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Feasance and Misdeeds by Public Authorities: A Comparative Tortious Review with a Spotlight on Cape Breton Island's Sustainability & Fiscal Neglect

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ABSTRACT

Feasance is a developing area of the law of torts. Torts is an area of law that deals with private wrongs. In essence, breaches of duties or obligations by a person or legal party that causes injury to another. It also has the distinction as being the only element of tort law applicable to the actions of public officials versus all other torts which are private wrongs causing injury. In Civil law systems such as Quebec along with much of Europe and South America this area or tortious wrongs is covered in an area of law known as delict, which similarly focuses on the obligations of people (or legal entities) to others and the possible remedy when obligations are breached, and significant damages result.

In this study I will explore the origins and early development of feasance in both civil law and common law and will also examine how the law distinguishes between the three types of tortious feasance: malfeasance, mis-feasance and nonfeasance. Finally, using the claims of the Nova Scotians for Equalization Fairness (NSEF) that Halifax has been unduly hording constitutionally directed federal equalization transfers to the Province of Nova Scotia from the outer laying regions of the province, a spotlight will be shown on Cape Breton Island's (CBI) demise and fiscal neglect to gauge whether NSEF might potentially have a substantiated claim of tortious action via litigation for damages incurred due to one or more of the feasance heads.

I. INTRODUCTION

Feasance is a developing area of the law of torts. Torts is an area of law that deals with private wrongs. In essence, breaches of duties or obligations by a person or legal party that causes injury to another. It also has the distinction as being the only element of tort law applicable to the actions of public officials versus all other torts which are private wrongs causing injury. In Civil law systems such as Quebec along with much of Europe and South America this area or

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II. BACKGROUND

Wrongs from the acts or omission of action causing damage other than criminal acts (such as murder, rape and theft) are otherwise in common law systems typically treated in private legal actions (also referred to as civil law or civil actions) under contract law (where agreements have been breached), or the law of torts - "a wrongful act or omission for which damages can be obtained in a civil court by a person wronged."² Furthermore, the law of torts is not mutually exclusive of the law of contracts or criminal law as tortious actions for wrongs may also be raised under contract law and criminal law.³ For instance, a contractor who defrauds the principal and fails to complete the project causing the principal to be held liable for damages incurred by others relying on the completion of the project would be actionable against the contractor potentially as both a criminal and/or civil offence, and where damages are proven under numerous categories of torts law too e.g. misrepresentation, negligence and others.

Laws can also be divided into public law⁴ (wrongs affecting others i.e. the public) and private law⁵ (laws affecting individuals), and feasant which is rooted in the tort of negligence and a

² Oxford Reference, accessed 14th December 2020 at Tort - Oxford Reference <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803105014458>

³ Ibid.

⁴ "Public law sets the rules for the relationship between the individual and society. If someone breaks a criminal law, it is seen as a wrong against society. It includes: criminal law, which deals with crimes and their punishments; constitutional law, which defines the relationship between various branches of government, as well as between federal and provincial governments; it also limits the exercise of governmental power over individuals through the protection of human rights and fundamental freedoms; and administrative law, which deals with the actions and operations of government." Department of Justice, What Is The Law? Government of Canada. Accessed 4th December 2020 at <https://www.justice.gc.ca/eng/csj-sjc/just/02.html>

⁵ "Private law sets the rules between individuals. It is also called civil law. Private law settles disputes among groups of people and compensates victims, as in the example of the fence. A civil case is an action that settles private disputes." Ibid.

duty of care, is a unique tort as it is an action (or omission) performed (or failure to perform) by a public agent or office with a duty of care, which causes damages to an individual or individuals, whereas all other torts are confined to the acts of private individuals.

In particular, there has been a renewed interest in misfeasance which essentially “is the exercise of power by a public officer in bad faith that causes loss to the claimant.”⁶ This public tort can be traced back to the case of *Ashby v White* (1703) and lay dormant for a long duration. Furthermore, it can be seen that in the twentieth century the courts were not readily recognizing or applying the tort. For instance, In *Davis v. Bromley*, [1908] 1 K.B. 170 (C.A.) the Court of Appeal held that misfeasance in a public office was not an accountable tort, even where public power was exercised maliciously.”⁷

Feasance, Malfeasance, Misfeasance and Nonfeasance

The etymology of the legal term ‘feasance’ is rooted in Latin as *facere* and old French (which is a Latin derived language) as *faisance*.⁸ Today in English *feasance* is a legal term which refers to “the performing of an act, especially out of one’s duty.”⁹ It is also defined as “a making; the making of an indenture, release, or obligation.”¹⁰

Within the family of *feasance* torts are three distinct variations: *mal-feasance*, *mis-feasance* and *non-feasance*. *Malfeasance* differs from *misfeasance* and *nonfeasance*, because under *malfeasance* there is no ascribed duty to perform and is defined as: “the wrongful or unjust doing of some act which the doer has no right to perform, or which he has stipulated by contract not to do.”¹¹ In the United Kingdom in recent years pursuant to the landmark case of “*Three Rivers District Council v. Governor and Company of the Bank of England (No.3)*” which restated the elements of the tort”¹² of *misfeasance*, the courts have commenced hearing claims for ‘*malfeasance*’. E.g.

“action for damages brought by depositors with failed bank BCCI against the Bank of

⁶ Andenas, Mads, and Duncan Fairgrieve. “Misfeasance in Public Office, Governmental Liability, and European Influences.” *The International and Comparative Law Quarterly*, vol. 51, no. 4, 2002, pp. 757–779. *JSTOR*, www.jstor.org/stable/3663187. Accessed 11 Dec. 2020.

⁷ THE LAW SOCIETY GAZETTE NEWS, BLAST FOR THE PAST -- RECENT CASES HAVE GIVEN THE TORT OF MISFEASANCE A NEW LEASE OF LIFE -- A LOOK AT THE ENDURING QUALITIES OF ANCIENT LAWS AND THEIR CONTINUING RELEVANCE TODAY, [HTTPS://WWW.LAWGAZETTE.CO.UK/NEWS/BLAST-FOR-THE-PAST-RECENT-CASES-HAVE-GIVEN-THE-TORT-OF-MISFEASANCE-A-NEW-LEASE-OF-LIFE-A-LOOK-AT-THE-ENDURING-QUALITIES-OF-ANCIENT-LAWS-AND-THEIR-CONTINUING-RELEVANCE-TODAY-/21622.ARTICLE](https://www.lawgazette.co.uk/news/blast-for-the-past-recent-cases-have-given-the-tort-of-misfeasance-a-new-lease-of-life-a-look-at-the-enduring-qualities-of-ancient-laws-and-their-continuing-relevance-today-/21622.article)

⁸ Accessed 20th November 2020 at <https://etymologeek.com/eng/feasance>

⁹ *Ibid.*

¹⁰ Accessed 20th November 2020 at <https://thelawdictionary.org/feasance/>

¹¹ Accessed 20th November 2020 at <https://thelawdictionary.org/malfeasance/>

¹² Erika Chamberlain, What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?, 2010 88-3 *Canadian Bar Review* 515, 2010, at 580. *CanLIIDocs* 95, <<http://canlii.ca/t/28lh>>, retrieved on 2020-12-11

England, on the grounds that the latter had failed adequately to supervise BCCI's UK operations, either by wrongly granting or wrongly failing to revoke its license. The action cannot lie in negligence because, as a regulatory body, the bank has statutory exemption under the Banking Act 1867."¹³

The origin of 'misfeasance' is a further development from the French as well who added *miss* in front of '*faisance*' and defining it as misdeeds.¹⁴ In contrast to malfeasance, misfeasance is a misdoing or misdeed of an action "that a party ought to do,"¹⁵ but doing it improperly and causing damage as a result. It is defined as "the improper performance of some act which a man may lawfully do."¹⁶

"Misfeasance, strictly, is not doing a lawful act in a proper manner, omitting to do it as it should be done; while malfeasance is the doing an act wholly wrongful; and nonfeasance is an omission to perform a duty, or a total neglect of duty. But "misfeasance is often carelessly used in the sense of "malfeasance." *Coite v. Lynes*, 33 Conn. 109."¹⁷

In Canada, the law related to misfeasance in a public office has been evolving since the Supreme Court of Canada's decision in *Odhavji Estate v. Woodhouse*.¹⁸ It is a claim which is now readily being added to other torts in actions against public authorities. E.g. not only actions for negligence but also "malicious prosecution, false arrest, and breaches of various rights under the Charter of Rights and Freedoms."¹⁹

Finally, nonfeasance, as identified above, is defined as "the neglect or failure of a person to do some act which he ought to do. The term is not generally used to denote a breach of contract, but rather as the failure to perform a duty towards the public whereby some individual sustains special damage, as where a sheriff fails to execute a writ."²⁰ Thus nonfeasance is essentially "the intentional failure to perform a required duty or obligation"²¹ and is used in civil court cases against public offices and officials, and people in a position of trust with an obligation and duty of care.

Nonfeasance is essentially an omission of action versus a wrongfully performed legal act causing damage (misfeasance), or an illegal act performed outside the scope of one's duty or

¹³ *Supra*, note 6.

¹⁴ Accessed 20th November 2020 at <https://study.com/academy/lesson/misfeasance-vs-nonfeasance.html>

¹⁵ <https://thelawdictionary.org/misfeasance/>

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Supra*, note 11 at 579.

¹⁹ *Ibid*, 580.

²⁰ Accessed 20th November 2020 at <https://thelawdictionary.org/nonfeasance/>

²¹ *Supra*, note 9.

without duty to perform which causes injury (malfeasance). “Omissions, like economic loss in which Lord Aitkin’s generalization in *Donoghue v. Stevenson*.... Offers limited help.”

“The familiar principle that there is no liability for nonfeasance but only for misfeasance is often presented as reflecting a merely factual difference between acts and omissions and is discussed as a discrete issue in tort law, alongside and after the treatment of general principles.”²²

III. SPOTLIGHT ON CAPE BRETON ISLAND’S FISCAL NEGLECT

In this section, I wish to examine if, and how, feasance (be it mal, mis or non feasance) may apply to CBI’s quest for equality of social services, fiscal administrations and prospectively autonomy as a self-governing entity within Canada, and either outside or within Nova Scotia.²³ CBI has experienced four decades of population exodus,²⁴ perennially high unemployment,²⁵ alarming child poverty²⁶, extreme consumer debt,²⁷ school and hospital closures²⁸, and a health care crisis²⁹. As well Halifax hoards most of federal transfers and equalization funds the province receives for its own needs within the Halifax area³⁰ e.g. build stadiums³¹ and convention centres for Halifax,³² while on CBI pulling up the rail

²² Benson, Peter, *Misfeasance as an Organizing Normative Idea in Private Law* (September 7, 2009). University of Toronto Law Journal, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=1469610> or <http://dx.doi.org/10.2139/ssrn.1469610>

²³ Abacas Data, *Cape Breton Regional Municipality: Public Attitudes Toward More Autonomy And a Potential By-Election For Mayor*, Summer 2019, at 8-11. Accessed 02/02/20 at <https://lookaside.fbsbx.com/file/New-Dawn-CBRM-Report.pdf>

²⁴ Wade Locke and Stephen G Tomlin, *Good Governance, a Necessary but Not Sufficient Condition for Facilitating Economic Viability in a Peripheral Region: Cape Breton as a Case Study*, Memorial University, 2003, at 4.

²⁵ *Ibid*, at 7.

²⁶ Nancy King, *High levels of child poverty persist in Cape Breton*, *Cape Breton Post*, Jan. 21, 2020. Accessed 03/02/20 at https://www.capebretonpost.com/news/local/high-levels-of-child-poverty-persist-in-cape-breton-401045/?fbclid=IwAR0KqKU_COSBdYIkZSrrmmRB5fOX6LvAO3RT573L1EcDiZn8SjYRVsel6YR8

²⁷ Statistics Canada, *Annual Consumer Insolvency Rates by Province and Economic Region, 2010-2018*. Accessed 03/02/20 at <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01820.html>

²⁸ Graeme Benjamin, *Hundreds of Cape Bretoners protest pending hospital closures along Canso Causeway*, *Global News*, Nov. 16, 2018. Accessed 02/02/2020 at <https://globalnews.ca/news/4671958/cape-breton-hospital-closure-protest/>

²⁹ *Supra* note 4, at 5.

³⁰ Paul Patterson, *Cape Breton: A Node Not An Island*, Centre 200 Presentation, 2018, Nova Scotians For Equalization Fairness.

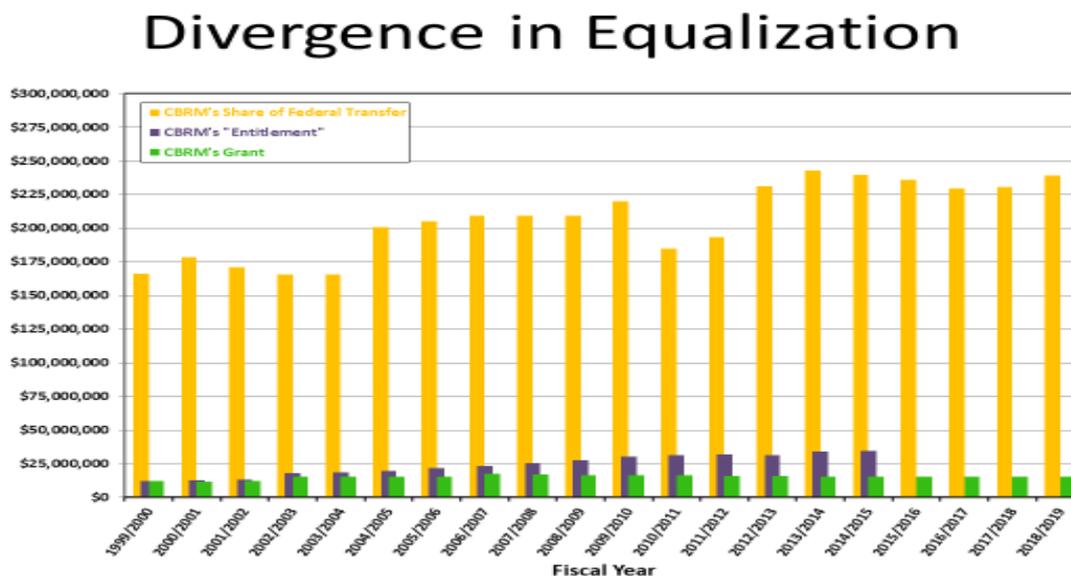
³¹ 3 DOWN NATION, *DETAILS OF THE CFL STADIUM PROPOSAL IN HALIFAX, SEP.26, 2019*. ACCESSED 02/02/2020 AT [HTTPS://3DOWNNATION.COM/2019/09/26/DETAILS-OF-THE-CFL-STADIUM-PROPOSAL-IN-HALIFAX/](https://3DOWNNATION.COM/2019/09/26/DETAILS-OF-THE-CFL-STADIUM-PROPOSAL-IN-HALIFAX/)

³² GLOBAL NEWS, *HALIFAX CONVENTION CENTRE OFFICIALLY OPENS FIVE YEARS AFTER FIRST PROPOSED*, DEC. 15, 2017.

“Built with \$169 million in taxpayer funding, the Halifax Convention Centre portion of a massive \$500-million construction project that dominates downtown Halifax.” Accessed 02/02/20 at <https://globalnews.ca/news/3919323/halifax-convention-centre-opens/>

service³³, ending programs and closing government facilities.³⁴ See Figure 1³⁵ below.

Figure 1



CBI was twice a colony under France, and twice a colony under Britain with a colonial charter including an executive, judiciary and legislature (although while requested never allowed to be formed) granted by King George III, before being undemocratically annexed by Nova Scotia in 1820.³⁶ Thus since then the colony of CBI has been detrimentally and discriminatorily administered by rival colony of Nova Scotia and its unjustly self-enriching public policy and fiscal stewardship, including federal equalization transfers. As the Nova Scotian's for Equalization fairness note:

“in addition to withholding all but 6.4% of the Federal Equalization funding intended for municipal use, the Nova Scotia government has been downloading the costs of provincial services (school board, housing and corrections) onto the CBRM, clawing back ~ \$16.5+ million /year. Effectively, therefore, the CBRM receives no equalization funding for the municipal services it must deliver.”³⁷

Canada's Constitution, Charter, and Cape Breton Island's Cause

The Constitution Act, 1982 contains two relevant provisions for a review of CBI's right to

³³ Transportation Action Atlantic, *Scotia Rail Development Society continues efforts to save Cape Breton rail line*, Aug. 18, 2016. Accessed 02/02/20 at <http://transportactionatlantic.ca/scotia-rail-development-society-continues-efforts/>

³⁴ SUPRA NOTE 9.

³⁵ SUPRA, note 22.

³⁶ Ronald W. D. MacDonald, *A Letter To The Prime Minister*, Cape Breton Post, Oct. 17, 2019. Accessed 02/02/20 at <https://www.capebretonpost.com/opinion/local-perspectives/letter-a-letter-to-the-prime-minister-364974/>

³⁷ SUPRA, note 22.

fiscal and social equality within Canada. They are:

“(1) the institution of the Charter of Rights and Freedoms; and. (2) the spelling out of a joint federal and provincial commitment to the pursuit of equality of opportunity, the lessening of regional disparities and the provision of basic public services, and of a federal responsibility in the area of equalization.”³⁸

The Charter applies to Canada’s Parliament and Government, and to each Provincial Government and Legislature. It enshrines democratic rights (sections 3 to 5), legal rights (sections 7 to 14), and equality rights (Section 15).³⁹ In the context of this study, Sections 2 (c) and (d), 7 and 15 are potentially the most important. The Charter also provides for ‘Enforcement’ of guaranteed rights and freedoms, Section 24 and ‘General’ Rights which includes Sections 26 and 27, as ‘Other rights and freedoms not affected by the Charter’.

First, in looking at Section 7, Legal Rights, within the Charter can it not be argued when CBI is experiencing dramatic inequities with the rest of Canada and an exodus of its population, not by choice but by desperation and economic exasperation, that residents are not being given the opportunity to sustain life, nor liberty and security to a reasonable standard. As well Section 15, Equality Rights, may apply? For instance, CBI is for a long time considered distinct by many, and it’s an identifiable people. The Charter notably too calls for “Equality before and under the law and equal protection and benefit of the law.” Subsection 1 reads as:’

“15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Arguably fiscal and demographic statistics seem to support a bad faith bureaucratic regime or some form of political systemic failure with respect to CBIs half century long decline and legacy of extreme social conditions. In essence, a misfeasance or nonfeasance which presents as an intentional neglect by the Province of Nova Scotia over its rival subjugated region known as the former Colony of Cape Breton Island. Thus, it may be asked, does colonialism still prevail in 2020, two hundred years after the NS annexation of CBI?

³⁸ Paul Hobson, David Cameron and Wade Locke, *A Question of Balance – An Assessment of the State of Local Government in Nova Scotia*, A discussion paper prepared for The Union of Nova Scotia Municipalities as part of their Fair and Equitable Funding Project, Final Report, April 2005, p. 20.

³⁹ Ibid.

Even if discrimination by Nova Scotia and or Canada toward CBI is proven under Section 15, will the courts recognize the discrimination under any of the respective heads of subsection 15 (1), i.e. based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability? Capers are not per se a race, but rather a mix of cultures coming from diverse ethnic backgrounds, color, religion and representing all genders, ages, and mental/physical disabilities. So, this element of the Charter seems a challenge for CBI to apply for its cause. Nevertheless, informally many know CBI as distinct.

Section 26 protects other rights people may have that aren't identified in the Charter's other sections, and Charter Section 24, Enforcement is of interest too and as well Section 32 holds Provinces accountable under the Charter.⁴⁰ Also the Charter is part of the Constitution and the former protects the rights of Canadians and given that a failure in the implementation of 'Equalization' by both the Governments of Canada and Nova Scotia is in part contributing to a comparative neglect of CBI, then it seems that Section 36, Equalization,⁴¹ of the Constitution is not being properly applied. In particular, the Canadian Constitution Act (Section 36.2) reads as: "Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

Equalization has been introduced to provide a level playing field across Canada with respect to the provision and access to social programs, services and facilities across Canada. Whereas under this mission funds by formula are extended from the federal government to Provinces of merit to administer within their jurisdiction to remedy social inequities, on behalf of the federal government, very arguably if they are not applied without discrimination across the province then a breach of duty of care has occurred.

"Where legislation gives a public authority discretion to make decisions.... A decision that is made by a public authority that has fettered its discretion in this way may be challenged on the grounds that the decision is unlawful. It may also be challenged on

⁴⁰ Dwight Newbury, *Halsbury's Laws of Canada - Constitutional Law (Charter of Rights)*, (2019 Reissue).

⁴¹ Section 36 reads as: "Commitment to promote equal opportunities: **36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to: (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and (c) providing essential public services of reasonable quality to all Canadians. Commitment respecting public services: (2) Parliament and the government Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

the grounds that the procedure by which it was made was unfair, or on the grounds that it is unreasonable.”⁴²

IV. A COMPARATIVE VIEW OF FEASANCE (PUBLIC TORT) IN CIVIL LAW V. COMMON LAW

As has been previously noted the term feasant is of Latin and French origin etymologically and has been used historically in the context of obligations and duties, be it fees or performance. For instance, in France, “the general rule is, as set forth by Article 1382 of the French Civil Code that ‘any act of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it.’”⁴³ Furthermore, Article 1383 also provides that “One shall be liable not only by reason of one’s acts, but also by reason of one’s imprudence or negligence.” Essentially under French law a claimant must prove fault (commission or omission), damage and a causal link between the two. “Unlike English law, French law does not refer to the concept of a duty of care in order to establish liability.”⁴⁴ In contrast to common law, in French law, “in order to commit a tort, one does not necessarily need to be conscious of the wrongful nature of one’s behaviour. There does not have to be a specific duty of care towards a plaintiff – the proof of fault, damage and causal link is sufficient for a claim of damages.”⁴⁵ With fault being “seen in terms of departure from a standard... Rather than as a breach of duty. Any derogation from the requisite standard of competence amounts to ‘a malfunctioning of the public service’ – the classic definition of fault in French administrative law.”⁴⁶

“Liability in English law for things under one’s control generally depends on the existence of a duty of care, breach of this duty, and causation: the existence of a duty being based on foreseeable damage, relational proximity and it being ‘fair just and reasonable’ to impose a duty to act as a reasonable man (similar to *homme avisé* in French law) in a given situation.”⁴⁷

Another significant contrasting aspect of “the French judicial system is that it is divided

⁴² Welsh Government, Law Wales - What does 'fettering' discretion mean? (gov.wales), accessed 4th December 2020.

⁴³ British Institute of International and Comparative Law, *Introduction to French tort law*, https://www.biiicl.org/files/730_introduction_to_french_tort_law.pdf

⁴⁴ Watson, Danny. “*Style over Substance? A Comparative Analysis of the English and French Approaches to Fault in Establishing Tortious Liability*,” The University of Manchester, at 2. [https://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_1\(Watson\).pdf](https://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_1(Watson).pdf)

⁴⁵ *Supra*, note 47.

⁴⁶ Harlow, Carol. “Fault Liability in French and English Public Law.” *The Modern Law Review*, vol. 39, no. 5, 1976, pp. 516–541. *JSTOR*, www.jstor.org/stable/1095144. Accessed 12 Dec. 2020

⁴⁷ *Supra*, note 43 at 3.

between judicial and administrative courts.”⁴⁸

“Cases against the State go before the administrative courts, with the Conseil d’Etat at its helm. But since that specific liability regime covers the activities of many public institutions, or private law entities performing tasks of general or public interest, it often deals with issues which are like those arising under general tort law. Thus, state liability has been developed through case law, mainly that of the Conseil s’Etat.”⁴⁹

French administrative law makes a further distinction with respect to ‘fault’; (a) “a fault which is attributable to the service as a whole, or for which that service is responsible (faute de service), and (b) a fault attributable to the agent alone (faute personnelle).”⁵⁰ Whereas English law tends to move against individuals as an agent of their employer, “with the administration vicariously responsible for his actions.”⁵¹

In the Province of Quebec where a bi-jural system exists (common law for public law matters and civil law for private law matters) there are two relevant sections of the Civil Code of Quebec which I shall reference in this review. The first is Article 1457, CCQ 1991 with respect to civil liability which reads as:

“Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.

He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.”⁵²

To further substantiate the claim under 1457 unique to civil law is the legal principle of ‘unjust enrichment’ which under CCQ 1493 reads as: “A person who is enriched at the expense of another shall, to the extent of his enrichment, indemnify the other for the latter’s correlative impoverishment, if there is no justification for the enrichment or the impoverishment.”⁵³

⁴⁸ *Supra*, note 42.

⁴⁹ *Ibid*.

⁵⁰ Harlow, Carol. “Fault Liability in French and English Public Law.” *The Modern Law Review*, vol. 39, no. 5, 1976, pp. 516–541. *JSTOR*, www.jstor.org/stable/1095144. Accessed 12 Dec. 2020

⁵¹ *Ibid*.

⁵² CCQ 1991, c. 64, a. 1457; 2002, c. 19, s. 15; I.N. 2014-05-01; 2016, c. 4, s. 177.

⁵³ CCQ 1991, c. 64, a. 1493; I.N. 2014-05-01.

V. REMEDYING INTERGOVERNMENTAL FISCAL IMPROPRIETY AND SOCIAL INEQUITY

Tort Law's Feasances

The case of *Roussel v. Province of New Brunswick*, March 11, 1977 raises the question of provincial responsibility for negligence with respect to its provincial highways. There it was noted that "In raising the issue of negligence on the part of the province, counsel for the plaintiff has brought us into the area of misfeasance as opposed to nonfeasance. It is well established law that the province can be made liable for misfeasance and not nonfeasance."⁵⁴

In the case noted above the claim on misfeasance and not nonfeasance the latter of which wasn't recognized as actionable, the plaintiff's counsel argued:

"You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore, it was nonfeasance. Once established that the local authority did something to the road, the case is removed from the category of nonfeasance. If work is imperfect and incomplete, it becomes a case of misfeasance and not nonfeasance, although damage was caused by an omission to take precaution to do something that ought to have been done. The omission to take precaution to do something that ought to have been done to finish the work is precisely the same thing it its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority has chosen to do nothing at all."⁵⁵

The court however did not feel the plaintiff's argument was sufficient to treat the complaint as a misfeasance, versus nonfeasance (improperly performing the task versus not performing the task). Thus analogously it is suggested if NSEF or leadership on Cape Breton Island were interested in pursuing legal action via the tort of feausance (alternatively to administrative or constitutional challenge and judicial review), then to be successful under a challenge/complaint premised on misfeasance or nonfeasance it will be necessary to very carefully define and substantiate which feausance head is being pursued. In the case discussed above a Province is recognized as responsible for misfeasance and not nonfeasance, and with the former it is essential to prove that a misdeed has been committed and then relevant damages resulted.

⁵⁴ *Roussel v. Province of New Brunswick*, 1977 CanLII 2316 (NB QB), <<http://canlii.ca/t/j5kvc>>, retrieved on 2020-12-15

⁵⁵ *Ibid.*

Whereas misfeasance seems more readily acceptable by the court than nonfeasance in recent years this distinctive tort has seen renewed use and attention in the courts, and it has “become rather commonplace for plaintiffs to plead misfeasance in a public office alongside other torts in actions brought against public authorities.”⁵⁶ Indeed, in lieu of this misfeasance has been added to claims of breaches under Canada’s Charter. “In such claims, the primary benefit of the misfeasance claim is to taint the public officer’s actions.”⁵⁷

Since the decisions in *Three Rivers* (elements of the tort and treatment of malice and duty), *Odhavji Estate* (identifying the types of tortious official misconduct) and *Watkins* (need to prove material damage, as well as violation of a right) many cases on misfeasance have heard by provincial and appellate courts in Canada.

“While it would be hasty to draw any hard and fast conclusions about the future of misfeasance in Canada some noteworthy trends have emerged. First, because it lacks a “proximity” requirement, misfeasance may, in some narrow circumstances, provide plaintiffs with a better claim than negligence against certain public authorities. Second, the evolving elements of misfeasance make it less likely to be struck out at a preliminary stage, thereby prolonging litigation and increasing pressure on defendants to settle. Finally, because it carries a taint of bad faith, misfeasance in a public office seems to offer plaintiffs a greater sense of vindication than other torts.”⁵⁸

Three advantages of misfeasance claims which enhance the effectiveness of this public tort for aggrieving and offended parties are:

“Plaintiffs who claim in misfeasance have some procedural advantages, including an expanded scope of discovery and greater resistance to defendants’ motions to strike. Second, the misfeasance tort serves as an “ombudsman” function, tainting the defendants conduct as abusive and providing a greater degree of psychological vindication to plaintiffs. Finally, in some limited circumstances, misfeasance claims may have a better chance of success than negligence claims, as they dispense with the somewhat troublesome requirements of proximity and policy.”⁵⁹

In adding misfeasance as a claim it arguably allows the scope of evidence gathering (known as discovery) to be broadened as information is exchanged by plaintiffs and defendants pre-

⁵⁶ Erika Chamberlain, *What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?*, 2010 88-3 *Canadian Bar Review* 515, 2010 CanLIIDocs 95, P.580 <<http://canlii.ca/t/28lh>>, retrieved on 2020-12-06.

⁵⁷ *Ibid*

⁵⁸ *Ibid*, 592.

⁵⁹ *Ibid*, at 579

trial, it also by expansion of the areas of law to the tort of misfeasance in tandem with other claims filed demonstrably increases the likelihood of a plaintiffs chances to succeed in court.⁶⁰

VI. CONCLUSION

Cape Breton Island is one of the first settled colonial locations in the western hemisphere and changed hands as a colony between France and England numerous times. In 1820 it was annexed a second time, involuntarily to the colony of Nova Scotia and entered confederation in 1867 attached to Nova Scotia whose pre-existing constitutions along with New Brunswick's are protected under the Canada Constitution Act. Since 1820 CBI has been administered by its rival colony, Nova Scotia.

In 1957 Canada introduced a federal equalization transfer program to assist provinces and communities across Canada who suffer from regional disparities. The equalization program was also subsequently enshrined in Canada's constitution via Section 36 and is so vaguely worded, other than broad purposiveness of addressing social inequities and being devolved to eligible provinces to administer, that Provinces have felt upon receipt of the equalization transfer that they have the discretion to implement it as they see fit.

However, in the case of Cape Breton Island a once proud distinct independent colony of its own arguably a remnant colony within a colony administered by rival Province of Halifax, equalization support has not been forth coming and data shows it instead accrues to Halifax who directs the funds predominantly to the benefit and unjust enrichment of its own benefit in the capital region. Thus, it appears meritorious that a fettering of discretion with respect to equalization funds and federal transfers has been occurring as data presented in this study supports.

In turn this study has examined constitutional as well as Charter Rights violations in support of CBI's claim, but more uniquely has examined the applicability of tort law under feasance and in particular misfeasance and has shown arguably a misdeed with respect to Nova Scotia obligations extended to it on a trust basis from Ottawa under the constitution to utilize equalization payments to address social service, programs and facilities inequities, has instead been arbitrarily fettered and abused by Nova Scotia to the detriment of CBI and its people.

This study has also explored and discovered that misfeasance claims against public authorities is as potential one part of a legal strategy procedurally enhancing and helping to improve the chance of cases being heard, by broadening the scope and increases the likelihood of success

⁶⁰ *Ibid.*, at 581

of claims against public authorities. And, we have seen that under common law a stress and test of the duty of care is essential to be proven versus civil law where ‘fault’ is essential, and also the later of which is also a system which recognizes and incorporates the principle of ‘unjust enrichment’. Thus you would think that in the Province of Quebec where article 1457 provides protection for civil liability that arguments more be inherently more readily founded, particularly where feausance has its early origins in roman and civil law. However, it is noted that Quebec is a bi-jural system of both common law and civil law, with misfeasance being a public tort it crosses over into the area of administrative and constitutional law i.e. public law whereby such matters are typically heard under common law proceedings.

VII. BIBLIOGRAPHY

1. Prud'homme v. Prud'homme, 2002 SCC 85 (CanLII), [2002] 4 SCR 663, <<http://canlii.ca/t/1g2w3>>, retrieved on 2020-12-10
2. Stéphane Rousseau, LA RESPONSABILITÉ CIVILE DES RÉGULATEURS EN VALEURS MOBILIÈRES : QUELLE PORTÉE POUR LA MISSION DE PROTECTION DES INVESTISSEURS EN DROIT CIVIL?, LA REVUE DU BARREAU CANADIEN, 2011, Volume 90, p. 27-67. 4262-Manuscript File-4262-1-10-20170922 (2).pdf
3. LYNDA COLLINS AND JASMINE VAN SCHOUWEN, Regulatory Negligence in Environmental Law, Ingleson, A. (Ed.). (2019). Environment in the courtroom. Calgary, AB: University of Calgary Press. <http://hdl.handle.net/1880/109483> book, Environment in the Courtroom (ucalgary.ca)
4. Lynda M. Collins, Material Contribution to Risk in the Canadian Law of Toxic Torts, 91 Chi.-Kent L. Rev. 567 (2016). Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol91/iss2/8>
5. [Stéphane Beaulac](#); [Jean-François Gaudreault-DesBiens](#), **Common law and civil law : a comparative primer = Droit civil et common law : convergences et divergences**, Montréal : Les Éditions Thémis, [2017] ©2017
6. Erika Chamberlain, What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?, 2010 88-3 *Canadian Bar Review* 515, 2010 CanLIIDocs 95, <<http://canlii.ca/t/28lh>>, retrieved on 2020-12-11
7. The Law Society Gazette News, Blast for the past -- recent cases have given the tort of misfeasance a new lease of life -- a look at the enduring qualities of ancient laws and their continuing relevance today, <https://www.lawgazette.co.uk/news/blast-for-the-past-recent-cases-have-given-the-tort-of-misfeasance-a-new-lease-of-life-a-look-at-the-enduring-qualities-of-ancient-laws-and-their-continuing-relevance-today-/21622.article>
8. Andenas, Mads, and Duncan Fairgrieve. "Misfeasance in Public Office, Governmental Liability, and European Influences." *The International and Comparative Law Quarterly*, vol. 51, no. 4, 2002, pp. 757-779. *JSTOR*, www.jstor.org/stable/3663187. Accessed 11 Dec. 2020.
9. Benson, Peter, Misfeasance as an Organizing Normative Idea in Private Law (September 7, 2009). University of Toronto Law Journal, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=1469610> or <http://dx.doi.org/10.2139/ssrn.1469610>
10. British Institute of International and Comparative Law, *Introduction to French tort law*, https://www.biiicl.org/files/730_introduction_to_french_tort_law.pdf

11. Harlow, Carol. "Fault Liability in French and English Public Law." *The Modern Law Review*, vol. 39, no. 5, 1976, pp. 516–541. *JSTOR*, www.jstor.org/stable/1095144. Accessed 12 Dec. 2020.

12. Watson, Danny. "Style over Substance? A Comparative Analysis of the English and French Approaches to Fault in Establishing Tortious Liability," The University of Manchester, [https://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_1\(Watson\).pdf](https://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_1(Watson).pdf)

13. Donaghue, Charles Jr.. "The Modern Laws of Both Tort and Contract: Fourteenth Century Beginnings, 40 *Man. L.J.* 9 (2017)"

14. Dworkin, Gerald. "Nonsense and Nonfeasance. Reaction and Reform." *The Modern Law Review*, vol. 23, no. 5, 1960, pp. 574–576. *JSTOR*, www.jstor.org/stable/1092099. Accessed 12 Dec. 2020.

15. Sawyer, Geoffrey. "Non-Feasance Revisited." *The Modern Law Review*, vol. 18, no. 6, 1955, pp. 541–556. *JSTOR*, www.jstor.org/stable/1090812. Accessed 12 Dec. 2020.

16. *Roussel v. Province of New Brunswick*, 1977 CanLII 2316 (NB QB), <<http://canlii.ca/t/j5kvc>>, retrieved on 2020-12-11

17. David G. Boghosian, J. Murray Davison

18. *The Law of Municipal Liability in Canada*,

19. Butterworths (Canada) Limited, 1999

20. Cane, Peter (2016). Role Responsibility. *The Journal of Ethics* 20 (1-3):279-298.

21. Web Toolbox, <https://www.law.cornell.edu/wex/malfeasance>

22. Keeshan, David and McKinlay, Tom, HCW-74 *Corwn Can Do No Wrong*, Halisbury's Laws of Canada – Crown ((2017 Reissue).

23. CHANG, ERIC C. C., et al. "LEGISLATIVE MALFEASANCE AND POLITICAL ACCOUNTABILITY." *World Politics*, vol. 62, no. 2, 2010, pp. 177–220. *JSTOR*, www.jstor.org/stable/40646199. Accessed 11 Dec. 2020.

24. Court of Common Pleas, *Watkins' Case*, Y.B.Hil 3 Hen. 6, f. 36, pl. 33 (1425). Accessed 11 December 2020 at <https://www.quimbee.com/cases/watkins-case>

25. Dworkin, G. (1960). Nonsense and Nonfeasance. Reaction and Reform. *The Modern Law Review*, 23(5), 574-576. Retrieved December 5, 2020, from <http://www.jstor.org/stable/1092099>

26. Oxford Reference, accessed 14th December 2020 at Tort - Oxford Reference <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803105014458>

27. Department of Justice, What Is The Law? Government of Canada. Accessed 4th December 2020 at <https://www.justice.gc.ca/eng/csjsj-just/02.html>

28. Accessed 20th November 2020 at <https://etymologeek.com/eng/feasance>
29. Accessed 20th November 2020 at <https://thelawdictionary.org/feasance/>
30. Accessed 20th November 2020 at Accessed 20th November 2020 at <https://thelawdictionary.org/malfeasance/>
31. Accessed 20th November 2020 at <https://study.com/academy/lesson/misfeasance-vs-nonfeasance.html>
32. <https://thelawdictionary.org/misfeasance/>
33. Accessed 20th November 2020 at <https://thelawdictionary.org/nonfeasance/>
34. Abacas Data, *Cape Breton Regional Municipality: Public Attitudes Toward More Autonomy And a Potential By-Election For Mayor*, Summer 2019, at 8-11. Accessed 02/02/20 at <https://lookaside.fbsbx.com/file/New-Dawn-CBRM-Report.pdf>
35. Wade Locke and Stephen G Tomlin, *Good Governance, a Necessary but Not Sufficient Condition for Facilitating Economic Viability in a Peripheral Region: Cape Breton as a Case Study*, Memorial University, 2003, at 4.
36. Nancy King, *High levels of child poverty persist in Cape Breton*, *Cape Breton Post*, Jan. 21, 2020. Accessed 03/02/20 at https://www.capebretonpost.com/news/local/high-levels-of-child-poverty-persist-in-cape-breton-401045/?fbclid=IwAR0KqKU_C0SBdYIkZSrmRB5fOX6LvAO3RT573L1EcDiZn8SjYRVsel6YR8
37. Statistics Canada, *Annual Consumer Insolvency Rates by Province and Economic Region, 2010-2018*. Accessed 03/02/20 at <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01820.html>
38. Graeme Benjamin, *Hundreds of Cape Bretoners protest pending hospital closures along Canso Causeway*, *Global News*, Nov. 16, 2018. Accessed 02/02/2020 at <https://globalnews.ca/news/4671958/cape-breton-hospital-closure-protest/>
39. Paul Patterson, *Cape Breton: A Node Not An Island*, Centre 200 Presentation, 2018, Nova Scotians For Equalization Fairness.
40. 3 Down Nation, *Details of the CFL stadium proposal in Halifax*, Sep.26, 2019. Accessed 02/02/2020 at <https://3downnation.com/2019/09/26/details-of-the-cfl-stadium-proposal-in-halifax/>
41. *Global News*, *Halifax convention centre officially opens five years after first proposed*, Dec. 15, 2017.
42. Accessed 02/02/20 at <https://globalnews.ca/news/3919323/halifax-convention-centre->

opens/

43. Transportation Action Atlantic, *Scotia Rail Development Society continues efforts to save Cape Breton rail line*, Aug. 18, 2016. Accessed 02/02/20 at <http://transportactionatlantic.ca/scotia-rail-development-society-continues-efforts/>

44. Ronald W. D. MacDonald, *A Letter To The Prime Minister*, Cape Breton Post, Oct. 17, 2019. Accessed 02/02/20 at <https://www.capebretonpost.com/opinion/local-perspectives/letter-a-letter-to-the-prime-minister-364974/>

45. Paul Hobson, David Cameron and Wade Locke, *A Question of Balance – An Assessment of the State of Local Government in Nova Scotia*, A discussion paper prepared for The Union of Nova Scotia Municipalities as part of their Fair and Equitable Funding Project, Final Report, April 2005, p. 20.

46. Dwight Newbury, *Halsbury's Laws of Canada - Constitutional Law (Charter of Rights)*, (2019 Reissue)

47. Welsh Government, Law Wales - What does 'fettering' discretion mean? (gov.wales), accessed 4th December 2020.

48. British Institute of International and Comparative Law, *Introduction to French tort law*, https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf

49. Harlow, Carol. "Fault Liability in French and English Public Law." *The Modern Law Review*, vol. 39, no. 5, 1976, pp. 516–541. JSTOR, www.jstor.org/stable/1095144. Accessed 12 Dec. 2020.

50. Watson, Danny. "Style over Substance? A Comparative Analysis of the English and French Approaches to Fault in Establishing Tortious Liability," The University of Manchester, [https://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_1\(Watson\).pdf](https://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_1(Watson).pdf)

51. Donaghue, Charles Jr.. "The Modern Laws of Both Tort and Contract: Fourteenth Century Beginnings, 40 Man. L.J. 9 (2017)"

52. Dworkin, Gerald. "Nonsense and Nonfeasance. Reaction and Reform." *The Modern Law Review*, vol. 23, no. 5, 1960, pp. 574–576. JSTOR, www.jstor.org/stable/1092099. Accessed 12 Dec. 2020.

53. Sawyer, Geoffrey. "Non-Feasance Revisited." *The Modern Law Review*, vol. 18, no. 6, 1955, pp. 541–556. JSTOR, www.jstor.org/stable/1090812. Accessed 12 Dec. 2020.
