

# FIDUCIA IN PUBLIC LAW

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*Breach advances a conceptual basis for understanding fiduciary relationships in a public law setting. Fiduciary concepts cut across traditional legal boundaries to encompass a broad array of legal relationships. Political theorists and legal commentators have extended these concepts to governments, acting as fiduciaries, and their populations. In practice, the courts are reticent to impose a fiduciary relationship at public law. However, two lines of authority support the existence of fiduciary principles that are unique to public law. The first draws on the Canadian experience with a sui generis form of fiduciary relationship between the Crown and indigenous peoples, and later commentary on the principles of the Treaty of Waitangi. The second is judicial recognition that the relationship between local authorities and ratepayers is a fiduciary relationship. Breach argues that it is necessary to define fiduciary concepts that are unique to public law. This will avoid the uncertainty resulting from a sui generis classification, or worse, the consequences of conflating public law with private law fiduciary relationships. In doing so, he reassesses how the duty of loyalty can be understood in a public law context.*

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## I INTRODUCTION

The notion that fiduciary relationships exist in public law is not particularly novel, but is controversial. There is already a large body of literature devoted to the idea that leaders are in a fiduciary relationship with the public that gave them a political mandate to act on their behalf.<sup>1</sup> The judiciary, however, is typically reluctant to recognise new classes of fiduciary relationships in order to avoid public perceptions about unnecessary judicial interference. Nevertheless, there is pressure on the judiciary to respond to public concerns about weak avenues of political accountability.<sup>2</sup> Despite the pedigree enjoyed by the concept, the nature and scope of fiduciary relationships in public law

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1 See for example Evan Fox-Decent *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press, Oxford, 2011) at 173; and D Theodore Rave "Politicians as Fiduciaries" (2013) 126 Harv L Rev 671 at 708.

2 JS Maloy "Two Concepts of Trust" (2009) 71 The Journal of Politics 492 at 503.

sorely needs some guidelines.<sup>3</sup> It is important to remember that the *ius publicum* (public law jurisprudence) concerns any principle or rule relating to the operation of the state.<sup>4</sup> An approach to this subject must be careful not to confound private law and public law principles through artificial transposition of the former onto the latter. There are also a number of authorities that recognise public law fiduciary relationships. The main category of public law relationships that the judiciary accept as fiduciary exist between the Crown and indigenous peoples, and local authorities and ratepayers. The infant state of this area of law has already indicated that public law fiduciary relationships will have qualities that distinguish them from their private law counterpart. These differences are clearest in the softer approach to the duty of loyalty in a public law context. The object of this work is to demonstrate that fiduciary relationships are a recognisable feature of the *ius publicum* and to provide a starting point for future extrapolation of principle.

## II BACKGROUND

The modern term "fiduciary" derives its meaning from a medieval interpretation of Roman law, and the translation of the term *fiducia* to impose legal duties on the stronger party for the protection of the weaker.<sup>5</sup> The notions attached to this civil law term formed part of English law through equity.<sup>6</sup> The modern concept of fiduciary did not feature in Roman law.<sup>7</sup> Nonetheless, one passage in *Justinian's Institutes* resonates with the English development of the trust in equity, and the enforcement of fiduciary obligations today.<sup>8</sup> Inst 2.23.1 states that *fideicommissa* were originally unenforceable and relied on the conscience of the stronger party.<sup>9</sup> Emperor Augustus intervened and its principles formed part of the Roman *ius honorarium* or "honorarian law". George Spence identified that the English experience with the recognition of fiduciary duties in equity coincidentally follows the Roman pattern of development.<sup>10</sup> However, the civil law did not limit this "trust concept", or *fides*,

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3 Gerald Lanning "The Crown-Māori Relationship: The Spectre of a Fiduciary Duty" (1999) 8 AULR 445 at 458.

4 Justinian *Digest* (translated ed: Alan Watson (translator), University of Pennsylvania, Philadelphia, 1985) at 1.1.1.2.

5 Peter Birks "The Context of Fiduciary Obligation" (2000) 34 Israel Law Review 3 at 8.

6 Leonard Rotman "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34 Alta L Rev 821 at 822.

7 Birks, above n 5, at 8.

8 David Johnston *The Roman Law of Trusts* (Clarendon Press, Oxford, 1988) at 285; William Buckland "Praetor and Chancellor" (1939) 13 Tul L Rev 163 at 164; and Thomas Ridley *A view of the Civile and Ecclesiastical Law: and wherein the practise of them is streitned and may be relieved within this Land* (Printed for the Company of Stationers, London, 1607) at 12.

9 *Justinian's Institutes* (translated ed: P Birks and G McLeod (translators), Cornell University Press, Ithaca, 1987).

10 George Spence *The Equitable Jurisdiction of the Court of Chancery* (Stevens, London, 1846) vol 1 at 411.

to the *fideicommissum* arrangement. It applied *fides* to a number of legal relationships arising in both the law of persons and the law of things.<sup>11</sup> The legal relationship itself would define what duties the fiduciary relationship would impose on the stronger party (for example, the medieval concept included the guardianship of children – law of persons, and the relationship between heirs and beneficiaries – law of things). This brief foray into the civil law origins seeks to demonstrate the flexibility of *fiduciae* concepts to apply to all kinds of legal relationships.

The prevailing view of fiduciary duties as a concept that cuts across traditional legal boundaries does not indicate an experience different from its civil law precursor.<sup>12</sup> As a result, the fiduciary concept is often criticised as an ill-defined concept marred by controversies despite its lengthy pedigree.<sup>13</sup> Nevertheless, there are some certain features. The notion of trust underpins all fiduciary relationships and will give rise to extraordinary duties.<sup>14</sup> In *Watson v Dolmark Industries*, Gault J recognised that to identify a fiduciary relationship a court must:<sup>15</sup>

... look for circumstances in which one person has undertaken to act in the interests of another or conversely one has communicated an expectation that another will act to protect or promote his or her interests. There are elements of reliance, confidence or trust between them often arising out of an imbalance in ... rights, powers or the use of information affecting their interests. Telling indications may be that person having taken, or been entrusted with opportunity to protect or benefit others stand in a position also to prefer their own interests.

The duties are proscriptive in effect and seek to identify what fiduciaries must not do, implying how a fiduciary must act, rather than setting clear guidelines.<sup>16</sup> They typically arise when one party reposed a special trust and power in another, which had the effect of leaving the former vulnerable to the actions of the latter.<sup>17</sup> This attribute fosters a broad interpretation about when a fiduciary obligation may feature as part of a legal relationship.

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11 William Buckland *A Text-Book of Roman Law: From Augustus to Justinian* (Cambridge University Press, London, 1921) at 428–429. See also Tamar Frankel *Fiduciary Law* (Oxford University Press, Oxford, 2010) at xiii.

12 Rotman, above n 6, at 852.

13 Paul Finn *Fiduciary Obligations* (Sydney Law Book, Sydney, 1977) at 1; and Leonard Rotman "Fiduciary Law's 'Holy Grail': Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91 BU L Rev 921 at 923.

14 Graham Virgo *The Principles of Equity and Trusts* (Oxford University Press, Oxford, 2012) at 21.

15 *Liggett v Kensington* [1993] 1 NZLR 257 (CA) as cited in *Watson v Dolmark Industries* [1992] 3 NZLR 311 (CA) at 317–318.

16 Virgo, above n 14, at 487.

17 At 479.

The kinds of legal relationships that give rise to duties of a fiduciary character are legion.<sup>18</sup> Included amongst their number are the relationship between parents and children, guardian and ward, spouses, solicitors and clients, and doctors and patients.<sup>19</sup> In *Royal Bank of Scotland v Etridge (No 2)*, Lord Nicholls made the prudent observation that "[t]he types of relationship, such as parent and child, in which this principle falls to be applied, cannot be listed exhaustively. Relationships are infinitely various."<sup>20</sup> This statement highlights the judicial attitude to accept the existence of novel circumstances that may give rise to a fiduciary relationship, and a reluctance to confine them to a particular set of facts.<sup>21</sup> Once the courts accept that a particular legal relationship is fiduciary, the difficulty turns to identifying the nature of its obligations.<sup>22</sup> Deborah DeMott observes: "Although one can identify common core principles of fiduciary obligation, these principles apply with greater or lesser force in different contexts involving different types of parties and relationships. Recognition that the law of fiduciary obligation is situation-specific should be the starting point for any further analysis."<sup>23</sup> She highlights the futility of an attempt to define them any further than acknowledging the relationship itself will dictate the obligation. The fiduciary relationship itself, therefore, ought to furnish insight into the obligations that may arise.<sup>24</sup> Since it is recognised that most fiduciary relationships arise in a private law context, then the nature of those obligations reflect principles in private law. Similarly, the notion of a public law fiduciary relationship ought to reflect the principles of the *ius publicum*. This removes the need to artificially impose private law concepts onto public law.

### **III POLITICAL THEORY: THE NATURE OF A PUBLIC LAW RELATIONSHIP**

Much ink has been spilt discussing whether the relationship between a government and its population can be defined in fiduciary terms. The discussion arose out of the medieval concept of *fiducia*, and subsequent humanist debates about sovereign power.<sup>25</sup> Political theorists would later, and

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18 At 480.

19 Robert Megarry and PV Baker *Snell's Principles of Equity* (Sweet & Maxwell, London, 1973) at 548–549; and Ethan Leib, David Ponet and Michael Serota "Translating Fiduciary Principles into Public Law" (2013) 126 Harv L Rev 91 at 93.

20 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 at [10].

21 Virgo, above n 14, at 483; and Lanning, above n 3, at 447.

22 Virgo, above n 14, at 479.

23 Deborah DeMott "Beyond Metaphor: An Analysis of Fiduciary Obligation" (1988) 37 Duke LJ 879 at 879.

24 *Boardman v Phipps* [1967] 2 AC 46 (HL) at 127; and J Derek Davies "Equitable Compensation: 'Causation, Foreseeability and Remoteness'" in Donovan WM Waters (ed) *Equity, Fiduciaries and Trusts* (Carswell, Scarborough, 1993) 297 at 310.

25 Maloy, above n 2, at 492 and 497.

continue to, analyse this relationship through the construct of a "social contract".<sup>26</sup> It is a hypothetical contract between the state and all its citizens about the exercise and limitations of sovereign power.<sup>27</sup> This topic is usually addressed in comparison to the "state of nature".<sup>28</sup> Thomas Hobbes' *Leviathan* (1651) paints a graphic image of the condition of humanity in nature, which suggests the human life would be "solitary, poor, nasty, brutish, and short" without the formation of an ordered state.<sup>29</sup> The Hobbesian approach indicates that political leadership provides the security necessary to avoid such a life.<sup>30</sup> He observes that:<sup>31</sup>

A Commonwealth is said to be instituted when a multitude of men do agree, and covenant, every one, with every one ... From this institution of a Commonwealth are derived all the rights and faculties of him, or them, on whom sovereign power is conferred by the consent of the people assembled.

Hobbes does not associate a fiduciary character with this relationship.<sup>32</sup> Nonetheless, the social contract gradually came to be seen as a foundation for political trust and the idea that legitimate political rule stems from the consent of the governed.<sup>33</sup>

Early political theorists defined sovereign power as either *monarchic*, or unelected authority, or *republics* as comprised of elected officials.<sup>34</sup> Both forms of government invoke the social contract notion that is enforceable through the exercise of political power.<sup>35</sup> It represents the tacit trust that

26 John Rawls *A Theory of Justice: Revised Edition* (Harvard University Press, Cambridge, 1999) at 10–11.

27 John Rawls *Political Liberalism* (Columbia University Press, New York, 2005) at 258.

28 Frederick Pollock *Locke's Theory of the State* (Oxford University Press, London, 1937) at 5.

29 Thomas Hobbes *Leviathan* JCA Gaskin (ed) (Oxford University Press, Oxford, 1998) at 84.

30 At 85. See Gregory Kavka "Hobbes War of All against All" in Christopher Morris (ed) *Critical Essays on Hobbes, Locke, and Rousseau: The Social Contract Theorists* (Rowman and Littlefield Publishers, Lanham (Maryland), 1999) 1 at 6; and Pollock, above n 28, at 6. Hobbes likely reflected on St Thomas Aquinas' *Summa Theologica* part 1, question 96, art 4, and the 13th century discussion about how law binds communities for the common good. The multi-volume translation of Thomas Aquinas *Summa Theologica* (translated ed: Fathers of the English Dominican Province (translator), Burns Oates & Washbourne, London, 1920) is an accessible edition of the treatise.

31 Hobbes, above n 29, at 115.

32 Maloy, above n 2, at 495.

33 Kent Greenawalt *Conflicts of Law and Democracy* (Oxford University Press, Oxford, 1987) at 56 and 62; Maloy, above n 2, at 500; and Victor Gourevitch *Rousseau: The Social Contract and other later political writings* (Cambridge University Press, Cambridge, 1997) at xv.

34 Niccolo Machiavelli *The Prince* (translated ed: Luigi Ricci (translator), Oxford University Press, London, 1910) at ch 1; Plato *The Laws* (translated ed: Trevor Saunders (translator), Penguin Books, Harmondsworth, 1970) at 143; and Hobbes, above n 29, at 123.

35 Greenawalt, above n 33, at 63; and Charles J Reid Jr "The Three Antinomies of Modern Legal Positivism and their Resolution in Christian Legal Thought" (2005) 18 *Regent University Law Review* 53 at 55.

citizens have placed in their government to manage their rights as a person and communal property for their benefit.<sup>36</sup> The compact places the individual in a vulnerable position. Jean-Jacques Rousseau begins his treatise *The Social Contract* (1762) with the statement: "Man is born free; and everywhere he is in chains".<sup>37</sup> The political philosopher states the social contract is the solution to both the preservation of liberty and the commonweal.<sup>38</sup> He reduces it as follows:<sup>39</sup>

... each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.

The essence of the relationship requires the people to give up their natural freedom for the rights and obligations of community and security.<sup>40</sup> John Rawls postulated a modern view of the social contract that interprets it as an agreement made by rational persons between each other about common principles of justice.<sup>41</sup> These principles ultimately determine the form of political authority they establish to govern over them.<sup>42</sup> In New Zealand, we accept the form of political authority is democratic in nature (a *republic*).

People living in a democracy expect certain "terms of contract" that characterise their government as foremost a "rule by the people".<sup>43</sup> Democracies also foster an expectation of certain rights, opportunities, and obligations.<sup>44</sup> Principles of liberty and equality (and fraternity) purport to guarantee the same fundamental rights political for everyone, including the right to participate in political decision-making.<sup>45</sup> Elections are the most visible facet of a democratic arrangement because they

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36 John Locke *Two Treatises of Government* (A Millar, London, 1763) at 349.

37 Jean-Jacques Rousseau *The Social Contract* (translated ed: Christopher Betts (translator), Oxford University Press, Oxford, 1994) at [1.1].

38 At [1.6].

39 At [1.6].

40 Locke, above n 36, at 198–199. See also Joshua Cohen "Reflections on Rousseau: Autonomy and Democracy" in Christopher Morris (ed) *Critical Essays on Hobbes, Locke, and Rousseau: The Social Contract Theorists* (Rowman and Littlefield Publishers, Lanham (Maryland), 1999) 191 at 192.

41 John Rawls *A Theory of Justice* (Harvard University Press, Cambridge, 2003) at 10.

42 Rawls, above n 26.

43 David Held *Models of Democracy* (Polity Press, Cambridge, 1996) at 1.

44 Rawls, above n 27, at xlvi.

45 John Rawls *The Law of Peoples: With the Idea of Public Reason Revisited* (Harvard University Press, Cambridge, 2002) at 29; Samuel Freeman *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (Oxford University Press, Oxford, 2006) at 31; and George Fallis *Multiversities, Ideas, and Democracies* (University of Toronto Press, Toronto, 2007) at 5.

allow citizens in their majority to choose who amongst them should govern.<sup>46</sup> The election process gives the governed a degree of control over elected officials, which gives rise to the expectation that political leadership will be accessible to public demands.<sup>47</sup> Leaders who receive sufficient mandate from the public acquire discretion to act on their behalf as representatives. The leadership undertakes to ensure the good of the state and its populace is maintained, even when it is against the interests of the majority.<sup>48</sup> Elections also ensure that public consensus can remove political leaders if the populace becomes generally dissatisfied with their performance.<sup>49</sup> This power of election makes democracy the most desirable and stable system of governance in post-enlightenment Western thought.<sup>50</sup> Electoral power casts the public as beneficiaries of an exercise of political power. In New Zealand, Members of Parliament must make an oath of allegiance before they are able to sit or vote in the House of Representatives,<sup>51</sup> which ought to be made according to the prescribed form.<sup>52</sup> Members who refuse to swear must vacate their seat.<sup>53</sup> The oath requirement accepts democratic states are comprised of elected and unelected officials, and reconciles the expectation of both as offices "characterised by trust, honesty, integrity, and mutual respect" in their capacity to exercise political power.<sup>54</sup>

The relationship between the governing political leaders and the governed populace attracts the attention of political theorists and jurists who seek to identify fiduciary elements as a feature of the

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46 Carole Pateman *Participation and Democratic Theory* (Cambridge University Press, Cambridge, 1970) at 4.

47 At 9 and 14.

48 NML Nathan "Democracy" (1993) 93 *Proceedings of Aristotelian Society* 123 at 123.

49 Charles Sampford "Trust, Governance, and the Good Life" in Ken Coghill, Charles Sampford and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* (Ashgate Publishing, Farnham, 2012) 43 at 50.

50 Held, above n 43, at 46; and Thomas Meyer *The Theory of Social Democracy* (Polity Press, Cambridge, 2007) at 9.

51 David McGee, Mary Harris and David Wilson (eds) *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at ch 3.

52 Oath and Declarations Act 1957, s 17. See also Oaths Act 1910, s 3. The distinction between an oath and affirmation is spiritual.

53 See Mark Hutton and others (eds) *Erskine May: Parliamentary Practice* (24th ed, LexisNexis Butterworths, London, 2011).

54 Frederique E Six and Leo WJC Huberts "Judging a public official's integrity" in Leo WJC Huberts, Jeroen Maesschalck and Carole L Jurkiewicz (eds) *Ethics and Integrity of Governance* (Edward Elgar Publishing, Cheltenham, 2008) 65 at 66.

democratic social contract.<sup>55</sup> These elements appreciate that the role of the people is to limit political power and hold their leaders accountable for its exercise.<sup>56</sup> John Locke explicitly states:<sup>57</sup>

... the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.

The notion of trust makes political leaders accountable to the public as a whole and not just constituents or loyal voters.<sup>58</sup> It imposes an expectation that political leaders possess a high degree of moral integrity, which means allegations of illegal practice or even acting immorally can end careers.<sup>59</sup> Leaders are to set aside self-interest to serve the entire population rather than pursue personal or group interests.<sup>60</sup> However, a legal view that political leaders act as trustees of power is fundamentally different from ideas that such an actor must be politically trustworthy.<sup>61</sup> This view invokes fiduciary notions that the public ought, as the beneficiaries of political power, to be able to trust political actors.<sup>62</sup> The fiduciary characteristics of the arrangement does not take into account public opinion about the popularity of a political actor at any given moment in their career.<sup>63</sup>

The recognition of fiduciary relationships in public law ought not interpret the social contract beyond a useful philosophical tool to conceptualise political relationships.<sup>64</sup> It is a useful starting point, however, to understand a view that defines political power as fiduciary in nature.<sup>65</sup> Justice Paul Finn, a foremost commentator on fiduciary law, made the often cited observation that "[t]he most

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55 John McCamus "Promethius Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 CBLJ 107 at 107; Leib, Ponet and Serota, above n 19, at 93; and Fox-Decent, above n 1, at 4.

56 Fox-Decent, above n 1, at 91 and 170; Sampford, above n 49, at 50; and Maloy, above n 2, at 501.

57 Locke, above n 36, at 328.

58 Peter Koslowski "Public Interest and Self-Interest in the Market" in Bernard Hodgson (ed) *The Invisible Hand and the Common Good* (Springer, New York, 2004) 13 at 29; and Leib, Ponet and Serota, above n 19, at 95.

59 Six and Huberts, above n 54, at 65.

60 At 67.

61 At 69–70.

62 Locke, above n 42, at 335; and Fox-Decent, above n 2, at 170.

63 Frankel, above n 11, at xiii.

64 Rawls, above n 27, at 273; Leib, Ponet and Serota, above n 19, at 92; Ralf Dahrendorf "The Social Contract in Static and Dynamic Perspective" in Peter Koslowski (ed) *Individual Liberty and Democratic Decision-Making* (JCB Mohr, Tübingen, 1987) 53 at 56; and Joseph Kary "Contract Law and the Social Contract: What Legal History can Teach us about the Political Theory of Hobbes and Locke" (2000) 31 Ottawa L Rev 73 at 75.

65 Fox-Decent, above n 1, at 22.

fundamental fiduciary relationship in our society is manifestly that which exists between the community (the people) and the state, its agencies and officials".<sup>66</sup> His words echo those of Jeremy Bentham, who stated:<sup>67</sup>

Fiduciary Rights [are] those which are possessed to be exercised for the advantage of another only, such as those of factor, attorney, guardian, father, or husband in quality of guardian. All political power is fiduciary ...

Bentham earlier noted:<sup>68</sup>

A fiduciary charge takes place between two or more interested parties, when, one of the parties being invested with a power or a right, is bound, in the exercise of this power and this right, by certain rules, for the advantage of the other party. This relation constitutes two conditions—the *trustee*, and the *trustor* ...

Bentham understood fiduciary duties in the modern sense and did not make an idle statement or refer to a theoretical philosophical compact. His inclusion of political power intimates a belief it ought to be included alongside other traditional fiduciary relationships. It imports the need to restrain that power through fiduciary obligations.<sup>69</sup> Robert Flannigan, accepting that most fiduciary relationships form in a private law context, makes the bold assertion that "[f]iduciary obligations are imposed on political representatives, Crown agents and servants, and other actors exercising public functions in a variety of respects."<sup>70</sup> At first glance, it is easy to dismiss the notion that the law regularly imposes fiduciary obligations on political actors as part of the social contract of a *republic*.

The idea that the Crown and the public had a fiduciary relationship recognised by public law in the late 19th century did not give rise to legally enforceable obligations.<sup>71</sup> It remained, however, an attractive notion amongst popular thought. Frederic Maitland, who doubted the notion of political trusts, stated: "Open an English newspaper and you will be unlucky if you do not see the word 'trustee' applied to 'the Crown' or to some high and mighty body."<sup>72</sup> The popular impressions of political philosophy could not be enforced. In *Kinloch v Secretary of State for India in Council*, their Lordships distinguished private trusts, or lower trusts, from public political trusts, which the Court identified as

66 Paul Finn "A sovereign people, a public trust" in Paul Finn (ed) *Essays on Law and Government: Principles and Values* (The Law Book Co, Sydney, 1995) 1 at 14. See also Fox-Decent, above n 1, at 170.

67 Jeremy Bentham "A General View of a Complete Code of Laws" in John Bowring (ed) *The Works of Jeremy Bentham* (William Tait, Edinburgh, 1843) vol 3, 154 at 182.

68 At 166.

69 RC Nolan "Controlling Fiduciary Power" (2009) 68 CLJ 293 at 293.

70 Robert Flannigan "The Boundaries of Fiduciary Accountability" [2004] NZ L Rev 215 at 232.

71 *Kinloch v Secretary of State for India in Council* (1882) 7 App Cas 619 (HL).

72 Frederic Maitland "Trust and Corporation" in HAL Fisher (ed) *The Collected Papers of Frederic Maitland* (Cambridge University Press, Cambridge, 1911) 327 at 403.

"trusts in the higher sense".<sup>73</sup> This interpretation, now called "political trust theory", persisted in common law thought as unenforceable obligations throughout the 20th century. In *Tito v Waddell (No 2)*, Megarry VC restated the words of Lord Selborne LC as follows:<sup>74</sup>

I propose to use the word "trust" simpliciter (or for emphasis the phrase "true trust") to describe what in the conventional sense is a trust enforceable in the courts, and to use Lord Selborne's compound phrase "trust in the higher sense" to express the governmental obligation that he describes.

The idea of a "trust in the higher sense" as fiduciary notions forming part of the *ius publicum* has, however, been demonstrably challenged by 20th century and modern judicial developments. The object of this article, to provide a starting point for further articulation of a workable fiduciary aspect to public law, can only be achieved through an examination of the precedent before it.<sup>75</sup>

#### **IV PUBLIC LAW FIDUCIARY RELATIONSHIPS**

There are two lines of authority that support an argument that fiduciary concepts do appear in public law. The first arises between the Crown's relationship to aboriginal peoples, and the second concerns local authorities and ratepayers. The growth of juridical recognition of a fiduciary element to public law appears as a response to social pressure for the judiciary to hold political actors to account.<sup>76</sup> Very occasionally the common law courts have invoked Lockean notions that cast the public as the beneficiary of political power.<sup>77</sup> In *Hawrelak v The City of Edmonton*, Dickson and Grandpré JJ stated:<sup>78</sup>

Confidence in our institutions is at a low ebb. This statement is not very original but unfortunately is unchallengeable. Many factors have brought about this crisis and unconscionable conduct by public officials is only part of the story. Still, if we are to regain some of the lost ground, we have to start somewhere. To reaffirm the requirements of highest public morality in elected officials is a major step in that direction. To speak of civil liberties is very hollow indeed if these liberties are not founded on the

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73 *Kinloch*, above n 71, at 625–626 per Lord Selborne.

74 *Tito v Waddell (No 2)* [1977] Ch 106 at 216.

75 The fiduciary concepts discussed in this article ought not to be conflated with fundamental law notions advanced in Lindsay Breach "The Utility of a Medieval Charter in New Zealand Litigation: The Case of the Magna Carta" in Stephen Winter and Chris Jones (ed) *Magna Carta and New Zealand: History, Politics and Law in Aotearoa* (Springer International Publishing, Cham, 2017) 161.

76 Leonard I Rotman "Crown-Native Relations as Fiduciary: Reflections Almost Twenty-Years after *Guerin*" (2003) 22 Windsor Yearbook Access to Justice 363 at 368; Edward J Waitzer and Douglas Sarro "The Public Fiduciary: Emerging Themes in Canadian Fiduciary Law for Pension Trustees" (2012) 91 Canadian Bar Review 163 at 172.

77 Andy Spalding "Freedom from Corruption: The New Human Right?" (2013) 107 ASIL PROC 483 at 484; and Waitzer and Sarro, above n 76, at 164.

78 *Hawrelak v The City of Edmonton* [1976] 1 SCR 387 at 416–417.

rock of absolutely unimpeachable conduct on the part of those who have been entrusted with the administration of the public domain.

One response to waning public confidence appears to be the importation of fiduciary concepts to prevent the usurpation of public power.<sup>79</sup> The majority of cases, however, demonstrate that political actors do not ordinarily attract fiduciary obligations in the exercise of their discretion.<sup>80</sup> Academics have criticised circumstances where the judiciary has used the language of fiduciary obligations when discussing public law without identifying what those duties are and to whom they might be owed.<sup>81</sup> Therefore, an acceptance of fiduciary principles in public law must contend with the question of their definition and scope.

The recognition of fiduciary obligations in public law jurisprudence ought to be framed according to basic principles already articulated in the *ius privatum*, and according to notions of equity.<sup>82</sup> Gerald Lanning outlines the following fundamental elements of fiduciary power, which he identifies ought to be applicable within a public law context:<sup>83</sup>

- (i) The fiduciary has scope for the exercise of some discretion or power.
- (ii) The fiduciary can unilaterally exercise that power or discretion to affect the beneficiary's legal or practical interests.
- (iii) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

These elements were present in the leading authority *Keech v Sandford*.<sup>84</sup> The foremost feature of a fiduciary relationship, identified in this case, is that the stronger party owes a duty of loyalty to the vulnerable party who has entrusted them with power, which requires them to act for the benefit of the weaker party and not place themselves in a position where a conflict of interest may arise.<sup>85</sup> There appears to be consensus that any recognition of a fiduciary relationship in a public law context must

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79 Robert Flannigan "Fiduciary Control of Political Corruption" (2002) 26 *Advocates Quarterly* 252 at 260; and Spalding, above n 77, at 484.

80 *Guerin v The Queen* [1984] 2 SCR 335 at 385.

81 Leonard Rotman "Provincial Fiduciary Obligations to First Nations: The Nexus between Governmental Power and Responsibility" (1994) 32 *Osgoode Hall LJ* 736 at 737; and Rotman, above n 76, at 366–369.

82 Lanning, above n 3, at 450; Flannigan, above n 70, at 268; Nolan, above n 69, at 294; and Rotman, above n 13, at 959.

83 Lanning, above n 3, at 447.

84 *Keech v Sandford* (1726) Sel Cas Ch 61 at 62, 25 ER 223 (Exch) at 223.

85 See generally Nicky Richardson and Lindsay Breach *Nevill's Law of Trusts, Wills and Administration* (12th ed, LexisNexis, Wellington, 2016) at [4.2.1].

import the duty of loyalty as its foremost feature.<sup>86</sup> This also agrees with the populist view that political actors owe a general duty of loyalty to the public and should not engage in self-interested behaviour.<sup>87</sup> It is necessary, therefore, to ascertain from authorities that recognise fiduciary relationships in public law whether they invoke elements of the duty of loyalty.

### ***A The Crown and Indigenous Peoples***

The idea that the Crown owes fiduciary obligations to indigenous peoples has been articulated strongest by the Canadian judiciary.<sup>88</sup> In the landmark decision of *Guerin v The Queen*,<sup>89</sup> Wilson J indicated that while s 18 of the Indian Act 1952<sup>90</sup> did not mention fiduciary obligations owed by the Crown, the Act "recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians".<sup>91</sup> Her Honour distinguished the "higher political trust" authorities from an actual fiduciary relationship because the latter arose from a legal right independent of legislation.<sup>92</sup> She held the Supreme Court could impose fiduciary obligations onto the Crown to protect indigenous peoples.<sup>93</sup> However, Dickson CJ sought to make clear that while the Crown must discharge its fiduciary obligations, they were not the same obligations as those found in private law.<sup>94</sup> His Honour indicated duties were enforceable not as a trust but in a manner that is trust-like.<sup>95</sup> He reasoned:<sup>96</sup>

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86 David Ponet and Ethan Leib "Fiduciary Law's Lessons for Deliberative Democracy" (2011) 91 BU L Rev 1249 at 1257; Deborah DeMott "Breach Of Fiduciary Duty: On Justifiable Expectations of Loyalty and their Consequences" (2006) 48 ACJ 925 at 938; Rotman, above n 81, at 742; Flannigan, above n 70, at 264; Birks, above n 5, at 11; Fox-Decent, above n 1, at 36; Leib, Ponet and Serota, above n 19, at 93; and McCamus, above n 55, at 118.

87 Flannigan, above n 79, at 252; and Rave, above n 1, at 714.

88 Alex Frame "The Fiduciary Duties of the Crown to Maori: Will the Canadian Remedy Travel?" (2005) 13 Wai L Rev 70 at 73; Flannigan, above n 70, at 240; Lanning, above n 3, at 447; and Rotman, above n 76, at 364.

89 *Guerin*, above n 80.

90 Indian Act RSC 1952 c 149, s 18.

91 *Guerin*, above n 80, at 348–349.

92 At 350–352. See also per Dickson CJ at 385.

93 At 355.

94 At 376.

95 At 375 and 387.

96 At 385.

The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.

His reasoning attracted criticism for obfuscating the nature of the obligations owed to indigenous peoples despite the Supreme Court's acknowledgement the Crown could owe fiduciary duties in their truest sense.<sup>97</sup> Canadian decisions after *Guerin*, nevertheless, trended towards the recognition that the Crown and indigenous peoples had a fiduciary relationship, although without comment on its obligations.<sup>98</sup>

The Supreme Court of Canada's decision in *R v Sparrow* provides insight into the implications of the recognition of such relationships. It held:<sup>99</sup>

The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor*, ground a general guiding principle for s 35.(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

*Sparrow* indicates that the effect of recognising a fiduciary relationship in a public law context imports a purposive approach to statutory interpretation.<sup>100</sup> In this case, the Court interpreted the Act in a manner that considers the historical relationship, traditions and treaties with indigenous people.<sup>101</sup> Since *Sparrow*, it is clear that Canadian jurisprudence accepts that the Crown owes unique fiduciary obligations to indigenous people.<sup>102</sup> In *Wewaykum Indian Band v Canada*, the Supreme Court reasserted, under a head that described the Crown's fiduciary duties as *sui generis*, that Canadian law had distinguished "political trusts" from the fiduciary obligations of the Crown that arise "in the nature of a private law duty".<sup>103</sup> It indicated the relationship bore the hallmarks of a fiduciary relationship because indigenous peoples are vulnerable to the Crown's power to exercise its discretion in respect

97 Frame, above n 88, at 79.

98 Rotman, above n 76, at 366.

99 *R v Sparrow* [1990] 1 SCR 1075 at 1108.

100 Renáta Uitz *Constitutions, Courts, and History: Historical Narratives in Constitutional Adjudication* (Central European Press, Budapest, 2005) at 131.

101 At 130.

102 Evan Fox-Decent "Fashioning Legal Authority from Power: The Crown-Native Fiduciary Relationship" (2006) 4 NZJPIL 91 at 92. See also *R v Adams* [1996] 3 SCR 101; and *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

103 *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 at [72]–[74].

to their interests.<sup>104</sup> The existence of a fiduciary relationship, therefore, imposes an additional consideration on an exercise of political power.<sup>105</sup>

The decision in *Wewaykum* sought to limit occasions when indigenous peoples could invoke the fiduciary concept to "specific Indian interests".<sup>106</sup> It reinforced the principle that "not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature, and that this principle applies to the relationship between the Crown and aboriginal peoples".<sup>107</sup> Furthermore, Binnie J emphasised:<sup>108</sup>

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting.

This statement indicates that the Crown, as a fiduciary, does not owe an absolute duty of loyalty to Canadian Indians. In fact, the case is silent on the nature and extent of this core fiduciary element. These lingering uncertainties are a cause for consternation.<sup>109</sup> Leonard Rotman critically suggests that "fiduciary" has simply taken life as a "catch-phrase" to describe government and indigenous relations.<sup>110</sup> Nonetheless, a parliamentary report titled *The Crown's Fiduciary Relationship with Aboriginal Peoples* concludes that the "Supreme Court of Canada decisions confirm that the fiduciary relationship does have legal and constitutional scope. The concept itself and obligations arising from it are still being developed".<sup>111</sup> It is evident that uncertainty arises, in part, because the judiciary is yet to accept that fiduciary principles must form part of either the *ius publicum* or the *ius privatum*. The decision to leave the definition of the Crown's role as a fiduciary in a state of purgatory is an unacceptable position.

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104 At [80]. Acknowledged by Lanning, above n 3, at 456.

105 Uitz, above n 100, at 129; and Flannigan, above n 70, at 243.

106 *Wewaykum Indian Band*, above n 103, at [81].

107 At [83] (citations omitted).

108 At [96] (citations omitted).

109 Uitz, above n 100, at 130; and Rotman, above n 6, at 824.

110 Rotman, above n 76, at 367.

111 M Hurley *The Crown's Fiduciary Relationship with Aboriginal Peoples* (Library of Parliament, Ottawa, 2002) at 8.

The historic conditions that define the relationship between the Crown and the indigenous people of Canada as fiduciary in nature may also be interpreted to exist in New Zealand.<sup>112</sup> This has signalled a need for jurists to reassess the nature of the Crown's relationship to Māori and the principles of the Treaty of Waitangi.<sup>113</sup> For the moment, New Zealand courts continue to follow English authority that suggests the Crown could only be understood as a fiduciary in the higher sense.<sup>114</sup> The argument that a fiduciary relationship could exist between the Crown and Māori, however, arises because of the continued uncertainty that surrounds the principles of the Treaty, which are summarised as partnership, preservation and protection, reasonable cooperation, and the recognition of the Treaty as a living document.<sup>115</sup> They attract academic criticism for their ambiguous nature and also accusations they are tools for judicial activism, which are observations applicable to the Canadian experience.<sup>116</sup> It is, therefore, somewhat paradoxical that the reason why New Zealand courts are reluctant to recognise a fiduciary aspect to the Crown-Māori relationship is to avoid uncertainty and prevent the widening of the scope of claims against the Crown.<sup>117</sup> Discussion about whether the relationship is fiduciary in nature also contends with the subject of Treaty obligations being more political than legal.<sup>118</sup> It remains arguable, nevertheless, that the similarities of the developments in Canada and New Zealand indicate that an underlying fiduciary relationship exists between the Crown and Māori.

The debate about whether a fiduciary relationship exists between the Crown and Māori emerged when the judiciary first articulated the Treaty principles. In *New Zealand Maori Council v Attorney-General*,<sup>119</sup> referred to later as the *Lands Case* and now the *SOE Case*,<sup>120</sup> adopted a purposive approach to interpreting s 9 of the State-Owned Enterprises Act 1986, which states: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of

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112 Frame, above n 88, at 77–78. Discussed in *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 at [155].

113 Lanning, above n 3, at 445; and Frame, above n 88, at 77.

114 Frame, above n 88, at 72. See *Wi Parata v Bishop of Wellington* (1877) 1 NZLRLC 14 (SC).

115 Kerry Howe "Post-Colonial Redemption in New Zealand" (2003) 22 Windsor Yearbook of Access to Justice 100 at 107 and 112.

116 Geoffrey Palmer "The Treaty of Waitangi" (1989) 19 VUWLR 335 at 337; David Round "Judicial Activism and the Treaty: The Pendulum Returns" (2000) 9 Otago LR 653 at 654; and Howe, above n 115, at 113.

117 Lanning, above n 3, at 445–446.

118 Palmer, above n 116, at 336.

119 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

120 See *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31. The Court noted at [15], n 25: "This case is frequently called the *Lands case*; we shall refer to it in this judgment as the *SOE case*, because, as we shall explain, what was in issue in that case was not only land but also water."

Waitangi".<sup>121</sup> President Cooke of the Court of Appeal observed that the "principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith".<sup>122</sup> His Honour also suggested, "[t]he relationship between the Treaty partners creates responsibilities analogous to fiduciary duties."<sup>123</sup> This observation set a trend of subsequent decisions that recognised the government owes a fiduciary-like duty in its dealings with Māori.<sup>124</sup> Later he would couch the relationship between the Crown and Māori chieftainship in the cloak of fiduciary obligation.<sup>125</sup> Alex Frame suggests that the recognition of a fiduciary relationship in New Zealand law would not stem from the Treaty instrument itself but from the wider relationship.<sup>126</sup> In response to apparent judicial rejection of this idea, he asserted:<sup>127</sup>

The fiduciary doctrine did not 'fail to take root in New Zealand public law', but rather has not yet been seriously pleaded before the New Zealand courts with general jurisdiction, as Justice Blanchard explicitly foreshadowed.

It is an attractive argument because the current law suggests the undesirable position that the Crown is in a fiduciary relationship with the indigenous peoples of Canada but not with Māori.

*Paki v Attorney-General* is the most recent case to discuss the nature of the Crown-indigenous relationship in New Zealand.<sup>128</sup> The appellants invited the Supreme Court to consider whether the Crown would be in breach of its fiduciary duties as a "constructive trustee" if it sought to claim the Waikato River and associated taonga.<sup>129</sup> Elias CJ thought the existence of independent legal rights, analogous to the Canadian experience, and the recognition of the Crown's sovereignty gave rise to duties of a fiduciary nature.<sup>130</sup> Her Honour approved of Cooke P's statement in *Te Runanga o Wharekaui Rekohu Inc v Attorney-General* that "an enduring relationship of a fiduciary nature in which each party accepted a positive duty to act in good faith, fairly, reasonably and honourably towards the other".<sup>131</sup> The statements made by the Chief Justice suggest that actual fiduciary duties

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121 *New Zealand Maori Council*, above n 119.

122 At 667.

123 At 662.

124 Lanning, above n 3, at 445.

125 Robin Cooke "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Wai L Rev 1 at 6.

126 Frame, above n 88, at 79; and Lanning, above n 3, at 445.

127 Frame, above n 88, at 79.

128 *Paki*, above n 112.

129 At [14].

130 At [150] and [152].

131 *Te Runanga o Wharekaui Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304.

may have arisen from the Treaty as an inherent part of New Zealand's social contract as a *republic*. However, William Young J adopted a narrower approach and directly treated the applicability of Canadian authority.<sup>132</sup> His Honour referred to Binnie J's conclusion in *Wewaykum* that suggested Canadian jurisprudence had over-extended the fiduciary concepts.<sup>133</sup> Justice William Young stated that:<sup>134</sup>

There are many New Zealand cases in which the view has been expressed that the relationship between the Crown and Māori is either analogous to a fiduciary relationship or actually is fiduciary in character.

However, he rejected the notion that "the Crown has a fiduciary duty in a private law sense that is enforceable against the Crown in equity".<sup>135</sup> The judgment in *Paki* suggests that, in the minds of the judiciary, the fiduciary doctrine has failed to take root in New Zealand public law.

New Zealand authority suggests the debate about whether the relationship between the Crown and Māori is fiduciary in nature is not yet resolved. If it is suggested that it exists as a fiduciary relationship, then it must arise in a public law context.<sup>136</sup> The constitutional status of both the Treaty of Waitangi<sup>137</sup> and s 35(1) of the Constitution Act 1982 (Canada),<sup>138</sup> which recognises and affirms the constitutional status of treaties and indigenous rights of indigenous peoples in Canada, suggests that if New Zealand recognises a fiduciary relationship between the Crown and Māori, it will form part of public law jurisprudence. Evan Fox-Decent makes clear that the constitutional status of the Canadian treaties indicates that the fiduciary relationship must be regarded as forming part of the public law.<sup>139</sup> The author would later err when he observed:<sup>140</sup>

... it appears that New Zealand judges now see the Treaty of Waitangi as a source of partnership and fiduciary obligation because they appreciate that Māori did not agree to surrender their sovereignty and, therefore, the legitimacy of Crown sovereignty depends on the Crown being held to a fiduciary standard.

It is likely an error made upon reflection about the similarities between the two jurisdictions. Therefore, it is reasonable to suggest that future developments in New Zealand will agree with the approach currently taken in Canada because fiduciary elements are already present within the Crown-

132 *Paki*, above n 112, at [272]–[274].

133 At [275].

134 At [276].

135 At [276]–[277].

136 Lanning, above n 3, at 458 and 471.

137 See *New Zealand Māori Council*, above n 120.

138 See Canada Act 1982 (UK), sch B.

139 Fox-Decent, above n 102, at 102–103.

140 At 109.

Māori relationship. Nonetheless, these elements must be viewed in light of other forms of fiduciary relationship recognised in public law jurisprudence.

### ***B Local Authorities and Ratepayers***

There is clear and long-established precedent that the common law acknowledges the existence of a fiduciary relationship between local authorities and ratepayers.<sup>141</sup> In New Zealand, the powers and functions of local authorities, primarily concerning the provision and maintenance of local infrastructure, is statutory in nature. In *Paki*, William Young J appears to have tied together the public law relationships between the Crown and local authorities with their respective beneficiaries, when he observed:<sup>142</sup>

There are also cases in which the position of a local authority vis-à-vis its ratepayers has been characterised as fiduciary in nature. Most commonly, the courts have done this when limiting the ability of local authorities to use ratepayer funds to subsidise services or pay wages in excess of market rates. The underlying idea is that local authorities in relation to their ratepayers "[stand] somewhat in the position of trustees or managers of the property of others".<sup>143</sup> In one New Zealand case, this principle was extended to require local authorities to "seek to balance fairly the respective interests of the different categories of ratepayers".<sup>144</sup>

His Honour cast doubt on the fiduciary nature of this relationship when also dismissing the notion the Crown owed fiduciary obligations to Māori.<sup>145</sup> The weight of authority, however, demonstrates with greater certainty that public law does entertain a fiduciary relationship between local authorities and ratepayers.

The notion that political power is fiduciary in nature appears to have influenced the English judiciary with regard to the delegated sovereignty enjoyed by local authorities throughout the 20th century. *Roberts v Hopwood* concerned the Poplar Council's exercise of discretion to set a high minimum wage of £4 per week on "socialist" or "moral grounds" (irrelevant considerations) without due consideration of prevailing economic factors.<sup>146</sup> The House of Lords held the local authority owed a fiduciary duty to consider the relevant interests of ratepayers, notwithstanding their electoral mandate, which the Council breached in an unreasonable exercise of its power.<sup>147</sup> Subsequent English

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<sup>141</sup> Fox-Decent, above n 1, at 160.

<sup>142</sup> *Paki*, above n 112, at [271] (footnote omitted).

<sup>143</sup> See Lord Atkinson's remarks in *Roberts v Hopwood* [1925] AC 578 (HL) at 595–596.

<sup>144</sup> *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA) at 47.

<sup>145</sup> *Paki*, above n 112, at [271].

<sup>146</sup> *Roberts*, above n 143.

<sup>147</sup> At 595.

decisions have reaffirmed the existence of this relationship. In *Bromley London Borough Council v Greater London Council*, it was observed:<sup>148</sup>

A local authority owes a fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory functions and this includes a duty not to expend those moneys thriftlessly but to deploy the full financial resources available to it to the best advantage.

English authority demonstrates a greater judicial willingness to respond to public expectations by imposing fiduciary obligations on local authorities because they exercise delegated sovereign authority.<sup>149</sup> This observation is applicable to the New Zealand experience.

New Zealand followed English precedent to recognise that local authorities owe fiduciary duties to ratepayers. In *Barton v Masterton District Council*, the High Court held these duties are owed when a local authority spends and levies funds from ratepayers.<sup>150</sup> Gallen J followed their Lordships' reasoning in *Roberts* to intimate that local authorities owe both moral and legal duties to ratepayers.<sup>151</sup> His Honour noted:<sup>152</sup>

Fiduciary duties involve acting in accord with the dictates of conscience and the dictates of conscience require the observance of obligations where looked at fairly an informed and reasonable member of the community would believe such obligations to exist. In this context I am prepared to accept a principle of legitimate expectation ...

Shortly afterwards, the Court of Appeal in *Mackenzie District Council v Electricity Corporation of New Zealand* followed *Barton* to recognise the existence of such a fiduciary relationship.<sup>153</sup> The judgment delivered by Richardson J recognised that the political power wielded by a local authority occupies a subordinate position to central government.<sup>154</sup> The Court of Appeal noted that a local authority carries out its public function to perform undertakings, services and activities for the benefit of the community.<sup>155</sup> It reasoned this imposed a general fiduciary duty to have regard for the interests of ratepayers when weighing up the exercise of this function.<sup>156</sup> The Court held the local authority

148 *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 (HL) at 829.

149 Ian Loveland *Constitutional Law, Administrative Law, and Human Rights* (6th ed, Oxford University Press, Oxford, 2012) at 304 and 313.

150 *Barton v Masterton District Council* [1992] 1 NZLR 232 (HC) at 233.

151 At 244.

152 At 245.

153 *Mackenzie District Council*, above n 144.

154 At 43.

155 At 47.

156 At 47.

had failed in this duty.<sup>157</sup> These authorities provide little reason to doubt the existence of a fiduciary relationship in a public law context.

There is academic criticism that these notions over-extend the fiduciary concept.<sup>158</sup> In particular, an imposition of a fiduciary duty on local authorities may create a burden impossible to discharge because a council must contend with conflicting interests from various groups.<sup>159</sup> In response to this issue, Fox-Decent suggests the recognition of a fiduciary duty reflects the need for transparent decision-making rather than the fact decisions may favour some groups over others.<sup>160</sup> The observation made by Panckhurst J in *Willowford Family Trust v Christchurch City Council* appears agreeable to Fox-Decent's conclusion when he notes, citing *Bromley*, that "[e]lected representatives, although entitled to give weight to the views of, or mandate from, constituents, may not regard themselves as bound to that viewpoint."<sup>161</sup> The case law seems to focus fiduciary obligations on transparency and reasonableness of decision-making. There appears, however, to be limits. In *Wellington City Council v Woolworths New Zealand Ltd (No 2)*, the Court of Appeal held:<sup>162</sup>

The judgment in *Mackenzie* went on to observe that a local authority has a fiduciary duty to the ratepayers to have regard to their interests. That is a consideration which is perhaps more readily applicable to spending than to funding decisions ... the fiduciary duty concept does not open up a route by which the Court can investigate and if thought appropriate interfere with every exercise by local authorities of their discretionary powers. That would completely undermine *Wednesbury* principles.

This decision attempts to establish a boundary between principles of judicial review and fiduciary obligations, which requires further comment because of the infancy of the present subject. Reference to judicial review, however, demonstrates that the Court envisaged this fiduciary relationship as a public law concept and did not attempt to define it as a *sui generis* relationship of the kind clumsily imposed on Crown-indigenous relations.

Canadian authority is clearer on the public law nature of the fiduciary relationship between local authorities and ratepayers. In *Bowes v City of Toronto*, the Privy Council held:<sup>163</sup>

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<sup>157</sup> At 52.

<sup>158</sup> Fox-Decent, above n 1, at 160.

<sup>159</sup> John Glover "Public Officials, Public Trusts and Fiduciary Duties" in Ken Coghill, Charles Sampford and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* (Ashgate Publishing, Farnham, 2012) 69 at 84.

<sup>160</sup> Fox-Decent, above n 1, at 160.

<sup>161</sup> *Willowford Family Trust v Christchurch City Council* [2011] NZAR 209 (HC) at [95].

<sup>162</sup> *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546.

<sup>163</sup> *Bowes v City of Toronto* (1858) 11 Moo 463 at 524, 14 ER 770 (PC) at 793.

We are of opinion, however, that neither the governing character nor the deliberative character of the Corporation Council makes any difference, and that the Council was in effect and substance a body of trustees for the inhabitants of Toronto; trustees having a considerable extent of discretion and power, but having also duties to perform, and forbidden to act corruptly.

However, their Lordships noted the difficulty of extending the principles to elected government officials. They observed:<sup>164</sup>

With regard to members of a Legislature, properly so called, who vote in support of their private interests; if that ever happens, there may possibly be insurmountable difficulties in the way of the practical application of some acknowledged principles by Courts of civil justice, which Courts, however, are nevertheless bound to apply those principles where they can be applied.

The Privy Council appears to have raised the same public policy concerns that the Court of Appeal in *Wellington City Council* identified as democratic and constitutional constraints to judicial interference with the ordinary affairs of the Council.<sup>165</sup> It identified misconstrued statutory power and failure to follow statutory process as examples of when the judiciary may intervene.<sup>166</sup> This observation appears applicable to the further development of the fiduciary obligations owed by the Crown, in particular with regard to indigenous peoples.

Canadian authorities indicate ratepayers are able to bring actions to restrain individual councillors in some circumstances.<sup>167</sup> The elected representative that has commercial dealings with the municipality while in office is a common theme.<sup>168</sup> *Hawrelak v The City of Edmonton* concerned a mayor who held 50 per cent of the shareholding of a company that had entered into negotiations with the local authority for rezoning of land it owned and its subsequent sale to the Council.<sup>169</sup> The Mayor signed the transaction on behalf of the company, in his capacity as an officer, which was sent to the local authority that executed the agreement. He also presided over the rezoning scheme and then sold his shares for a substantial profit.<sup>170</sup> Justice Spence recognised the mayor held a position analogous to a trustee who owes duties and is accountable to the municipality.<sup>171</sup> Prior to the decision, there had

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164 At 524.

165 *Wellington City Council*, above n 162, at 546.

166 At 546.

167 WP Rosenfeld "Conflict of Interest and the Ontario Municipal Act" (1962) 20 University of Toronto Faculty of Law Review 74 at 84.

168 At 74.

169 *Hawrelak*, above n 78, at 387.

170 At 388.

171 At 407.

been considerable support for strengthening the fiduciary duties of elected representatives because of their position of trust.<sup>172</sup> However, the majority determined on the facts of the case that no fiduciary duties had been breached.<sup>173</sup> If the Court had found the Mayor to have breached his fiduciary obligations, the expected result would be an account of profits and potential disqualification from office.<sup>174</sup> One commentator observed that the Supreme Court had no conceptual difficulty recognising the Mayor was in a fiduciary relationship with both the Council and ratepayers.<sup>175</sup> Jacobs lamented, however, that the Supreme Court failed to define the fiduciary duties it identified to reflect the power and responsibility of public officials.<sup>176</sup>

The judicial recognition of public law fiduciary duties owed by public officials may provide greater certainty to cases previously identified as falling under the tort of misfeasance in public office, which is the sole tortious action against political actors exceeding or abusing their office.<sup>177</sup> Juristic commentary since *Anns v Merton London Borough Council*<sup>178</sup> reveals unease at a tort attempting to define the relationship between public authority and individuals.<sup>179</sup> Furthermore, judicial treatment of the tort also underwent significant shifts in approach that mirrored changes in dominant political ideologies.<sup>180</sup> It is unsurprising the tort is often labelled unprincipled and incoherent.<sup>181</sup> There is also ample reason to doubt whether it is a tort at all.<sup>182</sup> Dan Priel observes:<sup>183</sup>

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172 EI Jacobs "Hawrelak v. City of Edmonton" (1977) 97 McGill LJ 97 at 107.

173 *Hawrelak*, above n 78, at 388.

174 Loveland, above n 149, at 313.

175 Jacobs, above n 172, at 102.

176 At 109.

177 Mark Aronson "Misfeasance in Public Office: A Very Peculiar Tort" (2011) 35 MULR 1 at 2. It would also be worth in further exploration of this tort to consider it in light of civil law delict. See Stephen Todd "Abuse of Public Office" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 1073 at 1074.

178 *Anns v Merton London Borough Council* [1978] AC 728 (HL).

179 Dan Priel "The Indirect Influence of Politics on Tort Liability of Public Authorities in English Law" (2013) 47 *Law and Society Review* 169 at 182; and Stephen Bailey "Public authority liability in negligence: the continued search for coherence" (2006) 26 *LS* 155 at 155.

180 Priel, above n 179, at 184.

181 Bailey, above n 179, at 155.

182 Aronson, above n 177, at 48.

183 Priel, above n 179, at 181.

On the more traditional understanding of tort law, it belongs firmly within 'private law'; as such it is only concerned with redressing private wrongs and any suggestion that it should be affected by the changing relationship between individual and the state would be misplaced.

There is a clear need to reassess whether a tort of misfeasance in public office exists. Stephen Bailey observed:<sup>184</sup>

The story thus far does not show the common-law method of developing the law in a flattering light. Recurrent features of the case-law include what (at least with hindsight) can be seen as fundamental errors of analysis, the introduction of complex and ultimately unworkable sub-principles into the picture and a persistent confusion between public and private law principles.

The jurisprudential difficulties identified by Bailey and others would be avoided by a re-examination of these cases in light of fiduciary principles, which do not encroach on the clear boundary between private and public law.<sup>185</sup>

The overarching rationale behind the tort of misfeasance in public office is to protect citizens against the wrongdoing from a misuse of public power.<sup>186</sup> This overall purpose underpins judicial recognition of public law fiduciary obligations. Stephen Bailey identifies a number of principles that could shape future expansion of fiduciary concepts in place of this tort. Like in the fiduciary relationship between the Crown and indigenous peoples, there is a duty to act in good faith.<sup>187</sup> Bailey indicates the invocation of the tort, therefore, requires either:<sup>188</sup>

... (a) 'targeted malice', ie conduct specifically intended to injure a person or persons; or (b) 'untargeted malice', ie conduct whereby a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the claimant, it being sufficient here that an act is performed with (subjective or advertent) reckless indifference as to the outcome.

Bailey further observes that liability arises when either there is an irrational failure to exercise a power or the harm is inflicted through an unlawful or careless action, or maladministration.<sup>189</sup> His observation that liability will not arise if an act falls within the ambit of statutory discretion agrees with the limitation on judicial interference outlined in *Wellington City Council* applicable to a public law fiduciary relationship.<sup>190</sup> The reclassification of these principles offers greater clarity to fiduciary

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184 Bailey, above n 179, at 156 (footnotes omitted).

185 At 165.

186 See Aronson, above n 177, at 17–29 and 35.

187 At 8; and Bailey, above n 179, at 158.

188 Bailey, above n 179, at 157–158.

189 At 171–176.

190 At 164–170.

concepts applicable to individuals in public law and preserves the integrity of tortious acts as private wrongs.

## V *LOYALTY IN A PUBLIC LAW CONTEXT*

The meaning of a duty of loyalty as part of a fiduciary relationship is yet to be clearly articulated in a public law context. In *Paki*, William Young J accepted the observation made by Binnie J that the Crown cannot be described as an ordinary fiduciary and, therefore, did not owe an absolute duty of loyalty to Māori.<sup>191</sup> Elias CJ observed:<sup>192</sup>

The language of "fiduciary" obligations is now familiar in connection with the dealings between the sovereign and indigenous peoples, including in decisions of the courts in New Zealand. Although a usual characteristic of a fiduciary is loyalty, a fiduciary duty in the sense in which it has been recognised in respect of indigenous people in New Zealand and in Canada does not seem to depend on a relationship characterised by loyalty. It follows that, without further development in a case in which the point arises, it remains an open question ...

Future cases may provide further clarity to the duty of loyalty in a public law context, although earlier authorities and juristic commentary provide some guidance. It is likely the judiciary will continue to define some fiduciary obligations as unenforceable if they fall within the higher trust concept. Nevertheless, the decision in *Guerin* suggests that the duty of loyalty is an aspect of a public law fiduciary relationship.<sup>193</sup> In this context, the duty arose immediately at the time when the Crown first established jurisdiction over the indigenous people of Canada.<sup>194</sup> Loyalty in this context includes elements of good faith that also form part of the Treaty principles in New Zealand.<sup>195</sup> Furthermore, the idea invokes notions of social contract theory that the Crown immediately undertook fiduciary obligations in exchange for a recognition of legitimacy to assert sovereign power.<sup>196</sup>

The observation made in *Wewaykum* would appear to accept a conclusion that the Crown cannot owe an absolute duty of loyalty to a single party at the expense of other interests. Flannigan suggests Canadian authority has confused the subject by giving the fiduciary label to all aspects of the relationship.<sup>197</sup>

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<sup>191</sup> *Paki*, above n 112, at [283].

<sup>192</sup> At [155] (footnotes omitted).

<sup>193</sup> *Guerin*, above n 80, at 337.

<sup>194</sup> Rotman, above n 81, at 738.

<sup>195</sup> McCamus, above n 55, at 118.

<sup>196</sup> Fox-Decent, above n 102, at 112.

<sup>197</sup> Flannigan, above n 79, at 257.

Nonetheless, a duty of loyalty in public law appears discernible when a specific relationship arises out of a particular arrangement or interaction.<sup>198</sup> An identifiable class of claimants appears to limit the scope of the fiduciary doctrine in public law.<sup>199</sup> In *Guerin*, the criteria for an obligation of loyalty in a public law context appear to have been satisfied because of a particular dealing with land.<sup>200</sup> The fiduciary label also appears to characterise the relationship between the Crown and Māori as a trust relationship. It is explicitly indicated in s 98(5) of the Marine and Coastal Area (Takutai Moana) Act 2011, which permits the High Court to determine an indigenous rights claim that "is based on, or relies on ... the fiduciary duty of the Crown". The Crown's jurisdiction to determine the reasonableness of customary exceptions to the general law falls within the ambit of the *ius publicum*.<sup>201</sup> This could impose a future obligation on the Crown to take positive actions to protect the customary marine and coastal areas against rising sea levels.<sup>202</sup> Nevertheless, the express acknowledgement of a fiduciary duty in legislation is the clearest indicator of their existence.<sup>203</sup>

The discussion about the duty of loyalty in the Crown-indigenous context appears to apply to other Crown relationships. In *Harris v Canada (TD)*, the aggrieved taxpayer argued the Minister of National Revenue had a fiduciary relationship with taxpayers.<sup>204</sup> This case unfortunately included unsubstantiated allegations of favouritism, ulterior motivations and illegal conduct.<sup>205</sup> The Federal Court did not find a fiduciary relationship in this case. However, Dawson J outlined the following considerations:<sup>206</sup>

(1) The Crown may in some circumstances owe a fiduciary duty, or a duty akin to a fiduciary duty.

...

(3) Where the Crown owes duties to a number of interests it is more likely that the Crown is not in a fiduciary relationship, but rather is exercising a public authority governed by the proper construction of the relevant statute.

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198 Rotman, above n 81, at 738; and Samuel Carpenter "Māori Claims and Private Law" [2013] NZLJ 253 at 256.

199 Fox-Decent, above n 1, at 37.

200 *Guerin*, above n 80, at 355.

201 William Blackstone *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1765) vol 1 at 77. The principle is also articulated in Gratian *Decretum* Dist 12, c 11.

202 Lindsay Breach "Rising sea-levels (2016–2100): The assertion and protection of mana tuku iho in marine and coastal land" (paper presented to the University of Canterbury, Christchurch, May 2016).

203 *Civilian War Claimants Assoc Ltd v The King* [1932] AC 14 (HL) at 27.

204 *Harris v Canada (TD)* 2001 FCT 1408, [2002] 2 FC 484 at [161].

205 At [120].

206 At [178].

(4) A fiduciary relationship is unlikely to exist where that would place the Crown in a conflict between its responsibility to act in the public interest and the fiduciary's duty of loyalty to its beneficiary.

This analysis, applicable to a Minister of the Crown, appears to accept that a duty of loyalty may arise if a specific relationship exists. Furthermore, the court will adopt a narrow interpretation in finding the existence of a fiduciary relationship. The duty of loyalty appears to attach itself to the discretionary power of administration that the fiduciary has assumed over the beneficiary.<sup>207</sup>

The question about whether a legal relationship is fiduciary in nature is not a closed subject.<sup>208</sup> A number of commentators have raised the possibility that elected politicians owe fiduciary duties to the wider populace. Flannigan suggests:<sup>209</sup>

Political office is an exemplar or archetype of the kind of arrangement that generally attracts fiduciary accountability. Politicians are granted access to public powers and property for the limited purpose of furthering the public good. That limited purpose may be pursued by all acceptable political means.

His opinion resonates with the popular view that the relationship between elected officials and the public requires both loyalty and integrity.<sup>210</sup> The duty of loyalty imposes on the fiduciary a requirement that they must avoid conduct *in mala fides*.<sup>211</sup> *Guerin* indicated, in a public law context, this would not allow a fiduciary to engage in unconscionable behaviour without making good "the losses suffered in consequence".<sup>212</sup> Fox-Decent elaborated upon this position when he observed: "To meet its justificatory burden, the Crown must show that it has acted in accordance with 'a high standard of honourable dealing'".<sup>213</sup> *Harris* indicated there is no conceptual difficulty about the recognition of fiduciary obligations between officers of the Crown, Members of Parliament, or other public law offices, and the public in the same manner as the Crown owes fiduciary obligations to indigenous people or local authorities owe to ratepayers.<sup>214</sup>

The public duty argument suggests the duty of loyalty in public law must be a soft duty, which becomes enforceable only when a specific relationship exists between the parties. Flannigan indicates that "[t]he 'public duty' argument" accepts that "individual citizens cannot enforce public duties unless

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207 Fox-Decent, above n 102, at 110.

208 *Paki*, above n 112, at [152].

209 Flannigan, above n 79, at 260.

210 Lindsay Aargaard "Fiduciary Duty and Members of Parliament" (2008) *Canadian Parliamentary Review* 31 at 35.

211 Nolan, above n 69, at 296.

212 *Guerin*, above n 80, at 337.

213 Fox-Decent, above n 102, at 97 (citations omitted).

214 At 101.

they have a special interest or peculiar loss not shared with the general public".<sup>215</sup> The tort of misfeasance suggests aspects of targeted or untargeted malice would breach fiduciary obligations because such conduct would not ordinarily be in the public interest. However, Flannigan goes further than requiring a specific relationship to inform the duty of loyalty in a public law context. He provides:<sup>216</sup>

Where public duties are discounted or subverted by the exploitation of power or office for private benefit, there is no 'public' foundation for immunity from civil actions instituted by the acknowledged beneficiaries of those duties.

The decision in *Hawrelak*, concerning accusations that a mayor exploited his public office for private benefit, suggests that any member of the public could bring an action for breach of a fiduciary duty against a political actor that abuses their office to make a secret profit without suffering a special interest or loss. This is a controversial suggestion and courts will likely require more than discretionary power or vulnerability in political decision-making before making a finding that politicians have breached a broad duty of loyalty. In the meantime, a narrower interpretation that limits the concept to a specific relationship accepts that the nature of the public law fiduciary relationships remains in its infancy despite a lengthy pedigree in political theory.

## VI CONCLUSION

The idea that the relationship between political power and the population is fiduciary in nature is traceable to enlightenment *philosophes* and the first iterations of the social contract. There is nothing revolutionary, therefore, about a modern suggestion of the same. Many arguments in favour of the notion indicate that the recognition of fiduciary obligations may impose a higher standard of accountability and encourage political actors to have a higher regard for the interests of those affected by political decisions.<sup>217</sup> These arguments appeal to the legitimate expectations of those who live in a democracy. However, it is difficult to create workable principles to furnish legal definition to a public law fiduciary relationship when numerous scenarios have attracted the "fiduciary" label. Nonetheless, the decisions related to Crown-indigenous and local authority-ratepayer relationships demonstrate that *fiducia* can cut across the jurisprudential divide between private law and public law. This is a conceptually sound position and necessary to avoid the confusion that has resulted from their classification as *sui generis*. Nonetheless, a public law interpretation of *fiducia* will import qualities that distinguish it from its private law application. The clearest difference is that a private law fiduciary who owes an absolute duty of loyalty to a beneficiary cannot be transposed onto a public

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<sup>215</sup> Flannigan, above n 79, at 285.

<sup>216</sup> At 285.

<sup>217</sup> Ken Coghill, Charles Sampford and Tim Smith "Rulers' Duties to Our Environment?" in Ken Coghill, Charles Sampford and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* (Ashgate Publishing, Farnham, 2012) 1 at 1.

law fiduciary who has multiple interests to consider. Existing authority suggests the judiciary requires the existence of a specific relationship between a public body and a limited class of beneficiaries before it will distinguish enforceable fiduciary obligations from "higher trust" concepts. Therefore, it is likely that future articulation will draw upon the principles related to public authority liability found in the law of tort. There remains, however, many outstanding questions about the nature and scope of fiduciary concepts in public law.