepherd also acknowledges that fiduciary relationships have not been found when it comes to members of parliament, but this is still an interesting avenue worthy of further exploration.

Third, Professor Evan Fox-Decent has published an article in which he made the case that the relationship between the state and citizens has something “deeply fiduciary” about it. As he writes, “legal subjects depend on the state for the provision of legal order” and it is this very dependence that “reflects the state’s discretionary power and triggers the fiduciary principle”. Indeed, according to Fox-Decent, it is the beneficiary’s right that justifies the imposition of fiduciary duty. This article is of interest for many reasons, paramount among them the fact that Fox-Decent’s article tackles many of the complex points that could create a barrier to the acceptance of a fiduciary relationship between public officials of any variety and constituents. These potential barriers include the issue of consent, the voluntary undertaking of fiduciary duty, the obligation owed to a group of beneficiaries rather than an individual, and the importance of trust in the relationship between fiduciaries and beneficiaries when dealing with public office holders. In Fox-Decent’s article we find a solid articulation of an argument that there is a fiduciary nature to the interaction between the state and citizens, and in so doing the article addresses many of the theoretical limitations to the imposition of fiduciary duty on members of parliament. An exposition of the arguments in this article in direct relation to members of parliament would be a useful step in developing the principle I am trying to outline here, but for the moment this article serves simply as evidence compelling this further examination.

Finally, though we do not want to enter into the realm of instrumental fiduciary relationships (appropriately disparaged by LaForest in *Lac Minerals*, according to Professor Smith), there is a very current and solid rational behind wanting to achieve the results that would flow from the imposition of fiduciary obligations on members of parliament. Finn argues that the fiduciary principle originates in public policy – it attempts to encourage certain behaviour in order to achieve certain ends. Fiduciary duty would emphasize the importance of accountability and transparency that has been a primary focus of the government in the 39th Parliament, and would ensure the integrity of the decisions made.

Part 3: The Consequences of the Application of Fiduciary Duty

There are many possible consequences which would 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

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63 Shepherd, *supra* note 7 at 26. Shepherd references the following to support his argument: *Lord Petrie v. ECR* (1833) 1 Rail Cas. 462; *Simpson v. Lord Howden* (1837) 40 ER 862, 3 Myl. Cr.97; *City of Toronto v. Bowes* (1858) 14 ER 770, 11 Moo. P.C. 463 (PC); *Hawrelak v. City of Edmonton* (1975) 54 DLR (3d) 45 (SCC).

64 Fox-Decent, *supra* note 52 at para.1.


66 Finn, *supra* note 7 at 27.

67 Shepherd, *supra* note 7 at 41.
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 necessitate 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 where the choice is impossible, or making a choice given the scenario is impossible without the perception of impropriety, there should be a recusal.  

**Advantages and Disadvantages**

**Advantages**
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 loyalty, honesty and selflessness central to the duty of a member of parliament to his or her constituents. This creates a minimum, yet exacting standard underpinning 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 in particular. Above all, a stricter and more emphasized regime of selflessness and loyalty would reinforce the reality that 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 in particular. 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, but ideally I do not believe

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68 The obligation of recusal has interesting implications for members of parliament and their constituents, as it would leave constituents without any representative – any voice – in certain circumstances.
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 on 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 of highlighting the obligation to be a trustworthy representative in the minds of the members themselves, 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 can 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 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 and their day-to-day functioning part of the public domain. 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

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69 When speaking of the beginning of responsible government, Forsey writes: “That meant responsible government, with a Cabinet responsible to the House of Commons, and the House of Commons answerable to the people.” Forsey, supra note 32 at 1.

70 I do not think this is something that should change, in fact. There are hard decisions that must be made, and that perhaps could not be made if every aspect of the debate process (such as that which occurs within cabinet) was subject to scrutiny by the public and the media – primarily because it can be hard to evaluate some decisions with due diligence without the extensive background that is inappropriately long and boring for media sound bites.
up any self-interest of 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.

Disadvantages
There are 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 very 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

71 See for example Smith, supra note 6.
72 Some of the difficulties I am thinking of involve the controversy over the previous Ethics Commissioner, Bernard Shapiro as well as some difficulty in getting members to comply. See for example: Francoli, Paco, “Ethics czar's 'special reading' of code rejected: MPs' spouses will have to disclose assets, liabilities publicly for first time in history” The Hill Times. Issue 760 Oct 25-Oct 31, 2004, 1; Peggy Curran “Ethics czar undermined by the “acrimony” of Ottawa, prof. says” CanWest News, Mar 9, 2006, 1 (Wirefeed).
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 responsibility, of which the Hon. Bill Graham spoke, 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. It has been defined as a “concept in search of a principle” and as Professor Smith has written, the role of fiduciary law is rather uncertain. 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 relationship 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 underlying obligations we can begin a consideration of this important relationship at the level of detail that is necessary. Overall, I firmly 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.

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74 This is an area in which Professor Fox-Decent has done significant work, and an area that would require detailed examination.

75 Conaglen, *supra* note 25 at 452; Smith, *supra* note 6 at 730.

76 Rotman, *supra* note 2 at 155; McLachlin, *supra* note 5 at 38.
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