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UMI

DUTY, THE HONOUR OF THE CROWN, AND *UBERRIMA FIDES*: FIDUCIARY DOCTRINE AND THE CROWN-NATIVE RELATIONSHIP IN CANADA

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A thesis submitted to the Faculty of Graduate Studies in partial fulfillment of the requirements for the degree of

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Canada

Duty, the Honour of the Crown, and *Uberrima Fides*: Fiduciary Doctrine and the Crown - Native Relationship in Canada

by

Leonard Ian Rotman

a thesis submitted to the Faculty of Graduate Studies of York University in partial fulfillment of the requirements for the degree of

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ABSTRACT

In *Guerin v. R.*,[1] the Supreme Court of Canada declared that the Crown owes fiduciary obligations to the aboriginal peoples of Canada. A number of cases decided after *Guerin* have relied upon its precedent to apply fiduciary doctrine to various relationships between the Crown and Native peoples. Most recently, the Supreme Court of Canada reaffirmed the fiduciary nature of the Crown-Native relationship in *Ontario (Attorney-General) v. Bear Island Foundation.*[2]

Since its initial judicial sanction in *Guerin* , the characterization of the Crown-Native relationship as fiduciary has become axiomatic despite the failure of the judiciary to detail why the relationship is fiduciary. Outstanding issues, including fundamental questions such as who owes the fiduciary duty to Native peoples, have yet to be answered or adequately addressed. Nevertheless, fiduciary doctrine is routinely applied to aboriginal rights jurisprudence in Canada.

The relationship between the Crown and the aboriginal peoples of Canada is unique. The combination of the entrenchment of aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982* and the history of Crown-Native relations which precipiced the constitutionalization of those rights illuminates rather than refutes this uniqueness. However, the nature of a relationship, not merely its uniqueness, is what renders it fiduciary.

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[1](1984), 13 D.L.R. (4th) 321 (S.C.C.).

[2][1991] 3 C.N.L.R. 79 (S.C.C.).

This thesis centres around the premise that the relationship between the Crown and aboriginal peoples in Canada cannot be characterized as fiduciary in the absence of an adequate understanding of fiduciary doctrine and its application to that *sui generis* relationship. The situation-specificity of fiduciary doctrine insists that fiduciary principles be applied to a relationship only where the nature of the relationship warrants it. Even then, fiduciary doctrine is applicable only to the extent that its general characteristics and principles are relevant to the relationship under scrutiny. Moreover, due to the malleability of fiduciary doctrine, its general principles and guidelines must first be established and understood if they are to be properly applied to the Crown-Native relationship.

The goal of this thesis is to address the deficient understanding of the fiduciary nature of the Crown-Native relationship in Canadian aboriginal rights jurisprudence. This process will be initiated by surveying case law to reveal the current status of fiduciary doctrine as it is applied to the Crown-Native relationship. The understanding of fiduciary law in general, achieved through a critical examination of its historical, conceptual, and theoretical background, is the second step of the process, culminating in the formulation of a new theory of fiduciary doctrine. Finally, the effects of applying fiduciary law to the Crown-Native relationship will be discussed.

It is hoped that this method of examination will result in the achievement of a greater understanding of the fiduciary nature of the relationship between the Crown and aboriginal peoples in Canada and the implications of applying fiduciary doctrine to it. The end result of these considerations will be to cement the understanding of the Crown-Native

fiduciary relationship by documenting the nexus between fiduciary doctrine and Crown-Native relations, thereby placing the Crown-Native relationship within its proper context in the sphere of Canadian aboriginal rights jurisprudence.

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I. INTRODUCTION

The application of fiduciary principles to the relationship between the Crown and aboriginal peoples is the subject of considerable confusion and misunderstanding in Canadian aboriginal rights jurisprudence. Although fiduciary law has enjoyed its position as one of the most significant facets of Canadian Native law for almost a decade since the landmark case of *Guerin v. R*,[1] this thesis contends that it is still largely misunderstood and misapplied by the judiciary and legal scholars alike.

It will be argued herein that judges and commentators have been content to invoke fiduciary doctrine in matters involving the relationship between the Crown and aboriginal peoples despite the misunderstanding and confusion surrounding the application of fiduciary principles to the law of aboriginal rights.[2] As will be illustrated by case law subsequent to *Guerin*, Canadian courts have neither questioned the application of fiduciary doctrine

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[1](1984), 13 D.L.R. (4th) 321 (S.C.C.).

[2]The term "aboriginal peoples," or "Native peoples," is just one of a number of descriptive terms which will be used interchangeably herein to refer to those people who are encompassed in the definition of "aboriginal peoples" in section 35(2) of the *Constitution Act, 1982* -- namely the Indian, Inuit, and Métis peoples of Canada. For a more detailed discussion of these terms, see Clem Chartier, '"Indian": An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867,' (1978-79), 43 *Sask. L. Rev.* 37; Peter W. Hogg, *Constitutional Law of Canada*, Second Edition, (Toronto: Carswell, 1985), at pp.552-553; Brian Slattery, "Understanding Aboriginal Rights," (1987), 66 *Can. Bar Rev.* 727, at footnotes 18 and 175; and, generally, Catherine Bell, "Who Are the Métis People in Section 35(2)?" (1991), 29 *Alta. L. Rev.* 351. For various legal definitions, see section 35(2) of the *Constitution Act, 1982*; section 2(1) of the *Indian Act*, R.S.C. 1985, c.I-5 (as amended); *Re Eskimo*, [1939] 2 D.L.R. 417 (S.C.C.).

to Native law nor have they attempted to explain the nature and extent of its application.[3] Instead, the judiciary appears to have routinely applied fiduciary principles to the relationship between the Crown and Native peoples. This thesis argues that the routine use of fiduciary principles in this manner is problematic for a number of reasons.

This thesis attempts to discuss the fiduciary obligations of the Crown to the aboriginal peoples in a general, doctrinal fashion so that its principles may be applied to all Crown-Native relationships in Canada. What is needed in individual circumstances, and what the situation-specificity of fiduciary doctrine requires, is for the historical, political, social, and legal aspects of the specific Crown-Native relationship under scrutiny to be fleshed out sufficiently in order to document the fiduciary character of the relationship. Once the specifics of particular Crown-Native relationships are ascertained, they will modify the general theory and principles discussed herein to render them applicable to the specific situation under consideration. What is proffered in this thesis, then, is merely a conduit for specific application in individual circumstances.

1. The Approach Taken

This thesis is quite broad-ranging and incorporates a variety of arguments and sub-arguments in arriving at its conclusions. Many of these

[3]For example, *Kruger v. R.* (1985), 17 D.L.R. (4th) 591 (F.C.A.); *Apsassin v. R.*, [1988] 1 C.N.L.R. 73 (F.C.T.D.); *Roberts v. R.* (1989), 57 D.L.R. (4th) 197 (S.C.C.); *Canadian Pacific Ltd. v. Paul* (1989), 53 D.L.R. (4th) 487 (S.C.C.); *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.); *Delgamuukw v. B.C.* (1991) 79 D.L.R. (4th) 185 (B.C.S.C.); *Ontario (Attorney-General) v. Bear Island Foundation*, [1991] 3 C.N.L.R. 79 (S.C.C.).

arguments and sub-arguments could be dealt with in a thesis in their own right. However, despite the emphasis placed upon these different arguments and their place within the paradigms illustrated, it is not feasible to develop them within this thesis. The goals of the thesis would be stunted by an attempt to be comprehensive in its discussion of each of these various approaches. However, the extraction of essential methods of understanding from these arguments and paradigms should provide the theoretical background to support the goals of this thesis.

Due to the complexity and magnitude of the subject-matter of this thesis, some aspects of the Crown-Native fiduciary relationship will receive only cursory treatment. In particular, the various historical, political, social, and legal bases of the Crown-Native fiduciary relationship cannot be canvassed to their fullest extent. For example, while the thesis argues strongly for the inclusion of historical analysis, both in terms of the thesis argument and the courts' determination of the issues discussed herein, it is not possible within the confines of the thesis to document the history of the relationship between the Crown and the aboriginal peoples in Canada dating back to the time of Contact.

To document all of the various sources of the Crown's fiduciary obligations to Native peoples would stray from the main goal of the thesis -- to investigate the legal effects and ramifications of the imposition of fiduciary doctrine upon the Crown-Native relationship. Furthermore, the existing commentaries, analyses, and historical documents which serve as the background for the production of this thesis more than adequately cover the

various bases of the Crown-Native fiduciary relationship so as to avoid having to replicate their arguments herein.

The path proposed in this thesis is intended to aid in understanding the nexus between fiduciary doctrine and its application to the relationship between the Crown and aboriginal peoples in Canada. It posits a strong case for the existence of general fiduciary obligations owed to aboriginal peoples in Canada by both the Federal and Provincial Crowns and offers suggestions as to what the fiduciary nature of the relationship between the Crown and aboriginal peoples means for the parties to that relationship.

2. Background

By determining in *Guerin* that the nature of the Crown's obligation to aboriginal peoples is fiduciary, and hence legal rather than merely political or moral, the Supreme Court of Canada blazed a new trail in Canadian aboriginal rights jurisprudence.[4] However, this thesis argues that *Guerin* provides little guidance as to the nature and extent of the Crown's duty and its implications for the parties affected by its existence. Subsequent aboriginal rights cases have provided ample opportunities to discuss the ramifications of applying fiduciary principles to the relationship between the Crown and Native peoples. Despite these opportunities, it will be suggested that the judiciary has been content to rely upon the Supreme Court's findings in *Guerin* without much in the way of elaboration.

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[4]Although it will be argued that this trail has not been expanded upon in subsequent cases and commentaries.

It is further submitted that academic commentaries written in this area have a similar flaw.[5] As with existing judicial commentaries, scholarly attempts to explain the application of fiduciary principles to the Crown-Native relationship are invariably more descriptive than analytic. This thesis is premised upon the assumption that, in the aftermath of *Guerin*, Canadian aboriginal rights jurisprudence has been characterized by a situation in which fiduciary rhetoric has been invoked to describe the Crown-Native relationship, yet the nature and extent of its application, and the ramifications which flow from it, have yet to be dealt with adequately by the judiciary or academic commentators.[6]

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[5]See, for example, Richard H. Bartlett, "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: *Guerin v. The Queen*," (1984-85), 49 *Sask. L. Rev.* 367; Bartlett, "The Fiduciary Obligation of the Crown to the Indians," (1989), 53 *Sask. L. Rev.* 301 [henceforth Bartlett (1989)]; John D. Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin v. The Queen*," (1985), 30 *McGill L.J.* 559; Darlene M. Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples," (1986), 30 *Ottawa L. Rev.* 307; William R. McMurtry and Alan Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective," [1986] 3 C.N.L.R. 19; James I. Reynolds and Lewis F. Harvey, "The Fiduciary Obligation of the United States and Canadian Governments Towards Indian Peoples," Unpublished paper, (Ottawa: Treaties and Historical Research Centre, 1985); D.P. Emond, "Case Comment: *Guerin v. R.* ," (1986), 20 E.T.R. 61; Donovan Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience," in Timothy G. Youdan, ed., *Equity, Fiduciaries and Trusts*, (Toronto: Carswell, 1989); Maureen Ann Donohue, "Aboriginal Land Rights in Canada: A Historical Perspective on the Fiduciary Relationship," (1990), 15 *Am. Ind. L. Rev.* 369; Phil Lancaster, *A Fiduciary Theory for the Review of Aboriginal Rights*, Unpublished LL.M. Thesis, University of Saskatchewan, 1990.

[6]Native law should not be singled out as the only culprit of this type of activity, however. The vast majority of judicial and academic considerations of fiduciary law in general tend towards the descriptive rather than the

A discussion of existing case law will provide evidence to support the proposition that fiduciary principles in Native law are presumed to exist as self-evident truths without ever having been put through any thorough examination of their applicability or appropriateness to the Crown-Native relationship. The longer this situation continues, the more comfortable others become with it. While a system of precedent may be effective where judicial decision-making is well-reasoned and logically deduced, it can also proliferate the effects of misapplied judgments. The longer an existing precedent remains in effect, the more difficult it generally becomes to challenge it or to have it overturned in the future.[7] This is due to the system of precedent, or *stare decisis*, upon which the common law is predicated.

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analytic. As P.D. Finn explains, the use of fiduciary doctrine "has generally been descriptive, providing a veil behind which individual rules and principles have been developed." Finn, *Fiduciary Obligations*, (Sydney: The Law Book Company, 1977), at p.1 [henceforth Finn (1977)]. Some recent discussions of fiduciary doctrine by legal commentators have, however, attempted to understand the theoretical basis upon which fiduciary doctrine is premised. See, for example, Finn (1977); J.C. Shepherd, *The Law of Fiduciaries*, (Toronto: Carswell, 1981); Tamar Frankel, "Fiduciary Law," (1983), 71 *Cal. L. Rev.* 795; Finn, "The Fiduciary Principle," in Timothy G. Youdan, ed., *Equity, Fiduciaries and Trusts*, (Toronto: Carswell, 1989) [henceforth Finn (1989)]; Robert Flannigan, "The Fiduciary Obligation," (1989), 9 *Ox. J. Leg. Stud.* 285.

[7]Law's emphasis upon tradition, stability, and continuity connotes the approval of a precedent merely through the passage of time. This is noted in the recent decision of the High Court of Australia in *Mabo v. Queensland [No.2]* (1992), 175 C.L.R. 1 (H.C. Aust.), an aboriginal rights case which focuses upon the question of aboriginal title, in the judgment of Deane and Gaudron JJ., at p.120: "Long acceptance of legal propositions, particularly legal propositions relating to real property, can of itself impart legitimacy and preclude challenge."

The rationale behind the principle of *stare decisis* is to provide law with a sense of stability, continuity, and, most importantly, authority. This time-tested principle is displayed by law as its symbol of rationality and

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Mabo also discusses the effects of precedent in situations where it no longer accords with contemporary notions of justice. As Brennan J. explains, at pp.29, 30:

> Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. ... [N]o case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.

Note also the judgment of Deane and Gaudron JJ. at p.109, where they state that:

> If this were any ordinary case, the Court would not be justified in reopening the validity of fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years. ... As has been seen, the two propositions in question provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection.

authority. As Learned Hand J. states in *Spector Motor Service v. Walsh,* the authority of law is achieved through reason and rationality rather than the arbitrary appraisal of particular facts or situations:

> ... [I]t always gives an appearance of greater authority to a conclusion to deduce it dialectically from conceded premises than to confess that it involves the appraisal of conflicting interests, which are necessarily incommensurable.[8]

To overturn a long-established precedent therefore requires something more than the dismissal of one argument in favour of another; it brings into question the entirety of judicial reasoning in every case in which the precedent has previously been upheld.

In this thesis, it will be argued that the continued application of fiduciary principles to the Crown-Native relationship based upon the precedent established in *Guerin* is inversely related to the perceived need to explain its application to that relationship. It is submitted that the more often *Guerin* is cited, without elaboration, for its proposition that the Crown owes fiducial obligations to aboriginal peoples, the perceived need to explain the basis of the Crown's duty is reduced. Indeed, since *Guerin* has been used as the springboard for the imposition of fiduciary duties upon the Crown towards aboriginal peoples, judicial and academic analysis of the basis of the Crown's duty and its effects has decreased.[9]

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[8]139 F. 2d 809 (C.A. Conn. 1944), at p.823.

[9]This is evidenced by the dearth of analytical examinations -- either by the courts or academic commentators -- of the Crown's fiduciary obligations to Native peoples published beyond the first two years after the *Guerin*

The case law suggests that the acceptance of precedent rather than an understanding of the foundation of its establishment has formed the basis of the Crown-Native fiduciary relationship in cases decided after *Guerin*. This is not to suggest that fiduciary law does not have a proper place within the ambit of aboriginal rights jurisprudence. However, given the frequency with which fiduciary law is invoked in the area of Native rights, it is troubling that these very principles which continually tint the Crown-Native relationship appear to remain barely understood.

As will be discussed in greater detail and emphasized throughout the thesis, it is not sufficient to state that a fiduciary relationship exists or that it has been breached without illustrating what the relationship encompasses or the ramifications of such a breach:

> ... [I]t is pointless to describe a person -- or for that matter a power -- as being fiduciary unless at the same time it is said for the purposes of which particular rules and principles that description is being used. These rules are everything. The description "fiduciary" nothing.[10]

Indeed, the portrayal of a relationship as fiduciary is only an initial step; the explanation of the resultant obligations arising by virtue of the relationship's existence is much more onerous. As Robert Flannigan suggests, "It is one

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decision. However, a number of cases from British Columbia which are soon to be released may halt this trend.

[10]Finn (1977), note 6, *supra*, at p.1.

thing to describe a relationship as fiduciary in nature. It is a more complex task to specify the content of the obligation in a particular case."[11]

3. Native Law and Fiduciary Law: An Unlikely Marriage?

The marriage of fiduciary law and Native law is, at first glance, an unlikely one. Fiduciary law is traditionally a part of private law, while Native law, insofar as such an area of law actually exists,[12] encompasses the legal relationship between aboriginal peoples and the Crown in Canada, which is a part of public law.[13] The difficulty in applying the private law of

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[11]Flannigan, note 6, *supra*, at p.310.

[12]The term "Native law," while generally well-understood for what it encompasses, is somewhat of a misnomer. It is a term of convenience and easy recognition, as opposed to being descriptive of a particular area of law, such as the law of Tort. What is conventionally categorized as Native law is, in fact, the entire sum of law which applies to Native peoples. Nevertheless, there are special circumstances and considerations which must be invoked within existing areas of law where aboriginal peoples are concerned -- either as a result of the special interests and concerns of the aboriginal peoples themselves or due to the effect of specific provisions of the *Indian Act* -- which provides for the existence of Native law as a special enclave within existing realms of law.

[13]The public/private distinction in law is one which is filled with controversy. In particular, it has been the subject of substantial debate in relation to the application of the *Charter of Rights and Freedoms*: see, for example, *R.W.D.S.U., Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 573; Katherine Swinton, "The Application of the Charter of Rights and Freedoms," in Walter S. Tarnopolsky and Gérald A.-Beaudoin, eds, *The Canadian Charter of Rights and Freedoms*, (Toronto: Carswell, 1982); Peter Hogg, "The Dolphin Delivery Case: The Application of the Charter to Private Action," (1986-87), 51 *Sask. L. Rev.* 273; Hogg, note 2, *supra*, especially at pp.674-675; Brian Slattery, "The Charter of Rights and Freedoms: Does it Bind Private Persons," (1985), 63 *Can. Bar Rev.* 148; Slattery, "The Charter's Relevance to Private Litigation: Does Dolphin Deliver?" (1987), 32 *McGill L.J.*

fiduciaries to the public relationship between the Crown and aboriginal peoples is noted by Dickson J. (as he then was) in *Guerin*:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the existence of discretion, do not typically give rise to a fiduciary relationship.[14]

Based upon his rationale concerning the discretionary aspect of public law duties and the general inapplicability of fiduciary law to them, Dickson J. explains that the nature of the Crown's fiduciary duty, insofar as he finds that it is directly associated with the nature of the aboriginal interest in land,[15] renders the Crown's obligation neither a public law duty nor a private law duty, but one which is *sui generis*:

905; Allan Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter," (1988), 38 *U.T.L.J.* 278; Roger Tassé, "Application of the Canadian Charter of Rights and Freedoms," in Gérald A.-Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, Second Edition, (Toronto: Carswell, 1989); Michael Kanter, "The Government Action Doctrine and the Public/Private Distinction: Searching for Private Action," (1990), 15 *Queen's L.J.* 33.

For the purposes of our discussion, the categories of "public" and "private" law are based upon the common legal understandings of the terms and are used only to facilitate the understanding of the discussion herein. They are not intended to comment upon the appropriateness or legitimacy of the public/private distinction discussed in the references above.

[14]*Guerin*, note 1, *supra*, at p.341. See the discussion of the existence of fiduciary duties belonging to publicly-elected and non-elected officials in notes 17-19, *infra*.

[15]This premise will be discussed in greater detail in the discussion of *Guerin* in Ch. III(a), *infra*.

> 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 none the less 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.[16]

With deference to Dickson J.'s characterization of the application of fiduciary law to public law duties, the thesis will argue that his view is not entirely correct. For example, elected public officials have been held to possess a fiduciary responsibility to their constituents regarding their public office duties.[17] In his *Second Treatise on Government*, John Locke also

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[16]*Guerin*, note 1, *supra*, at p.341. See the text accompanying note 20, *infra*, for the definition of *sui generis*.

[17]See, for example, *Toronto (City of) v. Bowes* (1858), 14 E.R. 770 (P.C.); *Hawrelak v. City of Edmonton*, [1972] 2 W.W.R. 561 (Alta. S.C.), especially at p.592; aff'd [1973] 1 W.W.R. 179 (Alta. C.A.), but overturned by the Supreme Court of Canada, [1976] 1 S.C.R. 387, on questionable grounds -- requiring the city to prove damages it suffered as beneficiary, whereas fiduciary law places the onus of proof on the fiduciary to demonstrate an absence of misconduct once a *prima facie* inference of fiduciary breach is shown. The reverse onus of fiduciary doctrine will be described in greater detail in the section entitled "The Reverse Onus," in Ch. IV(c), iv, 3, *infra*. Note should be made, however, of the dissent in *Hawrelak* at the Supreme Court of Canada level by De Grandpre and Dickson JJ. at p.420:

> The city respondent, however, does not have the burden of showing what might have happened because such a burden, if it were to be imposed on the city, would render impossible any recourse in cases of conflict.

Note should be made of the criticism of *Hawrelak* in E.I. Jacobs, "Comment: *Hawrelak v. City of Edmonton*," (1977), 23 *McGill L.J.* 97. Reference should also be made to *Carlsen v. Gerlach* (1979), 3 E.T.R. 231 (Alta.

fosters the theory that government possesses a fiduciary responsibility to its electorate due to the transfer of the political powers of individuals to elected officials to act in the former's best interests:

> ... *Political Power* is that Power which every Man, having in the state of Nature, has given up into the hands of the Society, and therein to the Governours, whom the Society hath set over it self, with this express of tacit Trust, That it shall be imployed for their good, and the preservation of their Property: ... it can have no other *end* or *measure*, when in the hands of the Magistrate, but to preserve the Members of that Society in their Lives, Liberties, and Possessions; and so cannot be an Absolute, Arbitrary Power over their Lives and Fortunes, which are as much as possible to be preserved.[18]

As a result of the fiduciary aspect of legislative power, Locke insists that elected officials bound by fiduciary obligations to their electorate are susceptible to removal for their failure to fulfill those obligations:

> ... [T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still *in the People a Supream Power* to remove *or alter the Legislative*, when they find the *Legislative* act contrary to the trust reposed in them. For all *Power given with trust* for the attaining an *end*, being

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Dist. Ct.); *Municipal Conflict of Interest Act*, R.S.O. 1990, c.M-50 (as amended); E.M. Rogers and S.B. Young, "Public Office as a Public Trust," (1974), 63 *Geo. L.J.* 1025; Shepherd, note 6, *supra*, at p.27; Lancaster, note 5, *supra*, at pp.280-282.

[18]John Locke, *Two Treatises of Government*, Peter Laslett, ed., Second Edition, (Cambridge: Cambridge University Press, 1967), at pp.399-400 (para. 171). See the illustration of the effects of a beneficiary's transfer of powers to a fiduciary in Ch. IV(c) ii, 3, *infra*.

> limited by that end, whenever that *end* is manifestly neglected, or opposed, the *trust* must necessarily be *forfeited*.[19]

The discretionary aspect of public law duties discussed by Dickson J. is, as suggested by Locke in the above passages, neither more nor less discretionary than the proper exercise of fiduciary duties by fiduciaries in the best interests of their beneficiaries, or *cestuis que trust*.

Dickson J.'s description of the relationship between the Crown and Native peoples as *sui generis* means that the relationship is "of its own kind or class."[20] In other words, the nature of the Crown-Native relationship, and the resultant obligations which flow from it, is sufficiently distinct to render it neither an exclusively public nor private law duty. As Dickson J. reiterates later in the *Guerin* judgment:

> ... [T]he fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the

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[19] *Ibid.*, at p.385 (para. 149). Note that one potential fiduciary remedy is the ability to seek a court order to remove a fiduciary in situations of potential conflict of interest where a beneficiary cannot unilaterally dismiss the fiduciary and demonstrates grounds for the fiduciary's removal. See the discussion of fiduciary remedies in Ch. IV(e), i, *infra* .

In addition to publicly-elected officials, non-elected officials, such as Deputy Ministers and other civil servants, may also owe fiduciary duties to the public that they serve. Further discussion of this topic is not necessary for the purposes of this thesis, however, as it is external to the main issues contained herein.

[20] *Black's Law Dictionary* , Fifth Edition, (St. Paul, Minn.: West, 1979), at p.1286.

> Crown, the fact that this is so should occasion no surprise.[21]

Dickson J.'s characterization of the Crown's obligation as *sui generis* is predicated upon what he emphasizes as the root of the fiduciary obligation -- the aboriginal interest in land[22] -- which he also characterizes as being *sui generis*. As the discussion of *Guerin* will indicate, Dickson J.'s judgment in *Guerin*, depending upon the viewpoint taken, may or may not address the application of the fiduciary relationship to situations other than the surrender of reserve land by an aboriginal band. His judgment does not suggest whether the Crown's fiduciary duty in situations other than the surrender of reserve land, if such a duty exists, is also *sui generis*. A detailed analysis of *Guerin* in this thesis will attempt to clarify whether the *sui generis* nature of the Crown's duty in *Guerin* is due to the *sui generis* nature of the Indian interest in land or if it is characteristic of any fiduciary duty of the Crown towards Native peoples. Interestingly, the public law/private law/*sui generis* distinction addressed by Dickson J. has not been assessed in subsequent judicial and academic commentaries on the Crown-Native fiduciary relationship.[23]

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[21] *Guerin*, note 1, *supra*, at p.343.

[22] And, more particularly, its surrender to the Crown. See the further discussion of *Guerin*, and of this point in particular, in Ch. III(a), *infra*.

[23] Although the Supreme Court of Canada in *Sparrow*, note 3, *supra*, does mention, at p.408, that in *Guerin* "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."

The thesis will argue that although the nature of the relationship between the Crown and aboriginal peoples in Canada is unlike other public law relationships due to the historical and political factors which underlie it, it is, strictly speaking, a public law relationship. Any relationship which involves the Crown is necessarily a public law relationship. However, the range of relationships between the Crown and aboriginal peoples in Canada varies greatly within what are classified as public law relationships. They may be akin to the relationship seen in *Guerin*, which, without the necessary interposition of the Crown by virtue of the requirements of the *Indian Act*,[24] would otherwise be a private law relationship involving the lease of land between private individuals. Alternatively, they may take the form of a patently public law relationship between the Crown, in its widest sense, as legislator and the aboriginal peoples as subjects of Crown legislation in a manner similar to the relationship in *R. v. Sparrow*.[25]

What these various types of Crown-Native relationships illustrate, and what Dickson J. acknowledges in *Guerin*, is that it is the specific nature of a relationship which makes it fiduciary, not the actors involved or whether the relationship fits neatly into an already-established category of fiducial relations.[26] Fiduciary doctrine may therefore be described as being *situation-specific*. Since nothing prohibits the application of fiduciary doctrine to a public law relationship, the precise classification of the Crown-Native

[24]For more detail on this point, see note 70, *infra*, and its accompanying text.

[25]Note 3, *supra*.

[26]*Guerin*, note 1, *supra*, at p.341.

relationship as either public or private would appear to be of little importance.

The *sui generis* nature of the Crown-Native relationship would appear to be of fundamental importance to the application of fiduciary doctrine to it, however. This thesis argues that the relationship between the Crown and the aboriginal peoples is based upon the historical, political, social, and legal interaction of the parties. This unique background and the subsequent manifestations of it creates the *sui generis* character of the relationship. This assessment differs from the strict interpretation of Dickson J.'s judgment in *Guerin*, which holds that it is the requirement that aboriginal peoples surrender their land only to the Crown that gives rise to the *sui generis* nature of the relationship.

Evidence will be put forward to demonstrate that the point of emphasis in the strict interpretation of Dickson J.'s judgment in *Guerin* is only one aspect of the fiduciary nature of the Crown-Native relationship. It will be shown that the surrender requirement arises *from* the fiduciary nature of the relationship; the surrender requirement does not *create* the fiduciary nature of the relationship. Dickson J.'s rationale for the basis of the relationship, under a strict interpretation of his judgment, may therefore be seen to be backward.[27] The implication of the *sui generis* nature of the Crown-Native relationship would appear to be that fiduciary doctrine cannot, *ipso facto*, be implemented in the same fashion as it is with private law fiduciaries or, for

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[27]This notion is elaborated upon more fully in the discussion of *Guerin* in Ch. III(a), *infra*.

that matter, public law fiduciaries. As the discussion of the situation-specific nature of fiduciary doctrine will demonstrate, this assertion is untrue.

4. The Application of Fiduciary Law

Fiduciary law operates in a two-step process. As will be discussed further, fiduciary doctrine governs all fiduciary relationships in a passive fashion as long as the integrity of the relationships is maintained, but assumes an active role once a fiduciary relationship becomes tainted, as with a breach of duty by a fiduciary to a beneficiary. It is only once this integrity disappears that the two-step process is implemented.[28]

The initial step of this process is the determination of whether a particular relationship is, indeed, fiduciary. An examination of fiduciary doctrine will show that any relationship which passes this first step must then be subjected to the principles of fiduciary doctrine. Upon the determination that a relationship is fiduciary, however, the duty itself is no longer important. It is the nature and extent of the duty -- which may only be determined on a case-by-case basis -- which becomes important in the face of a breach:

> ... [O]nce we have found the duty, we must forget about it. It is after all only a foundation for liability. It provides the bedrock on which we build our finding of a breach. But, like the foundation of a house, it does not determine either the form or

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[28]See Shepherd, note 6, *supra*, at p.139: "[T]he law of fiduciaries contains two quite distinct reasoning processes: the movement from the fact situation to the finding of a duty, and the movement from the duty to the finding of a breach." See also Shepherd at pp.35-42.

> the existence of the breach. It will, of course, again like the foundation of a house, limit in many respects the superstructure built upon it.[29]

The adaptation of the law of fiduciaries to its context within the Crown-Native relationship proceeds through the same two-step process as it does to all relationships -- whether they are public, private, or *sui generis* -- because the situation-specificity of fiduciary doctrine treats all relationships as if they are *sui generis*. It requires that the general principles of fiduciary law first be understood in their own right and then be translated to render them applicable to the relationship under consideration by examining the particulars of that specific relationship. On this basis, *a priori* assessments may be seen to be completely inappropriate within the realm of fiduciary law. Just as not all fiduciary relationships are identical, the application of fiduciary principles to fiduciary relationships is not identical:

> 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.[30]

The two-step process is necessary to arrive at a theory of fiduciary law as it applies to specific relationships. This is what is meant by the situation-

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[29]*Ibid.*, at p.127.

[30]Deborah A. De Mott, "Beyond Metaphor: An Analysis of Fiduciary Obligation," (1988), 5 *Duke L.J.* 879, at p.879. See also Flannigan, note 6, *supra*, at p.311: "Generally speaking, the obligation is defined by whatever rules are required in order to maintain the integrity of the particular relationship."

specificity of fiduciary doctrine. The law of fiduciaries is never properly implemented without due regard for the context within which it applies. However, as the discussion of existing case law will demonstrate, Canadian aboriginal rights jurisprudence has yet to adequately address the question of context in its application of fiduciary doctrine to the Crown-Native relationship.[31]

5. The Current Dilemma

Due to the situation-specific basis of fiduciary doctrine, any unexplained application of fiduciary law to the Crown–Native relationship is detrimental to the understanding of that relationship. A departure from the situation-specific basis of fiduciary doctrine not only heightens the confusion surrounding the already-clouded issue of the relationship between the Crown and Native peoples, but it also begs questions as to the meaning and effect of fiduciary principles as they apply to that relationship.

The comfort exhibited by the judiciary and aboriginal rights commentators in their use of fiduciary rhetoric to characterize Crown-Native

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[31]This has occurred despite the general recognition of the importance of context in Native law, especially in terms of principles of Indian treaty and statutory interpretation. See, for example, *R. v. Sioui* (1990), 70 D.L.R. (4th) 427 (S.C.C.), at pp.434-435, where Lamer J. (as he then was) states that any determination of the legal nature of a treaty "must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration" and, at p.460, that "the treaty essentially has to be interpreted by determining the intention of the parties ... at the time it was concluded." See also generally *Kruger and Manual v. The Queen* (1977), 75 D.L.R. (3d) 434 (S.C.C.), at p.437; *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont.C.A.), at p.232; *Sparrow*, note 3, *supra*, at pp.408, 410.

relations, as well as some of the inevitable questions which are raised as a result of its indiscriminate application, are illustrated in the recent decision of the Supreme Court of Canada in *Ontario (Attorney-General) v. Bear Island Foundation*.[32]

The *Bear Island* case originally focused upon the claim of the Teme-Augama Anishnabai, referred to as the Temagami by the trial judge, to ownership of their traditional lands by virtue of aboriginal title. Ontario sought to prevent the Temagami band from maintaining cautions which had been registered against tracts of certain unceded lands. Meanwhile, the Temagami band sought a declaration that it possessed aboriginal title to its traditional lands. The central issue in the Supreme Court's consideration of *Bear Island* is whether the Teme-Augama Anishnabai people adhered to the *Robinson-Huron Treaty, 1850*, either expressly or by implication.[33] The court held that the Temagami people surrendered their right to the land by arrangements subsequent to the *Robinson-Huron Treaty, 1850* by which they adhered to the treaty in exchange for annuities and a reserve. The court did find, however, that the Crown breached its fiduciary obligations to the Temagami by failing to comply with its obligations under the treaty.

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[32]Note 3, *supra*.

[33]This issue is much more complicated than it is presented here for the purposes of this discussion. For a greater understanding of the issues in *Bear Island* at the pre-Supreme Court of Canada level, see (1984), 15 D.L.R. (4th) 321 (Ont. H.C.); (1989), 58 D.L.R. (4th) 117 (Ont. C.A.); Kent McNeil, "The Temagami Indian Land Claim: Loosening the Judicial Straitjacket," in Matt Bray and Ashley Thomson, eds., *Temagami: A Debate on Wilderness*, (Toronto: Dundurn, 1990). For commentary on the Supreme Court's decision, see McNeil, "The High Cost of Accepting Benefits From the Crown: A Comment On The Temagami Indian Land Case," [1992] 1 C.N.L.R. 40.

In spite of its finding that the Crown breached its fiduciary obligations, the Supreme Court's judgment neither discusses nor otherwise mentions the fiduciary nature of the Temagami-Crown relationship. As with other judicial considerations of the fiduciary character of Crown-aboriginal relationships, the *Bear Island* decision fails to explain: (1) the basis of the fiduciary nature of the Crown-Temagami relationship, and; (2) the implications of imposing fiduciary principles upon the relationship to the parties involved in it. The question of *who* is bound by the fiduciary obligation to Native peoples is a fundamental question. The Supreme Court's characterization in *Bear Island* of "the Crown" as the party which owes the fiduciary duty to aboriginal peoples is only a partial answer.

The thesis will argue that it is simply insufficient to state that "the Crown ... breached its fiduciary obligations to the Indians"[34] without revealing which personifications of the Crown are bound by this obligation. In a juridical context, the phrase "the Crown" has a multitude of meanings which refer to a variety of personae. It may refer to the British Crown in its various personalities or, domestically, to the Crown in right of Canada or the Crown in right of a particular Province.[35] As the case law illustrated herein

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[34]Note 3, *supra*, at p.81.

[35]The significance of the various meanings associated with "the Crown" and the difficulties which have resulted from their indiscriminate use has been noted by a number of commentators. For a more detailed discussion of these distinctions, see John T. Juricek Jr., *English Territorial Claims in North America to 1660*, Unpublished Ph.D. Thesis, University of Chicago, 1970, and the commentary upon it in Geoffrey S. Lester, *The Territorial Rights of the Inuit of the Northwest Territories*, Unpublished D.Jur. Thesis, Osgoode Hall Law School, 1981.

will demonstrate, the statement that "the Crown" is responsible for carrying out fiduciary obligations towards aboriginal peoples is consistent with the judiciary's tendency to apply fiduciary principles to the Crown-Native relationship without explanation.

It is contended that the one consistent theme in judicial and academic treatments of the fiduciary nature of the Crown-Native relationship has been an overly-rigid adherence to acontextual, "black-letter" law. This conventional approach ignores the importance of context in its consideration of the Crown-Native fiduciary relationship. As fiduciary doctrine is entirely based upon context, the thesis will stress that the conventional approach's ignoring of context renders it incapable of properly addressing basic questions surrounding the incorporation of fiduciary principles into Canadian aboriginal rights jurisprudence.

Doctrinal analysis of fiduciary principles is unresponsive to the conventional approach because fiduciary principles are not a part of black-letter law. The modern law of fiduciaries, as will be seen, derives its existence from its origins in public policy. Fiduciary doctrine is premised upon the desire to protect certain types of relationships which are deemed to be socially important and in need of preservation. These socially valuable relationships take a variety of shapes and forms. What is common to them, and what is in need of protection, is the interdependent nature of their existence.

Fiduciary relationships involve the reposing of trust and confidence by one person in the honesty, integrity, and fidelity of another. As such, they are particularly subject to potential abuse through indecorous activity. The promulgation of fiduciary and quasi-fiduciary laws to regulate these

interdependent relationships seeks to ensure the equitableness of the dealings between individuals which, by their nature, are particularly susceptible to fraud, undue influence, and other activities which run afoul of public policy.

The origins of fiduciary doctrine in English law stem from the jurisdiction belonging to the court of Equity. The theoretical basis of Equity allows for the settlement of disputes based upon principles of flexibility, adaptability, fairness, and reason. As such, Equity stands in marked contrast to the traditionally rigid, rule-oriented basis of the common law. As Lord Denning M.R. explains in *Re Vandervell's Trusts (No. 2)*, "Equity was introduced to mitigate the rigour of the law."[36]

Equity's ability to avoid the pigeon-holing tendencies of law is one of the fundamental distinctions between it and the common law. When law and Equity were separate, the divergence of process which existed within their individual spheres of influence was inconsequential. Law and Equity were regarded as parallel systems, but they were quite separate and distinct:

> ... [T]he two streams of jurisdiction, though they may run in the same channel, run side by side and do not mingle their waters."[37]

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[36] [1974] 1 Ch. 269, at p.322.

[37] Walter Ashburner, *Principles of Equity*, (London: Butterworth & Co., 1902), at p.23. This view of the separateness of law and Equity has more recently been affirmed in Harold Greville Hanbury and Ronald Harling Maudsley, *Modern Equity*, Thirteenth Edition by Jill E. Martin, (London: Stevens & Sons, 1989), at pp.22-26. Note, however, the opposition to this stream of thought in *United Scientific Holdings Ltd. v. Burnley Borough Council*, [1978] A.C. 904 (H.L.), at pp.924-925, per Lord Diplock:

The premise behind the existence of these two systems was to allow for the resolution of any situation, either through traditional legal means or the more flexible principles of Equity. In *Dudley v. Dudley*, Lord Cowper explains the theoretical basis of the separate systems of law and Equity:

> Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth: it does also assist the law where it is defective and weak in the constitution (which is

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> Your Lordships have been referred to the vivid phrase traceable to the first edition of *Ashburner, Principles of Equity* ... My Lords, by 1977 this metaphor has in my view become both mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognise that by the Supreme Court of Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by courts of law and the Courts of Chancery ... were fused. If Professor Ashburner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now.

See also *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (C.A.), at p.9: "... [W]hatever the original intention of the Legislature, the fusion of law and equity is now real and total"; *Day v. Mead*, [1987] 2 N.Z.L.R. 443 (C.A.), at p.451; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at pp.580-588, per La Forest J.'s unanimous judgment (McLachlin J., delivering separate reasons, dissenting on this point).

These refutations of the separateness of law and Equity are based solely upon the effects of the *Judicature Acts* in merging legal and equitable jurisdictions. Their emphasis is entirely distinct from the philosophical differences of law and Equity which this thesis refers to regarding the separate foundations upon which legal and equitable reasoning are premised.

> the life of the law) and defends the law from crafty evasions, delusions, and new subtilties [*sic*], invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.[38]

Within the discretion-based confines of Equity, fiduciary doctrine was allowed to develop and flourish. When Equity's jurisdiction was merged with the common law through the passage of the *Judicature Acts* of 1873 and 1875,[39] fiduciary doctrine became submerged in the newly-combined jurisdiction of law and Equity. The commixture of law and Equity proved to be problematic for many equitable principles; the application of Equity's flexible, situation-specific principles was an impossibility within the rigid, taxonomic confines of law.

In the aftermath of the intertwining of legal and equitable jurisdictions, the law attempted to impart its sense of order to equitable doctrines by providing them with precise definitions to facilitate their understanding and application by the judiciary. As Shepherd argues, the result of this endeavour within the realm of fiduciary law has been the improper application of

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[38](1705), 24 E.R. 118 (Ch.), at p.119.

[39]*Judicature Act, 1873*, 36 & 37 Vict., c. 66; *Judicature Act, 1875*, 38 & 39 Vict., c.77.

fiduciary doctrine to situations which are not fiduciary at all[40] because of the law's tendency towards taxonomy:

> The indirect result of the vagueness of the [fiduciary] concept is a tendency in the courts to rely very heavily upon specific rules rather than on general principles. While reliance on rules has a place in judicial decision-making, simplifying the process, if taken to extremes it can lead to overly mechanical or technical application of those rules without any consideration of their underlying rationale.[41]

It will be argued that the misapplication of fiduciary doctrine is the inevitable result of law's taxonomic tendencies attempting to supersede the theoretical open-endedness of fiduciary doctrine within the latter's own jurisdiction. Specifically, the misapplication of fiduciary doctrine is due to the inherent inability of law to identify the totality of relationships which may be considered as fiduciary through principles of general applicability.[42] It will be argued that law's inability to precisely define the fiduciary relation in a general and abstract fashion is due to the equitable foundation upon which

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[40]See, for example, *Lennox Industries (Canada) Ltd. v. The Queen* (1987), 34 D.L.R. (4th) 297 (F.C.T.D.); *Chase Manhattan Bank v. Israel British Bank*, [1981] Ch. 105; *Goodbody v. Bank of Montreal* (1974), 47 D.L.R. (3d) 335 (Ont. H.C.); *Fonthill Lumber v. Bank of Montreal* (1959), 19 D.L.R. (2d) 618 (Ont. C.A.). The *Chase Manhattan* and *Goodbody* cases will be discussed further in Ch. IV(a), *infra*.

[41]Shepherd, note 6, *supra*, at p.8.

[42]Refer to the later section of this paper entitled "The Categories of Fiduciary Relationships Are Never Closed," in Ch. IV(c), iv, 2, *infra*.

fiduciary doctrine originates which renders it incapable of precise definition in the absence of context:

> So much varies in the application of fiduciary principles in particular contexts that the conception of fiduciary obligation itself is unable to justify its applicability, as a general matter and irrespective of context.[43]

The inability of law to capture the essence of fiduciary doctrine in a generic fashion has led one commentator to describe it as "a concept in search of a principle."[44] It is suggested that Mason's characterization of the nature of fiduciary law is incorrect, as it is based upon an assumption that the principles of the fiduciary concept conform in substance and effect to traditional legal principles, as reflected in the conventional approach. This assumption flies in the face of the divergence of the basic premises which underlie equitable, as opposed to purely legal, principles. Whereas law proceeds by applying established principles to specific situations (*i.e.* applying the laws of Contract to an agreement between two parties), it is the mirror-image of fiduciary doctrine's emphasis, which subjects specific situations to its general principles (*i.e.* making the fiduciary relationship between partners in a business venture subject to the general rule against conflict of interest):

> The evolution of fiduciary doctrine thus owed much to the situation-specificity and

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[43]De Mott, note 30, *supra*, at p.910.

[44]Sir Anthony Mason, "Themes and Prospects," in P.D. Finn, ed., *Essays in Equity*, (Sydney: The Law Book Company, 1985), at p.246.

> flexibility that were Equity's hallmarks. Moreover, as Equity developed to correct and supplement the common law, the interstitial nature of Equity's doctrines and functions made these doctrines and functions resistant to precise definition.[45]

It will be posited that part of the difficulty which the conventional approach's handling of fiduciary principles lies with the uncertainty which surrounds these principles in general[46] and, more particularly, with their application to Native law. The law, it may be argued, likes certainty. Law's emphasis upon certainty creates specific problems for equitable doctrines such as the law of fiduciaries whose fundamental basis is entirely different than that of law:

> There is a natural desire in legal writing to reduce the legal universe to manageable proportions through a process of classification into species and sub-species. This facilitates exposition and it sharpens our appreciation of the issues which need to be addressed in the particular application of the law, but it contains its own hazard. A species or whatever so delineated may become divorced from the sources of its inspiration, may come to be seen quite artificially as an independent entity in the legal order.[47]

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[45]De Mott, note 30, *supra*, at p.881.

[46]The judiciary's difficulty with fiduciary doctrine is illustrated by the comments of La Forest J. in the Supreme Court of Canada's decision in *LAC Minerals v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), at p.26: "[T]here are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship."

[47]Finn (1989), note 6, *supra*, at p.55.

It will be suggested herein that the malleability of equitable principles renders them better able to respond to the needs and requirements of specific situations -- especially those which do not fall into the "garden variety" of potential scenarios -- than the rigid, rule-oriented procedure of law. While equitable doctrines do not generally possess the rigidity characteristic of law, they do possess certain essential features which, where appropriate, are applied with the same rigidity. Nevertheless, equitable doctrines still manage to avoid law's tendency towards taxonomy.[48]

In summary, the equitable basis for implementing fiduciary principles occurs in a situation where one party in an interdependent relationship has their interests infringed upon, or unfairly taken advantage of, by a person in whom the former has reposed trust and confidence. The rigour of fiduciary principles is applied, where appropriate, to protect those involved in interdependent relationships from being improperly taken advantage of by virtue of their participation in such relationships. The implementation of fiduciary principles to any situation is entirely dependent upon the particulars of the specific relationship being examined. These principles come into play only after the initial determination that a relationship is, indeed, fiduciary.

In a number of cases beginning with *Guerin*, the Canadian judiciary has consistently tried to explain the basis of the Crown-Native fiduciary relationship by attempting to precisely define or concretize the root of the fiduciary relation rather than examining the nature and characteristics of the

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[48]Particular examples may be seen in the section of the thesis which discusses the general principles of fiduciary doctrine in Ch. IV(d), *infra*.

Crown-Native relationship. For example, in a variety of scenarios in aboriginal rights jurisprudence, the Crown's fiduciary obligation has been rooted in the *Royal Proclamation of 1763*,[49] in legislative enactments such as the *Indian Act*,[50] in the *Constitution Act, 1982*,[51] in legislative requirements such as the necessity for aboriginal bands to surrender their interests in land to the Crown before the land may be alienated to a third party,[52] or in recognized legal entities such as aboriginal title.[53] As has been suggested, the methodology indicated by the case law is fundamentally incompatible with fiduciary doctrine. It attempts to transform the fiduciary obligation into a purely black-letter legal entity through the decontextualization of the Crown's duty.

6. Alternatives to the Conventional Approach: The Pluralist Approach

Although these various "roots" of the Crown's fiduciary obligation do, in different ways and to various extents, entrench the Crown's duty to the aboriginal peoples, it will be argued that they do not create the duty, but merely affirm its existence. The conventional approach holds that only those rights or duties which are derived from positive law have any existence in

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[49]*Guerin* , note 1, *supra.*

[50]*Guerin*, note 1, *supra*; *Roberts*, note 3, *supra.*

[51]*Sparrow*, note 3, *supra.*

[52]*Guerin*, note 1, *supra*; *Apsassin*, note 3, *supra.*

[53]Although the legal recognition of aboriginal title is not itself clear after more than two hundred years of deliberation.

law.[54] Under this view, the only way in which the Crown owes a fiduciary duty to aboriginal peoples is by virtue of a positive creation of that duty, such as that in the *Royal Proclamation of 1763*.[55] In opposition to this view, it will be argued that the Crown's fiduciary obligation to Native peoples predates both the explicit protection of aboriginal rights decreed in the *Royal Proclamation of 1763* and the initial judicial imposition of the Crown's fiduciary duty in *Guerin*.[56] It is suggested that any attempt to concretize the Crown's fiduciary obligation by rooting it in these legal entities which then give rise to the duty is misdirected. If an understanding of the nature and extent of the Crown's responsibilities to Native peoples is to be achieved, such an understanding should come about from an examination of sources external to those generally contemplated by the conventional approach.

It has been contended that the conventional approach is incapable of addressing the full range of constituent elements which comprise the basis of the Crown's fiduciary duty towards Native peoples because of its exclusive concentration upon the purely legal, black-letter basis of the duty. It has also been suggested that the Crown's duty may only be properly understood if it is examined in context. This entails examining the purely legal, black-letter

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[54]The basic premise of the conventional approach being that law is something which is to be found, not made, thereby legitimizing every legal system which exists simply by virtue of the fact that it exists. See, for example, Arthur Allan Leff, "Unspeakable Ethics, Unnatural Law," (1979), 6 *Duke L.J.* 1229, at p.1234: "If a valid legal system is one that is in fact in place, then anything that is in fact in place is the legal system."

[55]R.S.C., 1985, App. II, No.1.

[56]Refer to the further discussion in Ch. III(e), *infra*.

basis of the Crown's duty, but also the historical, political, and social reasons for the Crown's obligation.

A pluralistic approach offers an alternative to the conventional approach. It necessitates an examination of the various factors which affect the relationship between the Crown and aboriginal peoples, including an investigation into the historical nature of the interaction between the Crown, its representatives, and the aboriginal peoples. Historical events, military and political alliances, and treaties of peace and friendship are some of the extra-legal factors which account for the Crown's fiduciary responsibilities towards the aboriginal peoples. The Crown entered into a number of relationships with the aboriginal peoples which entailed reciprocal rights, duties, and obligations by allying itself with various aboriginal groups for military and political purposes. These alliances are the progenitor of the modern Crown-Native fiduciary relationship.

It should be emphasized, however, that in looking to other sources of the Crown's obligation to Native peoples using the pluralist approach, the black-letter basis of the Crown's duty is not rejected. The black-letter basis remains an important element of any consideration of the nature of the Crown-aboriginal relationship. The difference between the two approaches is that with the pluralist approach the black-letter basis of the Crown's duty is only one of a number of different factors which give rise to the Crown's duty rather than being the sole factor. In the pluralist approach all of these elements are equally relevant in determining the nature and extent of the Crown's fiducial obligations.

The thesis argues that the pluralist approach's recognition of the various constituent elements of the Crown's fiduciary obligation is an important advance beyond the conventional approach. Whereas the conventional approach is shown to isolate and dissect the Crown's duty in an artificial environment devoid of context, the pluralist approach extricates the Crown's duty from its law-imposed abstractness by placing it in context. However, while contextualizing the Crown's obligations progresses beyond the conventional approach in some ways, it ultimately fails to be more than merely descriptive. The pluralist approach widens the base from which the Crown's duty is seen to arise, but it, too, cannot fully account for the nature and extent of the duty.

7. Beyond the Conventional and Pluralist Approaches: The Analytic Approach

A fuller understanding of the nature and extent of the Crown's duty to aboriginal peoples may be achieved by scrutinizing the effects of the various historical, political, social, and legal entities giving rise to the Crown-Native fiduciary relation. This analytic approach[57] ventures beyond recognizing the existence of these entities by ascertaining their origins and the effects of their existence upon the Crown-Native relationship. The analytic approach seeks to explain why the perception of the Crown's fiduciary obligations is the way that it is through the deconstruction of the normative assumptions and

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[57]Which may be favourably compared to the Critical Legal Studies Movement's approach to the understanding of law.

conventional wisdoms which exist in judicial and academic considerations of the Crown-Native relationship.

As will be indicated, the deconstruction of common assumptions held by judicial and academic commentators reveals the underlying dynamics of existing considerations of fiduciary doctrine as it is applied to the Crown-Native relationship. Through the analytic method of analysis, new light may be shed upon the commonly-held assumptions about the nature of the Crown's obligations by understanding the basis upon which these assumptions are formulated.[58] This is simply not possible with either the conventional or pluralist approaches. Moreover, the analytic approach provides the ability to analyze what is actually being said by these commentators by achieving an understanding of the unseen phenomena which backgrounds their formulation of the Crown's fiduciary obligations.

The benefits to be obtained from the analytic approach may be illustrated by contrasting its analysis of the legal factors behind the Crown's fiduciary obligations with those of the conventional and pluralist approaches. Rather than merely recognizing that the legal basis of the Crown's duty is rooted in legal documents such as the *Royal Proclamation of 1763*, the *Indian Act*, or the *Constitution Act, 1982*, or in historical events, alliances, and treaties, the analytic approach investigates the background to these documents, events, alliances, and treaties in order to ascertain why they

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[58]For example, the presumption of hierarchy in the relationship between the Crown and aboriginal peoples and the effects that such a hierarchical relationship may have upon the interaction between the Crown and the aboriginal peoples. See the further discussion of this topic in the section entitled "Inequality Theory," in Ch. IV(c), ii, 3, *infra*.

legally-entrench the Crown's fiduciary obligation. Instead of treating the legal basis for the Crown's duty as a given -- as the conventional and pluralist approaches are prone to do -- the analytic approach looks to its content and underlying dynamics.

This thesis argues that the analytic approach is particularly germane to an examination of fiduciary doctrine. Despite the manner in which it presents itself and is often regarded, law is not acontextual; it comes into being in response to external stimuli, not of its own accord. Subsequently, any legal entrenchment of fiduciary obligations upon the Crown towards aboriginal peoples must also arise in response to particular events, circumstances, or requirements. These precursors to the Crown's fiduciary duty provide a basis in themselves for ascertaining the nature of the Crown-Native relationship. Furthermore, they shed a different light on the legal entrenchment of the Crown's duty by placing that entrenchment in the context within which it originated.

The contextualization of the Crown's fiduciary obligations may be seen by examining the institution and entrenchment of the Crown's obligation in a particular legislative enactment or document. Focusing exclusively upon the legal effects of the *Royal Proclamation of 1763*, for example, provides only one element of the Crown's duty. Recognizing that the Proclamation affects the Crown's responsibilities to the aboriginal peoples renders another component of the Crown's duty. Examining the process by which the Proclamation was promulgated and the underlying rationale for its institution in law is a third component. The result of placing the Crown's duty in context, then, is a multi-tiered view of the Proclamation's effect upon

the Crown-Native relationship. By examining the entirety of documents, events, alliances, and treaties which comprise various elements of the Crown's fiduciary obligations, a much richer understanding of the nature of that obligation may be obtained. There is a danger that only a limited understanding of the Crown's duty will be achieved unless these documents, events, alliances, and treaties are scrutinized for their effects upon the legal entrenchment of the Crown's obligations. To avoid the danger, the proper accounting of the basis of the Crown's duty must be well-rounded and include a consideration of events as understood by the Crown and by the Native peoples.

8. The Aboriginal Perspective

Traditionally, one of the most neglected aspects of any examination of the application of fiduciary law to the Crown-Native relationship is the aboriginal understanding of the relationship. The inability to account for or pay heed to the Native perspective has plagued the development of Canadian aboriginal rights jurisprudence. For example, in the landmark case of *St. Catherine's Milling and Lumber Co. v. The Queen*,[59] which has been often described as the benchmark of Canadian aboriginal rights jurisprudence more than one hundred years after its adjudication,[60] the aboriginal peoples whose

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[59](1888), 14 A.C. 46 (P.C.), affirming (1887), 13 S.C.R. 577; (1886), 13 O.A.R. 148; (1885), 10 O.R. 196 (Ch.).

[60]References to this effect may be seen in *Calder v. Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) 145 (S.C.C.), at p.150, where Judson J. states that "Any Canadian inquiry into the nature of the Indian title must begin with *R. v. St. Catharine's Milling & Lumber Co. v. The Queen*,"

land interests were the subject-matter of judicial deliberation were not even a party to the proceedings.[61]

By adopting an aboriginal standpoint, the nature of the Crown-Native relationship appears fundamentally different. This requires an adhesion to what is sometimes referred to as an *emic* -- an understanding of the characteristics of a particular group of people or culture as understood by those people. The Native emic reveals the aboriginal understanding of the nature of their relationship with the Crown and the effects of the various documents, events, alliances, and treaties upon it.[62] Although the Native

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(references omitted), in *Smith v. R.* (1983), 147 D.L.R. (3d) 147 (S.C.C.), at p.244, where Estey J. notes that "The authority of ... [the *St. Catherine's Milling*] decision has never been challenged or indeed varied by interpretations and applications," and, more recently, in *Canadian Pacific Ltd. v. Paul,* note 3, *supra*, at p.504. See the further discussion of *St. Catherine's Milling* in Ch.V(b), iii, 1, *infra.*

[61]The recognition of aboriginal perspectives appears to be increasing, especially if the Supreme Court of Canada's formulation of its principles of Indian treaty and statutory interpretation in the *Nowegijick* line of cases -- the precedent initially established in *Nowegijick v. The Queen* (1983), 144 D.L.R. (3d) 193 (S.C.C.) and subsequently affirmed over the course of a decade by *Simon v. The Queen* (1985), 24 D.L.R. (4th) 526 (S.C.C.); *Dick v. The Queen* (1985), 23 D.L.R. (4th) 33 (S.C.C.); *Derrickson v. Derrickson* (1986), 26 D.L.R. (4th) 175 (S.C.C.); *R. v. Horse,* [1988] 1 S.C.R. 187; *R. v. Sioui,* note 31, *supra*; *R. v. Sparrow,* note 3, *supra*, and; *R. v. Horseman,* [1990] 1 S.C.R. 901 -- is an indication of the current judicial climate. This recognition of aboriginal perspectives stands in opposition to the judiciary's predisposition to ignore such reasoning in favour of its traditional, ethnocentric attitudes, as demonstrated by the Supreme Court of Canada's majority decision in *Mitchell v. Peguis Indian Band* (1990), 71 D.L.R. (4th) 193 (S.C.C.). See the discussion of *Mitchell* at Ch. V(b), iii, 3, *infra* and in the section entitled 'The Aboriginal Understanding of "The Crown",' in Ch. V(b), iv, *infra.*

[62]A wealth of aboriginal perspectives on a number of issues of fundamental importance in aboriginal rights jurisprudence currently exist. They range from general observations to commentaries on more specific

emic provides a useful perspective, it cannot provide a full picture of the Crown-Native relationship on its own. By utilizing the aboriginal viewpoint in conjunction with other viewpoints, however, a more complete understanding of the fiduciary character of the Crown-Native relationship is possible.

9. Concluding Remarks

This thesis concludes that the ability to properly examine the Crown-Native relationship requires the combined use of different perspectives due to the complexity of the relationship. The thesis suggests answers to some of the questions which have not been addressed by judicial and academic considerations of the Crown-Native fiduciary relationship. In doing so, it also seeks to stimulate further discussion by providing a foundation for further discourse in this area. The rationale behind couching the conclusions reached in this thesis in such strong terms is twofold: (1) to assert the need to

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topics such as aboriginal self-government. See, for example, Harold Cardinal, *The Unjust Society*, (Edmonton: Mel Hurtig, 1969); James Youngblood Henderson, "Unravelling the Riddle of Aboriginal Title," (1977), 5 *Am. Ind. L. Rev.* 75; Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights," in Menno Boldt, J. Anthony Long, and Leroy Little Bear, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, (Toronto: University of Toronto Press, 1985); Paul C. Williams, *The Chain*, Unpublished LL.M. Thesis, Osgoode Hall Law School, 1982; Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences," (1989-90), *Cdn. Hum. Rghts. Y.B.* 3; Robert A. Williams, Jr., *The American Indian in Western Legal Thought*, (New York: Oxford University Press, 1990); John Joseph Borrows, *A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government*, Unpublished LL.M. Thesis, University of Toronto, 1991; Mary Ellen Turpel, "In *Sparrow* We Trust: Federal and Provincial Fiduciary Responsibilities," Unpublished paper, 1992 (on file with author).

examine and address these issues which are vital to an understanding of the fiduciary nature of the Crown-Native relationship, and; (2) to raise a number of issues and problems heretofore neglected in judicial and academic discourse for debate. Ultimately, future Canadian aboriginal rights jurisprudence will dictate the direction which this area of law will follow. This thesis merely suggests a basis from which to launch its progression down the road of knowledge and understanding.[63]

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[63]For further reference, the primary sources relied upon in the thesis are documented in the bibliographic information at the end of the thesis.

II. METHODOLOGY

The foregoing discussion of the different views of the nature of the Crown's fiduciary duty demonstrates the existence of a variety of perspectives and approaches which contribute towards a well-rounded vision of the Crown-Native relationship. Although not every possible paradigmatic approach to this relationship has been canvassed, those which have been documented provide a greater understanding of the nature of the relationship for the purposes of this thesis.

The combination of various elements of these documented approaches allows for the development of a well-rounded vision of the Crown-Native fiduciary relationship. This vision is necessary if some of the untreated issues of fundamental importance surrounding the application of fiduciary doctrine to the Crown-Native relationship are to be considered. These issues may be broken down into three broad categories:

(1) What is the current status of fiduciary law relating to the Crown-Native relationship? (Chapter III)

(2) What are the characteristics and principles of fiduciary doctrine in general? (Chapter IV)

(3) What does the application of fiduciary law to the Crown-Native relationship entail? (Chapter V)

The goal of this thesis is to attempt to clarify these four broad issues through a step-by-step approach. Each issue will be dealt with separately by raising and answering the sub-issues which emanate from them. The first

three chapters outlined (Chapters III, IV, and V) are arranged in the inverse order of their complexity: the most straightforward -- the present status of fiduciary law relating to the Crown-Native relationship -- coming first and the next two categories gradually becoming more theoretically intricate. Each of these chapters acts as a building block of sequential understanding upon which the following chapters may be discussed.

As the thesis progresses from chapter to chapter, the foundational basis for approaching the next section increases in scope to allow for the progression towards more theoretically intricate discussion. This foundation of understanding reaches its zenith in the discussion of the effects of fiduciary doctrine upon the Crown-Native relationship in Chapter V.

The starting point of the thesis is ascertaining the current status of fiduciary law as it is applied to the Crown-Native relationship in Canada (Chapter III). This will be accomplished primarily by examining relevant case law in order to understand the judiciary's characterization of fiduciary principles as applied to aboriginal rights jurisprudence. This chapter will examine the judiciary's understanding of fiduciary principles within the realm of aboriginal right jurisprudence in an analytical light. Since existing academic writings on this topic are inherently more descriptive than analytical, they will only receive minor consideration.

Chapter III and Chapter IV are mutually-enriching sections. The application of fiduciary doctrine to the Crown-Native relationship discussed in Chapter III provides a basis upon which to appreciate the understanding of fiduciary doctrine in general provided in Chapter IV. By the same token, the discussion of general fiduciary theory in Chapter IV provides a greater

understanding of the deficiencies in the application of fiduciary law to the Crown-Native relationship documented in Chapter III.

Chapter IV examines the theoretical basis of fiduciary law in general by looking to its historical foundations as well as to various theories of the fiduciary relation provided by case law and academic commentaries. Equal emphasis is placed upon judicial and academic discussions of fiduciary doctrine to arrive at a more well-rounded view of fiduciary theory. Once the theoretical background to fiduciary doctrine is established, a new theory of fiduciary doctrine will be proposed which outlines the general characteristics and principles governing all fiduciary relationships. The advantages of fiduciary doctrine over other spheres of legal influence is also discussed in Chapter IV, including a brief examination of fiduciary remedies, to ascertain the reasons for the ever-increasing popularity of fiduciary law in practice.

Chapter V is the product of combining Chapters III and IV. The information used in Chapter V is based almost entirely upon that gathered through the discussion and analysis in Chapters III and IV. Its purpose is to take our new theory of fiduciary doctrine and "plug" it in to the Crown-Native relationship in Chapter III in order to answer the fundamental questions and issues which have been left unanswered by judicial and academic commentaries on the topic. The topics to be covered in Chapter V include:

(1) What Principles Apply to the Crown-Native Fiduciary Relationship?

(2) Who is Bound by the Fiduciary Obligation to Aboriginal Peoples?

(3) Is the Fiduciary Relationship Terminable?

(4) May the Crown's Fiduciary Obligation be Reduced in Scope?

(5) Is the Crown's Fiduciary Duty Purposive?

(6) The Crown's Duty and Conflict of Interest.

Chapter V discusses many of the salient issues which exist due to the confluence of fiduciary law and Native law. Much of Chapter V will necessarily be speculative, since it attempts to illustrate the implications of applying fiduciary doctrine to the Crown-Native relationship in situations which either have yet to occur or have not been judicially or academically considered. Consequently, Chapter V will rely heavily upon the dictates of our theory of fiduciary doctrine established in Chapter IV as well as the nature and history of the relationship between the Crown, its representatives, and the aboriginal peoples of Canada. Our theory of fiduciary doctrine will also be applied to the controversial case of *Kruger v. R.* [64] to discover its effects in practice.

The reader may note in some circumstances the absence of American case law dealing with the nature of governmental fiduciary obligations to aboriginal peoples.[65] Although American case law does discuss the

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[64]Note 3, *supra.*

[65]In particular *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206 (U.S. 1983), overturning *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535 (U.S. 1980). Reference to some of the pertinent American cases in this regard may be obtained by referring to the American cases listed in the "Table of Cases Consulted" at the beginning of the thesis. Note also the articles cited in the bibliograpy contained at the end of the thesis which refer to American

application of Trust or fiduciary principles to the relationship between government and aboriginal peoples, it does so in a fashion which neither assists nor furthers the undertaking which provides the basis of this thesis. Despite some initial similarities, the history of relations between Native peoples and governmental authority in Canada versus those in the United States has become vastly different. This difference is reflected in the divergence between modern Canadian and American Native rights case law.[66]

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aboriginal rights jurisprudence.

[66]Modern American aboriginal rights jurisprudence has progressed in an entirely different fashion from Canadian Native Law to the point that judicial decisions emanating from the two jurisdictions cannot automatically be implemented in the other, as had been often true until the decision of the United States Supreme Court in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (U.S. 1955). The *Tee-Hit-Ton* decision, being representative of the plenary power held by Congress over Native peoples in the United States, simply cannot be reconciled with the decision of the Supreme Court of Canada in *Guerin*, note 1, *supra*. See Slattery, note 2, *supra*, at pp.752-753; Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights," (1982-83), 8 *Queen's L.J.* 232, at pp.272-273:

> The relevancy of the *Tee-Hit-Ton* decision to Canada is disputed. The *Tee-Hit-Ton* decision ... does not reflect the legal position obtaining in British colonial territories. ... As British subjects, native Canadians were entitled to the protection of the Crown to the same extent as non-native Canadians. The schoolboy vision of American history invoked by the American Supreme Court was never the Canadian legal reality.

American aboriginal rights jurisprudence is centred around the premise that absolute and unqualified legislative power over aboriginal peoples ultimately resides in Congress. Moreover, as aboriginal rights in the United States are not constitutionally-protected or affirmed, their existence is entirely dependent upon the unfettered power and discretion of Congress.

In summary, this thesis attempts to remedy some of the deficiencies in the application of fiduciary doctrine to Canadian aboriginal rights jurisprudence through a theoretical examination of the basis of fiduciary doctrine and the practical effects of its application to the Crown-Native relationship. It attempts to contribute to a much-overlooked area of law whose significance is already considerable and will only increase with the passage of time.[67]

The reader should note that the law cited herein is current as of December 31, 1992.

Consequently, American aboriginal rights jurisprudence, which has been static and sometimes regressive since the *Tee-Hit-Ton* decision, cannot be reconciled with its Canadian counterpart, which is characterized by the entrenchment of aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982* and the recent negotiations and proposals surrounding Native self-government in Canada. For further discussion of the impact of *Tee-Hit-Ton*, see Kent McNeil, *Common Law Aboriginal Title,* (Oxford: Clarendon Press, 1989), at pp.259-264, 265-267.

[67]This is especially true in light of the recent negotiations surrounding aboriginal self-government and the investigations currently being conducted by the Royal Commission on Aboriginal Peoples on this and other topics of importance to the future of Native peoples in Canada.

III. THE CHARACTERIZATION OF THE CROWN-NATIVE FIDUCIARY RELATIONSHIP BY THE COURTS

The high profile which fiduciary law currently enjoys within the confines of Canadian aboriginal rights jurisprudence cloaks the fact that the first Canadian judicial characterization of the relationship between government and aboriginal peoples as fiduciary in nature occurred less than ten years ago in *Guerin v. R.*[68] Similarly the casual manner in which the judiciary and academic commentators apply fiduciary doctrine to the Crown-Native relationship would also appear to indicate the long-standing application of fiduciary theory to that relationship and the complete understanding of its application and ramifications upon that relationship. As we have already seen, this picture painted by existing judicial and academic commentaries on the subject is misleading.

Rather than being a completed work, the application of fiduciary doctrine to the Crown-Native relationship is a project in its infancy. The purpose of this section is to discuss and analyze the more prominent aboriginal rights decisions which apply fiduciary principles to the relationship between the Crown and aboriginal peoples in Canada. Appropriately, this section will begin with the initiation of the project -- the case of *Guerin v. R.*

(a) *Guerin v. R.*: The Formulation of the Duty

The facts of the *Guerin* case illustrate one particular aspect of the

[68]Note 1, *supra*.

relationship between aboriginal peoples and the Crown in Canada: the procedure by which aboriginal peoples may sell, lease, or otherwise dispose of their lands. Accordingly, the findings in *Guerin* concentrate on this particular facet of the Crown-Native relationship. Moreover, as the commencement of the action in *Guerin* predates the passage of the *Constitution Act, 1982,* the Supreme Court of Canada's decision in the case does not incorporate the affirmation and protection of aboriginal and treaty rights contained within sections 25 and 35 of the Act.[69] These factors do not suggest, however, that the findings in *Guerin* apply solely to the relationship between the Crown and aboriginal peoples within the context of the disposal of land, or that the principles in *Guerin* are inapplicable to the rights and protections contained within sections 25 and 35. Rather, they account for the context within which the *Guerin* decision arises and the basis of the determinations made therein.

The issues in *Guerin* revolve around a dispute between the plaintiffs, the Musqueam Indian band which occupied an Indian reserve situated within the charter area of the City of Vancouver, and the Department of

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[69]For more detail on sections 25 and 35, see Slattery, note 66, *supra;* Slattery, "The Hidden Constitution: Aboriginal Rights in Canada," (1984), *Am. J. Comp. L.* 361; Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada," (1982), 4 *S.C.L.R.* 255; McNeil, "The Constitution Act, 1982, Sections 25 and 35," [1988] 1 C.N.L.R. 1; Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada," (1983), 61 *Can. Bar Rev.* 314; Kenneth Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada," in Walter S. Tarnopolsky and Gérald A.-Beaudoin, eds., *The Canadian Charter of Rights and Freedoms,* (Toronto: Carswell, 1982); William Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982,* LL.M. Thesis, University of Ottawa, 1987, reprinted, (Saskatoon: University of Saskatchewan Native Law Centre, 1987).

Indian Affairs, which had been approached by the Shaughnessy Heights Golf Club about leasing a portion of the Musqueam reserve for use as a golf club. Under the provisions of the *Indian Act*, aboriginal bands are prohibited from selling, leasing, or otherwise alienating title to their lands other than to the Crown in right of Canada (the Federal Crown).[70] For the golf club to obtain a

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[70]In *Guerin*, the sections concerning the surrender of reserve lands are contained within sections 18(1) and 37-41 of the *Indian Act*. The most relevant of these sections of the *Indian Act*, note 2, *supra*, read as follows:

> 37. (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38 (1) by the band for whose use and benefit in common the reserve was set apart.
>
> 38. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.
>
> (2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.
>
> 39. (1) An absolute surrender or a designation is void unless
>
> (a) it is made to Her Majesty
>
> 41. (1) An absolute surrender or a

lease of Musqueam land, it was necessary for the band to surrender the land for that purpose to the Crown, which could then turn it over to the golf club under the terms and conditions agreed to by the Musqueam.

At a band council meeting on 7 April 1957, the District Superintendent of the Indian Affairs branch put forward some of the terms of the Shaughnessy proposal to the Musqueam, though not the actual proposal itself. After a period of negotiation, the band agreed to surrender 162 acres of their reserve to the Crown to lease to the golf club on specified written and oral terms and conditions.

The surrender document signed by the Musqueam band was comprised of two parts: the surrender document and the oral terms and conditions attached to it. The text of the surrender document was set out as follows:

> TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people.
>
> AND upon the further condition that all moneys received from the leasing thereof, shall be credited to our revenue trust account at Ottawa.

> designation shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender or designation.

This practice of allowing surrenders of reserve lands only through the Crown dates back to the early colonization of North America; see the further discussion of this point in Ch. III(e), *infra*. For further discussion and analysis of the surrender requirements contained within the *Indian Act*, see J. Paul Salembier, "How Many Sheep Make A Flock? An Analysis of the Surrender Provisions of the *Indian Act*," [1992] 1 C.N.L.R. 14.

> AND WE, the said Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof.[71]

Despite their absence from the text of the surrender document, the oral conditions were communicated to and discussed with officials from the Department of Indian Affairs. The surrender was accepted by the Crown on 6 December 1957. The Department of Indian Affairs subsequently entered into negotiations with the golf club's owners, but chose to ignore the oral conditions which were set out by the Musqueam.

The Department of Indian Affairs leased the surrendered reserve land to the golf club on 22 January 1958, but on less favourable terms than the oral conditions specified by the band.[72] The Department did not seek the Musqueam's consent to these terms and only provided the band with a copy of the lease in March, 1970, 12 years after its execution. The band sued the Crown for damages arising from its breach of trust in December, 1975. At

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[71] *Guerin*, note 1, *supra*, at p.354.

[72] For instance, the lease signed by the Department provided for renewal periods of 15 years rather than the 10 specified by the band, maximum rent increases of 15% for the second 15 year period, the unilateral right of the golf club terminate the lease at the end of any 15 year period (with 6 months advance notice), and the right to remove within six months after the termination or expiration of the lease any buildings and improvements made by the club.

trial,[73] Collier J. determined that the Crown was a trustee of the lands surrendered by the Musqueam. By acting contrary to the interests of the Musqueam, the Crown was found to be in breach of its trust responsibilities and liable in damages to the band in the amount of ten million dollars.

The Crown appealed to the Federal Court of Appeal,[74] which set aside the trial judgment and dismissed the band's cross-appeal. Le Dain J. held that the trust relationship described by the Collier J. was not a true trust obligation enforceable by law, but was instead a trust "in the higher sense," or a political trust, which was only morally binding.[75] In emphasizing that the nature of the trust was political rather than equitable, Le Dain J. said:

> It is my opinion that the words "in trust" in the surrender document were intended to do no more than indicate that the surrender was for the benefit of the Indians and conferred an authority to deal with the land in a certain manner for their benefit. They were not intended to impose an equitable obligation or duty to deal with the land in a certain manner. For these reasons, I am of the opinion that the surrender did not create a true trust and does not, therefore, afford a basis for liability based on a breach of trust.[76]

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[73](1981), 127 D.L.R. (3d) 170 (F.C.T.D.).

[74](1982), 143 D.L.R. (3d) 416 (F.C.A.). The Musqueam cross-appealed for a higher award of damages and interest.

[75]*Ibid.*, at p.469.

[76]*Ibid.*, at pp.470-471.

The Musqueam appealed the decision to the Supreme Court of Canada.[77]

After considering the trial and appeal judgments, the Supreme Court held that the political trust idea formulated by Le Dain J. was not an accurate depiction of the relationship between the band and the Crown. The Crown's duty to the Musqueam was determined to be equitable rather than political; correspondingly, it is rooted in law rather than moral obligation. There are three separate judgments in *Guerin*, none of which garner the support of a majority of the eight participating justices. Seven of the eight justices agree that the Crown is subject to a general fiduciary duty regarding Indian lands. The lone dissent to the finding of a fiduciary duty is by Estey J., who, in holding the Crown to the same obligations as the other justices, grounds his judgment in the law of agency.[78]

The judgments given by Dickson J. (as he then was) and Wilson J. find different grounding for a general fiduciary duty owed by the Crown with respect to aboriginal lands.

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[77]Note 1, *supra*.

[78]Estey J.'s agency argument is based upon his assertion that the *Indian Act* creates a statutory agency between the Crown and aboriginal peoples. It appears to be predicated upon his belief that the law of agency provides similar and simpler answers to future applications of the *Indian Act* surrender requirements than what he describes as "the more technical and far-reaching doctrines of the law of trusts and the concomitant law attaching to the fiduciary": *Guerin*, note 1, *supra*, at p.349. His argument is uncompelling and inappropriate to describe the relationship between government and aboriginal peoples in Canada. It has been ignored in virtually all subsequent discussions of the *Guerin* case and will not be discussed in any further detail here. Note also the dissent to Estey J.'s argument by Dickson J. (as he then was) in *Guerin*, at p.343. See also the discussion in Hurley, note 5, *supra*, at pp.564-565; Bartlett (1989), note 5, *supra*, at p.323.

At first blush, Dickson J.'s judgment appears to be at odds with Wilson J.'s findings. However, this conclusion is based upon a strict reading of Dickson J.'s judgment which fails to consider the basis upon which the judgment itself is founded. The following discussion of the judgments of Dickson and Wilson JJ. in *Guerin* will first illustrate the strict, or narrow, interpretation of Dickson J.'s judgment which adheres to the conventional approach discussed in the introduction to the thesis. We will then discuss the substance and effect of Wilson J.'s judgment and contrast it with the strict interpretation of Dickson J.'s conclusions. Finally, in the "Summary and Conclusions" section of this part, we will examine Dickson J.'s judgment in light of the basis upon which it is founded to demonstrate that, unlike the conclusion suggested by the strict interpretive approach, Dickson J.'s judgment is entirely consistent with that of Wilson J. and should not be read to be restricted exclusively to situations involving land surrenders.

The strict interpretation of Dickson J.'s judgment, with which Beetz, Chouinard, and Lamer JJ. concur, determines that the fiduciary duty stems from three sources: the nature of aboriginal title,[79] the statutory requirements of the *Royal Proclamation of 1763* and the *Indian Act*,[80] and the Crown's discretionary power to manage and dispose of aboriginal lands.[81]

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[79]*Guerin*, note 1, *supra*, at p.334: "The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title."

[80]*Ibid*.: "The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians."

[81]*Ibid*., at p.340: "This discretion on the part of the Crown, far from

Whereas the latter source is an independent progenitor of the Crown's fiduciary obligation, Dickson J. indicates that the first two sources must be combined for a fiduciary obligation to result: "The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in land is inalienable except upon surrender to the Crown."[82]

Although the narrow view of Dickson J.'s judgment grounds the Crown's fiduciary duty in these three sources, its determination of the fiduciary nature of the Crown's obligation to Native peoples is entirely dependent upon the surrender of Indian reserve land. The act of surrender itself, not the three sources of the Crown's duty, is the catalyst which creates the Crown's fiduciary obligation.[83] The necessity of the act of surrender to the existence of the Crown's fiduciary obligation is underscored by Dickson J.'s statement that "When, as here, an Indian band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf."[84]

Therefore, while the three sources of the fiduciary obligation are necessary to the establishment of that duty, the narrow view of Dickson J.'s

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ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one."

[82] *Ibid.*, at p.334.

[83] *Ibid.*, at p.339: "... [T]he Crown is under an obligation to deal with the land on the Indians' behalf *when the interest is surrendered.*" [Emphasis added]

[84] *Ibid.*, at pp.341-342.

judgment holds that they are insufficient in themselves to create the duty. The Indian interest in land requires its surrender; similarly, the Crown's discretion to deal with the land does not arise until after the act of surrender. The second source, the statutory requirements of the *Indian Act*, simply mandates the surrender. As Dickson J. explains, the relevance of the fiduciary duty in *Guerin* 'is based on the requirement of a "surrender" before Indian land can be alienated.'[85]

Wilson J.'s judgment, with which Ritchie and McIntyre JJ. concur, founds the Crown's fiduciary obligation exclusively in the nature of aboriginal title. It holds that section 18 of the *Indian Act* "is more than just an administrative direction to the Crown,"[86] and recognizes the existence of the obligation which is rooted in the Indian title.[87]

Between the strict interpretation of Dickson J.'s analysis and the

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[85]*Ibid.*, at p.339. See also at p.339, where Dickson J. discusses the relevance of the aboriginal interest in land to the Crown's fiduciary obligation: "... [T]he interest gives rise *upon surrender* to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians."

[86]*Ibid.*, at p.356:

> While I am in agreement that s.18 does not *per se* create a fiduciary obligation in the Crown with respect to Indian reserves, I believe that it recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians as discussed in *Calder et al. v. A.-G. B.C.* [References omitted]

[87]*Ibid.*, at p.357: "... [T]he Crown has a fiduciary obligation to the Indian bands with respect to the uses to which reserve land may be put and that s.18 is a statutory acknowledgment of that obligation."

judgment of Wilson J., the latter goes further by finding that, in addition to the general fiduciary duty of the Crown which arises pursuant to the use of reserve lands, the particulars of the surrender in *Guerin* render the Crown's duty a trust obligation rather than a fiduciary one:

> ... [T]he fiduciary duty which existed at large under the section to hold the land in the reserve for the use and benefit of the band crystallized upon the surrender into an express trust of specific land for a specific purpose.[88]

Wilson J.'s analysis is predicated upon her understanding of the basis for the institution of a trust relationship. In contrast to the strict reading of Dickson J.'s analysis, Wilson J. determines that the surrender of the reserve lands by the Musqueam does not create a fiduciary duty; that duty is already in place by virtue of the nature of aboriginal title. Instead, the general fiduciary duty is transformed into a trust obligation due to the specific terms upon which the surrender is effectuated and the concomitant obligations of the Crown to carry out those terms:

> There is no magic to the creation of a trust. A trust arises ... whenever a person is compelled in equity to hold property over which he has control for the benefit of others (the beneficiaries) in such a way that the benefit of the property accrues not to the trustee, but to the beneficiaries. I think that in the circumstances of this case ... the Crown was compelled in equity upon the surrender to hold the surrendered land in trust for the purpose of the lease which the band members had approved as being for their benefit. The Crown was no longer

[88]*Ibid.*, at p.361.

> free to decide that a lease on some other terms would do. Its hands were tied.[89]

By failing to carry out the terms of the surrender in the manner agreed to by the Musqueam, Wilson J. finds the Crown to be in breach of trust.[90]

What may be gathered from the *Guerin* decision for the purposes of a discussion of the obligations of the Crown towards aboriginal peoples is not initially clear. The consensus reached by the Dickson and Wilson JJ. judgments is that a fiduciary obligation on the part of the Crown towards Native peoples exists in respect of reserve lands. However, the narrow interpretation of Dickson J.'s ruling insists that the act of surrender is necessary to give rise to the fiduciary duty, whereas Wilson J. finds that the duty exists solely by virtue of the nature of aboriginal title. Furthermore, Dickson J.'s key ingredient for the existence of the fiduciary obligation -- the surrender requirement -- is the very same element which Wilson J. says creates a trust relationship. These different conclusions concerning the effect of the act of surrender are arrived at due to a fundamental difference in their understandings of the nature of aboriginal title.

In holding that the act of surrender creates a trust relationship between the Crown and the aboriginal band, Wilson J. suggests that aboriginal title amounts to a beneficial interest in land. Even in the absence of an act of surrender, the nature of the aboriginal interest combines with a duty on the

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[89] *Ibid.*

[90] *Ibid.*: "... [T]he Crown acted in breach of trust when it barrelled ahead with a lease on terms which, according to the learned trial judge, were wholly unacceptable to its *cestui que trust.*"

Crown to protect that interest to create a fiduciary relationship:

> Indian bands have a beneficial interest in their reserves and ... the Crown has a responsibility to protect that interest ... This is not to say that the Crown either historically or by s.18 holds the land in trust for the bands. The bands do not have the fee in the lands; their interest is a limited one.[91]

Although she finds that the Indian interest in land is limited, Wilson J. insists that it is not "terminable at will by the Crown without recourse by the band."[92] The land is protected by the Crown's fiduciary obligation, but is not held in trust by the Crown due to the limited nature of Indian title.[93]

Dickson J.'s treatment of the Indian title question involves a more detailed consideration of the nature of the title itself which is not considered by the strict interpretation of his judgment. More importantly, Dickson J.'s treatment of the Indian title question refutes the conclusions which the strict interpretation of his judgment fosters. He cites the *Calder* decision for its determination that aboriginal title is not dependent upon any treaty, executive order, or legislative enactment, but that it is, rather, a pre-existing, legal right "derived from the Indians' historic occupation and possession of their tribal lands."[94] He then holds that the aboriginal interest in

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[91]*Ibid.*, at p.357.

[92]*Ibid.*, at p.359.

[93]*Ibid.*, at p.357.

[94]*Ibid.*, at p.335. See also p.336: "Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s.18(1) of the *Indian Act*, or by any other executive order or legislative provision."

unsurrendered lands and reserve lands is the same.[95] The debate over whether Indian title is a "personal and usufructuary" interest, as initially determined in *St. Catherine's Milling and Lumber Co. v. The Queen*,[96] or a beneficial interest is not, in Dickson J.'s eyes, a debate at all. He states that these two characterizations do not conflict, but that:

> Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has none the less arisen because in neither case is the categorization quite accurate.[97]

The exact nature of aboriginal title is deemed unimportant by Dickson J. He prefers to rely upon a general understanding of the critical elements of aboriginal title rather than a more precise explanation of what aboriginal title amounts to:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither

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[95]*Ibid.*, at p.337, citing the decision in *Attorney-General for Quebec v. Attorney-General for Canada, Re Indian Lands* (1920), 56 D.L.R. 373 (P.C.), more commonly known as the *Star Chrome* case.

[96](1888), 14 A.C. 46 (P.C.), at p.54.

[97]*Guerin*, note 1, *supra*, at p.339.

> is its nature completely exhausted by the concept of a personal right. ... The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.[98]

From their understandings of the nature of aboriginal title, it is readily apparent why Wilson J. finds a trust duty from the surrender requirement whereas Dickson J. grounds a fiduciary duty. Where Wilson J. is able to ground a trust relationship as a result of the beneficial nature of her definition of Indian title,[99] Dickson J. maintains that he cannot because his understanding of Indian title is insufficient to constitute the *res* , or *corpus*, of a trust:

> The law of trusts is a highly developed, specialized branch of the law. An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here. Indeed, there is not even a trust corpus. As the *Smith* decision, *supra*, makes clear, upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust *res*, so that even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although the nature of Indian title

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[98]*Ibid.*

[99]*Ibid.*, at p.357.

> coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender.[100]

Note should be made of the fact that the judgment in *Smith* dealt with an unconditional surrender of land for sale, whereas in *Guerin*, the surrender of land was conditional and for the purposes of a lease. Furthermore, Estey J.'s characterization of the nature of the aboriginal interest in land in *Smith* as "a personal right which by law must disappear upon surrender by the person holding it" and that "such an ephemeral right cannot be transferred to a grantee, be it the Crown or an individual" is both inconsistent with Dickson J.'s own definition in *Guerin* and contrary to precedent.[101]

It should be noted, though, that Dickson J.'s rationale for the inability of the relationship between the Crown and the Musqueam in *Guerin* to amount to one of trust is faulty. His characterization of the nature of aboriginal title as "not, strictly speaking, amount[ing] to a beneficial interest," but as *sui generis*[102] does not, *ipso facto*, render the Indian interest non-

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[100]*Ibid.*, at p.342.

[101]*Smith*, note 60, *supra*, at p.250. See also Hurley, note 5, *supra*, at pp.572-576; Bartlett (1989), note 5, *supra*, at pp.318-319.

In addition, Estey J.'s characterization in *Smith* makes redundant the treaty-making process between the Crown and aboriginal peoples -- where the Indian interest in land was transferred, at the Crown's request, by treaty from the aboriginals to the Crown -- and ignores the basis of English land law, which insists that the title to land, unless it is an original title, must necessarily be derivative. For a more detailed discussion on this latter point and how it relates to the title of aboriginal peoples, see McNeil, note 66, *supra*.

[102]See note 20, *supra*.

beneficial. Moreover, even if Dickson's J.'s characterization of aboriginal title is something less than an equitable estate in land, that does not prevent the existence of a trust relationship for lack of a trust *corpus* or *res*. As Donovan Waters points out in his discussion of *Guerin*:

> ... [A] personal interest, less than an equitable estate, is an acceptable beneficial interest for the purposes of a trust. In *Moore v. Royal Trust Co.*, a mere personal license to live in a particular house was accepted by the Supreme Court of Canada as a valid beneficial interest.[103]

Despite his finding that the relationship between the Crown and the Musqueam amounts to a fiduciary rather than a trust relationship, Dickson J. emphasizes that the Crown's obligations and the remedies which flow from a breach of those obligations are the same under either scenario: "If ... the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect."[104] This statement is based upon the fact that a trustee is a type of fiduciary. Moreover, it is a generally accepted principle that the law relating to trusts and trustees is applicable by analogy to the law of fiduciaries (with some exceptions).[105]

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[103]Waters, note 5, *supra*, at p.423. See also *Moore v. Royal Trust Co.*, [1956] S.C.R. 880.

[104]*Guerin*, note 1, *supra*, at p.334.

[105]*In re West of England and South Wales District Bank, Ex parte Dale and Co.* (1879), 11 Ch.D. 772, at p.778; cited with approval in *Guerin*, note 1, *supra*, at p.345; *Farrington v. Rowe McBridge and Partners*, [1985] 1 N.Z.L.R. 83 (C.A.), at p.99; *Canson Enterprises Ltd. v. Boughton & Co.* (1989), 61 D.L.R. (4th) 732 (B.C.C.A.). It should be noted that the status of *Canson* as an

The evidentiary requirements for demonstrating a fiduciary relationship are substantially less than that to prove a trust. There are no "certainties" in fiduciary law as there are in trust law.[106] It is the nature and scope of a relationship which renders it fiduciary, not the actors involved or the subscription to particular rules or regulations.[107] Dickson J.'s judgment, therefore, imposes the strict demands of a trustee's duties upon the Crown without imposing the onerous task of establishing the existence or maintenance of a trust upon the Musqueam.

While the nature of the Crown's obligations to the Musqueam may now be seen to be the same under both Dickson and Wilson JJ.'s judgments in *Guerin*, the circumstances under which the Crown's duty arises differ in their respective formulations.

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authority for this proposition is now uncertain due to La Forest J.'s mistaken understanding of the application of trust law by analogy to fiduciary doctrine in the Supreme Court's consideration of the case, note 37, *supra*, at pp.578-580, versus McLachlin J.'s affirmation of the applicability of trust doctrine at pp.546, 549-551.

[106]In particular, certainty of subject, object, and intent. See D.W.M. Waters, *Law of Trusts in Canada*, Second Edition, (Toronto: Carswell, 1984), chapter 5; Glanville Williams, "The Three Certainties," (1940), 4 *Mod. L. Rev.* 20.

[107]*Guerin*, note 1, *supra*, at p.341,per Dickson J.: "It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty." For further elaboration, refer to the section of the thesis entitled "The Situation-Specificity of Fiduciary Doctrine," Ch. IV(c), iv, 4, *infra*.

i. Summary and Conclusions

A narrow reading of the *Guerin* decision holds that the Crown owes a duty to act in the best interests of an aboriginal band regarding its use of land.[108] Whether that duty entails a fiduciary, trust, or agency relationship is not as important as the Supreme Court's recognition of the Crown's duty itself and the obligations which emanate from it. The end result of any of these classifications of duty is essentially the same.

The Crown's obligation entails its responsibility to act in the best interests of the aboriginal peoples concerned and renders it liable for any failure to do so. In *Guerin,* the oral conditions attached to the surrender document were a vital part of the surrender agreement, representing the wishes of the Musqueam regarding the lease of their land. The Crown, in concordance with the nature of its obligations to the Musqueam, could not ignore those obligations without breaching its fiduciary duty:

> The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to

[108]Although there is debate over whether the fiduciary duty found in *Guerin* applies only to Indian lands, more specifically the surrender of Indian lands, or whether the duty was discussed solely in relation to Indian lands in *Guerin* due to fact that the *Guerin* decision deals only with the duty of the Crown in relation to Indian lands. This point will be discussed further at various stages throughout Chapter III.

> permit the Crown simply to ignore those terms. ... The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.[109]

What remains unclear after *Guerin* is whether the act of surrender is necessary for the Crown's fiduciary duty to arise, as the strict reading of Dickson J.'s judgment insists, or whether it exists because of the peculiar nature of Indian title, as Wilson J. maintains.

This distinction is important because it affects the breadth of the Crown's duty to aboriginal peoples in Canada. The Crown's obligation under Wilson J.'s formulation is more onerous and wide-ranging than that suggested by the strict interpretation of Dickson J.'s holding. Wilson J.'s fiduciary duty is a duty to act in the best interests of aboriginal peoples with regard to their reserve lands. Wilson J.'s duty does not exist in hibernation until a surrender is made. Rather, Wilson J.'s duty is ever-present, whereas Dickson J.'s duty, in its narrow sense, lays at rest until it becomes activated by the act of surrender.

Wilson J.'s duty arguably includes a Crown obligation to protect reserves from unwanted intrusion or ecologically-damaging effects which encroach upon or otherwise adversely affect the reserve. An example of this is the polluting of a stream which runs alongside or through a reserve. Not only must the Crown act to prevent such an occurrence, but it may find itself liable for breaching its duty if it grants mining or timber rights in adjacent

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[109] *Guerin*, note 1, *supra*, at p.344.

areas which have the effect of damaging the reserve, either directly or indirectly, or otherwise adversely affecting the interests of the band which possesses the reserve.

None of this is at all relevant in the Dickson J. scenario. Under the narrow interpretation of Dickson J.'s judgment, the Crown is obligated only to see that the aboriginal interests in surrendering their land, as specified by any terms or conditions which accompany the surrender, whether written or oral, are protected and that the terms of the surrender are properly carried out.

The basis which founds Dickson J.'s judgment, however, indicates that his understanding of the Crown's duty towards aboriginal peoples is more deeply rooted and far-reaching than the strict interpretation of his judgment indicates. Moreover, the historical and political basis for the Crown's imposition of the surrender requirement, which Dickson J. recognizes in his judgment, suggests that the portrayal of the surrender requirement's role in creating the Crown's fiduciary obligation under the narrow vision of Dickson J.'s decision is, in fact, the mirror-image of reality. It is the fiduciary duty assumed by the Crown which gives rise to the surrender requirement, not vice versa.

Dickson J.'s emphasis on the historic obligation of the Crown to aboriginal peoples demonstrates that the Crown's duty pre-dates the *Indian Act* and, therefore, exists independently of the Act. The *Indian Act*, as he states, merely confirms the "historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties."[110] This responsibility, says Dickson J.,

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[110]*Ibid.*, at p.340. Note also Wilson J.'s emphasis on the historic nature of

originates from the *Royal Proclamation of 1763*[111] and has been:

> ... [C]ontinuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada.[112]

The *Royal Proclamation of 1763* mandates that any purchase of aboriginal lands must be made from the Crown. Purchases of land directly from the aboriginal peoples is strictly prohibited:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy

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the Crown's duty, at pp.356-357, where she says that "it is the acknowledgment of a historic reality, namely, that Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest."

[111]Note 55, *supra*. For more detailed discussion of the Proclamation and its effects, see Kenneth M. Narvey, "The Royal Proclamation of 7 October 1763. The Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company," (1974), 38 *Sask. L. Rev.* 123; Jack Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763*, (Ottawa: Research Branch, Indian and Northern Affairs Canada, 1981); Brian Slattery, *The Land Rights of Indigenous Canadian Peoples As Affected by the Crown's Acquisition of Their Territories*, (D.Phil. Thesis, Oxford University, 1979, reprinted, Saskatoon: University of Saskatchewan Native Law Centre, 1979); Lester, note 35, *supra*.

[112]*Guerin*, note 1, *supra*, at p.340.

> Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians.[113]

Yet, in actuality, the origins of the requirement that aboriginal peoples may not surrender their lands other than to or with the permission of the Crown or its representatives predates both the *Indian Act* and the *Royal Proclamation of 1763.*

The intent of the Crown and its representatives in North America to be a requisite intermediary in any transactions of aboriginal lands originated in the practice of the American colonies in the Seventeenth Century. One such example is an Act passed by the Grand Assembly of Virginia on 10 March 1655, which states that:

> What lands the Indians shall be possessed of by order of this or other ensuing Assemblys, such land shall not be alienable by them the Indians to any man de futuro, for this will putt us to a continuall necessity of allotting them new lands and possessions and they will be allwais in feare of what they hold, not being able to distinguish between our desires to buy or inforcement to have, in case their grants and sales be desired; Therefore be it enacted, that for future no such alienation or bargaines and sales be valid without the assent of

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[113]Note 55, *supra*, at p.6.

the Assembly.[114]

Virginia was not the first American colony to enact legislation of this type to effect a similar purpose. The 1655 Virginia Act was predated by two Acts of similar tenor in the colony of Maryland in 1638 and 1649.[115]

The *Royal Proclamation of 1763*, then, simply continues a long-standing practice "to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited."[116] The purpose of the surrender requirement to protect aboriginal land interests from exploitation is only one element of the Crown's desire to protect the aboriginal peoples' peaceful occupation of their lands and the concomitant rights which flow from those interests.[117] The Crown's protection of Native interests -- one facet of which limits the alienation of Indian lands exclusively to the Crown -- denotes its unilateral undertaking of a fiduciary responsibility towards Native peoples. Therefore, the surrender requirement documented in the *Royal Proclamation of 1763* is a requirement which *flows from* the Crown's fiduciary undertaking; it is not, as the strict interpretation of Dickson J.'s judgment suggests, a pre-requisite

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[114]As quoted in Stagg, note 111, *supra*, at p.22.

[115]See Charles C. Royce, *Indian Land Cessions in the United States, Eighteenth Annual Report of the Bureau of American Ethnology, to the Secretary of the Smithsonian Institute, Part II*, (Washington, D.C.: Government Printing Office, 1896-97), at pp.571-572 (as quoted in Stagg, note 111, *supra*, at p.22).

[116]*Guerin*, note 1, *supra*, at p.340.

[117]Such as, but not restricted to, the right to hunt, trap, and fish.

for the founding of the Crown's fiduciary obligation. Subsequently, Dickson J.'s determination of the Crown's duty may be seen to be no less in magnitude than that suggested by Wilson J.

As to the application of the Crown's fiduciary obligations to Native peoples beyond circumstances involving aboriginal land interests, one need only consider the historic basis upon which the Crown undertook to protect aboriginal peoples and their interests. The duty which arises from this unilateral undertaking of the Crown was not initially restricted to the protection of aboriginal lands. It extended to a protection of the aboriginal peoples in the enjoyment of their pre-existing rights *in rem*, such as the right to hunt, trap, and fish, as well as to exercise religious, cultural, and linguistic freedom, and to practice self-government.[118]

To limit the application of the legally-enforceable Crown duty to something less than the initial intention behind the Crown's gratuitous undertaking of that duty is inappropriate. Subsequently, the Crown's fiduciary obligation found in *Guerin* is not restricted in its application to Indian land interests, but extends to all aboriginal interests; it is a general duty rather than a specific duty.[119]

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[118]See also Brian Slattery, "First Nations and the Constitution: A Question of Trust," (1992), 71 *Can. Bar Rev.* 261, where he suggests, at p.273, that the range of obligations which exist under the Crown's fiduciary duty includes the providing of "protection to Aboriginal land rights, laws, and powers of self-government, and perhaps also Aboriginal languages and cultures."

[119]See Slattery, note 2, *supra*, at p.754:

> The *Guerin* decision, while dealing only with the particular fiduciary relations created by a

(b) Judicial Characterizations of the Crown's Duty After *Guerin*

Although the *Guerin* fiduciary duty offers no explicit suggestions as to its application beyond that related to aboriginal land, neither does it discount the idea that its duty is of general applicability to the relationship between the Crown and aboriginal peoples in Canada. While *Guerin* centres around the aboriginal surrender of land to the Crown for the purposes of leasing it to a third party, the Supreme Court's judgments should not be viewed as being restricted to such scenarios. Dickson and Wilson JJ. both discuss the application of the Crown's duty within the context of the surrender of land,[120] but this is due to the nature of the considerations germane to the case, not because of any restriction on the scope of the duty.

As our analysis of *Guerin* demonstrates, the nature of the Crown's obligation to Native peoples is understood by both Dickson and Wilson JJ. to be a general fiduciary duty rooted in the historic obligations assumed by the Crown to protect aboriginal interests. Nevertheless, *Guerin*'s lack of precise direction has led some to conclude that if the *Guerin* duty extends beyond its application to Indian land interests, it offers no suggestions as to the application of the fiduciary duty of the Crown outside of these confines:

> surrender of Indian lands to the Crown, suggests that a more general fiduciary duty exists that informs and explains those relations.

See also Bartlett (1989), note 5, *supra*, at pp.321-322.

[120]Although Wilson J.'s duty, it must be remembered, is not restricted to situations involving land surrenders.

> ... [A]s a self-contained, quasi-trust relationship the *Guerin* fiduciary association is of uncertain application or scope. It may refer in the instance of the Crown and the Indian peoples to the lands (reserve or reserve and tribal) of the Indians or to the total relationship between the Crown and the Indians.[121]

Since the Supreme Court's judgment in *Guerin* may either be interpreted in a broad and liberal fashion or a strict, conservative manner, it is useful to examine subsequent judicial interpretation of the nature of the Crown's duty towards aboriginal peoples.[122]

i. *Kruger v. R.*

Shortly after *Guerin*, the Federal Court of Appeal was presented with an opportunity to consider the extent of the Crown's duty towards Native peoples in *Kruger v. R.*, a case involving the expropriation of aboriginal lands by the Federal government for use as an airport.[123] The court in *Kruger* holds that the fiduciary duty discussed in *Guerin* extends beyond the limited context of surrenders of Indian reserve lands. Heald J.'s analysis of *Guerin* leads him

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[121]Waters, note 5, *supra*, at p.424.

[122]The cases discussed below are not fully comprehensive of all cases discussing the Crown's fiduciary obligations, but focus upon the more noteworthy decisions which are relevant to this analysis.

[123]Note 3, *supra*. The *Kruger* case will be discussed in greater detail later in the section of the thesis entitled "The Practical Application of Fiduciary Doctrine: A Reappraisal of *Kruger v. R.*," Ch. V(g), *infra*.

to state that:

> I do not think, however, that what was said by Mr. Justice Dickson relative to the fiduciary relationship existing between the Crown and the Indians can be construed in such a way as to be authority for the proposition generally that the fiduciary relationship arises only where there is a surrender of Indians [*sic*] lands to the Crown. ... Accordingly, I think it clear that the fiduciary obligation and duty being discussed in *Guerin* would also apply to a case such as this as well.[124]

Far from being confined to reserve surrenders, *Kruger* determines that the Crown's fiduciary obligations are a fundamental part of the special, *sui generis* relationship between the Crown and Native peoples. Nevertheless, the exact nature of the Crown's fiduciary obligation -- in terms of the judicial understanding of its nature and extent -- is seen by the *Kruger* court to be in its infancy. As Stone J. states, "The doctrine of fiduciary duty enunciated by the Supreme Court of Canada in *Guerin et al. v. The Queen et al.* will, of course, require elaboration and refinement on a case-by-case basis."[125]

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[124]*Ibid.*, at p.597. See also the comments by Urie J. at p.646: "... [I]t is clear that what was said by Dickson J. in the *Guerin* case was related to a fiduciary relationship in the context of that case, *i.e.*, where there was a surrender of Indian lands to the Crown on certain terms."

Kruger affirms our conclusion that the Crown's fiduciary duty, as expressed in *Guerin*, is a general duty on the Crown to act in the best interests of the aboriginal peoples.

[125]*Ibid.*, at p.658.

ii. *Apsassin v. R.*

After *Kruger*, the fiduciary obligation of the Crown was discussed by the Federal Court, Trial Division in *Apsassin v. R.*[126] In discussing the applicability of the Crown's fiduciary obligations to aboriginal peoples, Addy J. enlists a restrictive interpretation of Dickson J.'s judgment in finding that the Crown's obligations arise only upon surrender:

> With the exception of any special obligations which might be created by treaty, there is no special fiduciary relationship or duty owed by the Crown with regard to reserve lands previous to surrender, nor, *a fortiori*, is there any remaining after the surrendered lands have been transferred and disposed of subsequently. The duty from that moment attaches to the proceeds of disposition. There might indeed exist a moral, social or political obligation to take special care of the Indians and to protect them (especially those bands who are not advanced educationally, socially or politically) from the selfishness, cupidity, cunning, stratagems and trickery of the white man. That type of political obligation, unenforceable at law, which the Federal Court of Appeal in the *Guerin* case (supra) felt should apply to the Crown following surrender (which concept was, of course, rejected by the Supreme Court), would be applicable previous to surrender.[127]

According to Addy J., the Crown's duty is restricted to the actual process of the surrender of land by aboriginal peoples to the Crown. The Crown's

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[126]Note 3, *supra*.

[127]*Ibid.*, at p.92. [References omitted]

duty is to protect the land interest of the aboriginal peoples from the time it acquires that interest upon surrender through to the sale of the land to a third party. The proceeds from the sale are then substituted in place of the land and become subject to the same Crown duty as the land had been. That the Indian interest after the sale is purely monetary is inconsequential; the Crown is still bound to the same fiduciary responsibilities with regard to the money garnered through the sale of the land.

The *Apsassin* duty is clearly a restrictive interpretation of the Crown's duty which strays from the general duty found in *Kruger* and *Guerin*. Any duty of the Crown to protect the aboriginal peoples prior to the actual surrender and sale of aboriginal lands, is viewed by Addy J. as merely a "moral, social or political" obligation which is unenforceable at law.

Addy J.'s decision suggests that to impose a general fiduciary duty upon the Crown towards the aboriginal peoples implies the subordinate position of the aboriginals vis-à-vis the Crown. Although he acknowledges that the rights and *de facto* independence of Native people in Canada is restricted by the *Indian Act*, Addy J. insists that the Native peoples are no less capable of managing their own affairs than non-Native persons. For that reason, the Crown is not legally bound to act in their best interests in situations beyond the surrender of Indian land:

> The *Indian Act* does impose certain restrictions on the actions and on the rights of status Indians. Except in so far as those specific restrictions might prevent them from acting freely, the Indians are not to be treated at law somehow as if they were not *sui juris*, such as infants or persons incapable of managing their own affairs, which would cause some legally enforceable fiduciary duty

> to arise on the part of the Crown to protect them or to take action on their behalf. They are fully entitled to avail themselves of federal and provincial laws and of our judicial system as a whole to enforce their rights, as they are indeed doing in the case at bar.[128]

As will be argued later, Addy J.'s understanding of the position of the beneficiary relative to the fiduciary in a fiduciary relationship is based upon a fundamental misconception of the nature of fiducial relations. His view that aboriginals would be reduced to the status of "infants or persons incapable of managing their own affairs" if the Crown was bound by a legally-enforceable fiduciary duty towards them demonstrates his skewed notion of the nature of fiduciary relations and of fiduciary doctrine in general.[129] Accordingly, *Apsassin* should not be considered as an authoritative pronouncement upon the nature and extent of the Crown's fiduciary obligations to Native peoples.

iii. *Canadian Pacific Ltd. v. Paul/Roberts v. R.*

The Supreme Court of Canada briefly mentions the existence of the fiduciary relationship between the Crown and aboriginal peoples in *Canadian Pacific Ltd. v. Paul*[130] and *Roberts v. R.*[131] While neither case deals

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[128]*Ibid.*, at p.92.

[129]Refer to the section on "Inequality Theory," at Ch. IV(c), ii, 3, *infra*.

[130]Note 3, *supra*.

[131]*Ibid*.

specifically with the question of the Crown's fiduciary duty, they are noteworthy for their demonstration of the Supreme Court's understanding of the nature of the Crown's obligation.

In the *Paul* case, the court adopts a restrictive view of Dickson J.'s judgment in *Guerin*. Its statement that "In *Guerin*... this Court recognized that the Crown has a fiduciary obligation to the Indians with respect to the lands it holds for them,"[132] adheres to the strict interpretation of Dickson J.'s judgment in *Guerin* by restricting the Crown's duty to aboriginal peoples to the land it holds for them. As our analysis of the true nature of Dickson J.'s judgment in *Guerin* reveals, this understanding is simply untrue.

In *Roberts*, meanwhile, the court adheres to Wilson J.'s understanding of the Crown's fiduciary obligation while suggesting that the Crown's duty is rooted in something more than just aboriginal title:

> ... [T]he provisions of the *Indian Act* which, while not constitutive of the obligations owed to the Indians by the Crown, codify the pre-existing duties of the Crown toward the Indians. Still another source is the common law relating to aboriginal title which underlies the fiduciary nature of the Crown's obligations.[133]

Interestingly, although both *Paul* and *Roberts* adhere to the land-based conception of the Crown's duty, in neither case does the Supreme Court state that the fiduciary obligation exists only where there is a surrender of Indian lands. It should be remembered, though, that the court's consideration of the

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[132] *Paul*, note 3, *supra*, at p.504.

[133] *Roberts*, note 3, *supra*, at p.208.

Crown's duty is only a subsidiary issue in both *Paul* and *Roberts*. The nature of the Crown's duty is merely mentioned by the court as an important consideration to the determination of the main issues in question. Until its decision in the *Sparrow* case, the Supreme Court did not discuss in any detail the nature and extent of the Crown's fiduciary responsibilities which it had considered in *Guerin*.

(c) *R. v. Sparrow* : The *Guerin* Duty Reconsidered

Due to the greater emphasis placed upon the Crown's fiduciary obligations by the Supreme Court in *R. v. Sparrow*,[134] it is useful to examine the case in some detail. The primary issue in *Sparrow* is the determination of the nature and scope of aboriginal fishing rights and the ability of the Crown to interfere with those rights. It is within the context of this consideration that the Crown's fiduciary duty becomes relevant.[135]

Sparrow centres around a dispute between aboriginal fishing rights and the provisions of the *British Columbia Fishery (General) Regulations* (hereafter referred to as the *Fisheries Act*).[136] Specifically, the appellant Sparrow was charged with fishing with a drift net longer than that permitted

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[134]Note 3, *supra*.

[135]While our discussion of the *Sparrow* decision will be primarily restricted to its contribution to the judicial understanding of the Crown's obligation to the aboriginal peoples, it may only be truly comprehended by understanding the specific context within which it arises.

[136]SOR/84-284.

by the terms of his band's food fishing license. Sparrow admitted to using a longer net than the license allowed, but claimed that he was exercising his aboriginal right to fish under section 35(1) of the *Constitution Act, 1982*. He maintained that the *Fisheries Act* was repugnant to his aboriginal right to fish and that he should not be limited in his right by the Act because the Act conflicted with section 35(1).

To determine the fundamental issue in dispute, the Supreme Court was faced with "explor[ing] for the first time the scope of s. 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada."[137] To clarify the method of interpretation that is to be given to section 35(1), the court considered the meaning of the terms included within section 35(1), the power of Parliament to regulate the aboriginal and treaty rights contained within it, and the historical relationship between the Crown and aboriginal peoples in Canada. From its assessment of these factors, the court determined that:

> ... [Section] 35(1) of the *Constitution Act, 1982*,

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[137]*Sparrow*, note 3, *supra*, at p.389. In reality, the meaning of section 35(1) should have been clarified to a greater extent prior to *Sparrow*. Section 37.1 of the *Constitution Act, 1982* provides for the establishment of constitutional conferences to be held to discuss "matters that directly affect the aboriginal peoples of Canada," as detailed in section 37.1(2). Originally, these conferences were to focus upon "the identification and definition of the rights of those peoples to be included in the Constitution of Canada," but this clause was eliminated from versions of the Constitution after 17 April 1982. See Michael Asch and Patrick Macklem, "Aboriginal Right and Canadian Sovereignty: An Essay on *R. v. Sparrow*," (1991), 29 *Alta. L. Rev.* 498, at p.504. The conferences held under this section ended in 1987 without any furtherance to the understanding of what aboriginal and treaty rights consist of and what their protection in section 35(1) entails.

> represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. ... It also affords aboriginal peoples constitutional protection against provincial legislative power.[138]

Delivering the unanimous judgment for the court, Dickson C.J.C. and La Forest J. suggest that this conclusion is not new, but is based upon the precedent established in *Guerin*:

> We are, of course, aware that this would, in any event, flow from the *Guerin* case, *supra*, but for a proper understanding of the situation, it is essential to remember that the *Guerin* case was decided after the commencement of the *Constitution Act, 1982*.[139]

This statement appears to affirm the court's understanding that the protection of aboriginal and treaty rights from Provincial legislative interference supported by *Guerin* is now constitutionally supported by section 35(1). However, nowhere in *Guerin* is there any discussion of the ability of Provincial governments to legislate in respect of Native rights.

In light of the Supreme Court's understanding of the breadth of the *Guerin* decision, it may be understood that the court is expressly recognizing that the Crown's obligation to act in the best interests of aboriginal peoples is not restricted to situations involving the surrender of reserve lands, but applies to all situations involving aboriginal rights. Although the *Sparrow*

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[138] *Sparrow*, note 3, *supra*, at p.406.

[139] *Ibid.*, at p.406.

court explains that in *Guerin* "this court found that the Crown owed a fiduciary obligation to the Indians *with respect to the lands*,"[140] it rejects the *Guerin* approach in favour of the reasoning established in *R. v. Agawa*, where Blair J.A. states that:

> ... [R]ecent judicial decisions ... have emphasized the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties, and legislation: see *Guerin v. The Queen* ..."[141]

Unlike previous cases which discuss the applicability of fiduciary law to Native rights, *Sparrow* no longer purports to follow the *ratio* of the strict interpretation of Dickson J.'s judgment in *Guerin* to found the Crown's fiduciary obligation. Instead, it looks to the underlying principles existing in decisions such as *Guerin*, *Agawa*, and *R. v. Taylor and Williams*[142] for guidance in interpreting section 35(1) of the *Constitution Act, 1982* :

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams*, 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.[143]

This is not to suggest that *Sparrow* ignores *Guerin*'s inference that the basis of

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[140]*Ibid.*, at p.408. [Emphasis added]

[141](1989), 53 D.L.R. (4th) 101 (Ont. C.A.), at p.120.

[142]Note 31, *supra*.

[143]*Sparrow*, note 3, *supra*, at p.408. [References omitted]

the fiduciary duty rests in the historical relationship between the Crown and aboriginal peoples in Canada.[144] *Sparrow* determines that section 35(1) itself includes the existence of a Crown responsibility "to act in a fiduciary capacity with respect to aboriginal peoples":[145]

> [W]e find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.[146]

Where the fiduciary duty of the Crown becomes relevant in *Sparrow* is in the ability of the Federal government to regulate the aboriginal right to fish through the passing of legislation which specifically affects aboriginal fishing rights. Although the court determines that there is necessarily "some restraint on the exercise of sovereign power" based upon the fiduciary relationship between the Crown and aboriginal peoples, this restraint does not entail an inability to regulate aboriginal rights:

> Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s.35(1). In other words, federal power must be reconciled with

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[144]Note also that the *Sparrow* court states, at p.408, that "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."

[145]*Ibid.*

[146]*Ibid.*, at p.409.

> federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[147]

The result of the Federal government's power to pass legislation directly affecting aboriginal rights combined with its fiduciary duty to the Native peoples[148] is the establishment of a justificatory scheme in *Sparrow* which any legislation that affects an aboriginal right must pass for it to be constitutionally valid.

Prior to the implementation of the *Sparrow* justificatory test, there were a number of different interpretations of the meaning and extent of section 35(1) rights. The most reasonable understanding of those rights prior to *Sparrow*, it is suggested here, is that the guarantee of rights in section 35(1) was dependent upon the sovereignty of the *Constitution Act, 1982*, which is established by section 52, subject to the necessary balancing of rights and competing interests which exist in all societies. What did not exist, however, was any explicit explanation of how section 35(1) rights ought to be limited where necessary.

Rights which exist in a democratic society cannot be absolute.[149] The

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[147]*Ibid.*

[148]Which insists that it adhere to "a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*." *Ibid.*

[149]Due consideration for the manner in which the rights belonging to aboriginal societies have come into conflict with rights belonging to non-aboriginal persons and groups must also be factored into this equation, however.

protection of civil rights by the State necessarily involves balancing the rights of some with the competing rights of others. As Peter Hogg explains:

> When we speak of the protection of civil liberties in a society, we are really speaking about the nature of the compromises which that society has made between civil libertarian values ... and the competing values recognized by social and economic regulation, which limits individual freedom in pursuit of collective goals, such as public order and morality, safety, fair dealing, and a more equitable distribution of wealth.[150]

The balancing of competing rights is also addressed in *Agawa*, where Blair J.A. states that:

> Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s.1 of the *Canadian Charter of Rights and Freedoms*.[151]

Unlike rights enshrined in the *Charter of Rights and Freedoms*,[152]

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[150]Hogg, note 2, *supra*, at pp.627-628.

[151]*Agawa*, note 141, *supra*, at p.121. For further discussion of the ability to limit section 35(1) rights, see Slattery, note 66, *supra*, at p.234; Slattery, note 2, *supra*, at p. 782.

[152]Section 35 exists as Part II of the *Constitution Act, 1982* entitled "Rights of the Aboriginal Peoples of Canada." Meanwhile, section 1 explicitly states that it applies only to the rights and freedoms which exist *within* the *Charter*:

section 35(1) rights, while subject to being balanced with competing interests, had no explicit limitation placed upon them prior to *Sparrow*. *Charter* rights are limited by section 1 of the *Charter*, which is explained by the *Oakes* test.[153] However, the rights guaranteed by section 35(1) are not affected by the limitations clause in section 1 since section 35(1) exists outside of the *Charter*. Section 35(1) protects and constitutionally entrenches all aboriginal and treaty rights which had not been extinguished prior to 17 April 1982, including rights which had been infringed, but not terminated prior to that date.[154] Prior to *Sparrow*, section 35(1) rendered any legislation that was inconsistent with the dictates of section 35(1) invalid to the extent of that inconsistency, subject only to an amorphous balancing of section 35(1) rights with competing interests.

To avoid the misunderstanding of section 35(1) rights as being absolute, *Sparrow* imposes a test which acts in the place of the section 1 justificatory test, or *Oakes* test, for the purpose of limiting the aboriginal and treaty rights contained within section 35(1) where it is both legitimate and necessary to do so:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[153]Named after the case in which the test was first articulated by the Supreme Court of Canada, *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.).

[154]For a more detailed explanation of this effect of section 35(1), see Slattery, note 66, *supra*, especially at pp. 243, 264.

> ... [Section] 35(1) is not subject to s.1 of the Charter. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s.52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will none the less be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s.35(1).
>
> There is no explicit language in the provision that authorizes this court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.[155]

In the aftermath of *Sparrow*, section 35(1) rights may only be abrogated or derogated from in three ways: (1) by voluntary consent of the aboriginal peoples concerned; (2) by Constitutional amendment, or; (3) by passing the *Sparrow* test. The first method is straightforward. The second is somewhat less so. It requires that the onerous amending procedure outlined in section 38 be followed. The less stringent amending procedure in section 43 cannot be used because it applies only to amending a provision of the Constitution which applies to one or more, *but not all* of the Provinces. Aboriginal and treaty rights apply to all Provinces and Territories -- although to varying degrees and extents -- thereby rendering any amendment subject to the section 38 requirement.

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[155] *Sparrow*, note 3, *supra*, at p.409.

The third method of limiting section 35(1) rights applies only to legislation, not to private action. While the Supreme Court of Canada has held in a number of cases that the *Charter* applies only to public, not private, activity,[156] section 35(1), existing outside of the *Charter*, arguably applies to both public and private activity. The importance of this distinction is that section 35(1) rights cannot be interfered with by a private party without breaching section 35(1). However, the *Sparrow* test allows for the infringement of section 35(1) rights by legislative initiatives which pass its justificatory standards.

The *Sparrow* test, as emphasized by the court, must be implemented on a case-by-case basis due to the generality of section 35(1) itself, and the "complexities of aboriginal history, society and rights," which necessitates that "the contours of a justificatory standard must be defined in the specific factual context of each case."[157] The test is many-faceted, but may be summarized in five parts:

(1) There must be a *legislative* objective for the test to be applied (*i.e.* the objective must be supported by legislation).

(2) If a legislative objective exists, it must be determined whether that objective interferes with section 35(1)'s guarantee of aboriginal and

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[156]See note 13, *supra*, and its accompanying text.

[157]*Sparrow*, note 3, *supra*, at p.410. The importance of context in the discussion of aboriginal rights issues has been emphasized on a number of occasions. See note 31, *supra*.

treaty rights.[158] A three-part approach is implemented to determine whether there is a *prima facie* interference with a section 35(1) right:

i. Is the limitation imposed by the legislation unreasonable?

ii. Does the legislation impose undue hardship upon the aboriginal peoples?

iii. Does the legislation deny aboriginal peoples their *preferred* means of exercising their section 35(1) rights?[159]

The onus of proving a *prima facie* infringement remains with the person or group challenging the legislation.[160] An infringement exists if the purpose or effect of the limitation unnecessarily infringes the interests protected by the section 35(1) right. An example of such an infringement would be where a regulation makes fishing much more difficult, time consuming, and costly to aboriginal peoples.[161]

(3) If a legislative objective exists which interferes with a section 35(1) right, does it amount to a legitimate regulation of a constitutional right?[162] To determine this point, the legislative objective must be

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[158] *Sparrow*, note 3, *supra*, at p.411.

[159] *Ibid*.

[160] *Ibid*., at pp.411, 417.

[161] *Ibid*., at p.412.

[162] *Ibid*.

deemed to be *valid*.

This is an interpretive question which must be answered in each case within the context in which it arises. The Supreme Court in *Sparrow* suggests that a "public interest" justification is "so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."[163] However, the principles of conservation and resource management are valid justifications which are "consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights."[164]

(4) If the legislative objective is valid, it must be consistent with the fiduciary obligation of the Crown towards Canada's aboriginal peoples.[165] In keeping with the Crown's fiduciary duty, any legislative interference with section 35(1) rights must infringe those rights as little as possible in order to effect the desired result.[166]

The onus of proving that the infringement of section 35(1) rights is justifiable rests upon the government enacting the legislation.[167] To demonstrate a justifiable infringement, the legislation must not have

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[163] *Ibid.*

[164] *Ibid.*, at p.413.

[165] *Ibid.*: "The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."

[166] *Ibid.*, at p.416.

[167] *Ibid.*, at pp.410, 417-418.

an underlying unconstitutional objective and must be "absolutely necessary to accomplish the required limitation."[168]

(5) Other factors to be considered within this context include an obligation to pursue other feasible options for producing the same net effect which do not infringe section 35(1) rights. It is only where there is no other viable option to the infringement of section 35(1) rights that a legislative objective, having passed the requirements set out above, may be upheld by the courts. Even where legislation is upheld in this way, there would appear to be an obligation to consult with the aboriginal peoples affected with regard to any conservation measures to be implemented.[169] Moreover, in circumstances which involve the expropriation of aboriginal lands, fair compensation must be made available.[170]

The Crown's fiduciary obligation to the aboriginal peoples necessitates that the implementation of the *Sparrow* test pass only those valid legislative objectives which are deemed sufficiently necessary to warrant their intrusion

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[168]*Ibid.*, at p.418.

[169]Due to the combination of the Crown's fiduciary obligation towards the aboriginal peoples and the court's dictum, at p.417, that:

> ... [T]he aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

[170]*Ibid.*, at pp.416-417.

upon the aboriginal enjoyment of section 35(1) rights:

> By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary [fiduciary] relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples.[171]

Indeed, the final comments of the Supreme Court in *Sparrow* regarding the justificatory test for legislative initiatives re-emphasizes the fiduciary nature of the relationship between the Crown and Native peoples. Should any other considerations arise under circumstances which were not contemplated by the court in *Sparrow*, any measures to be implemented must be consistent with the terms of section 35(1) itself. Section 35(1)'s recognition and affirmation of aboriginal and treaty rights and its entrenchment of the Crown's fiduciary obligation requires "sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians."[172]

The fiduciary duty described in *Sparrow* may therefore be seen to be derived from a different, although not contrasting, source than that

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[171]*Ibid.*, at p.410.

[172]*Ibid.*, at p.417.

established in *Guerin*. Whereas the Crown's fiduciary obligation to Native peoples in *Guerin* is ultimately based upon the historic relationship between the groups and the undertakings of the Crown to protect Native interests, the *Sparrow* duty is rooted in section 35(1) of the *Constitution Act, 1982*. However, the historical, political, social, and legal factors which give rise to the Crown-Native fiduciary relationship form the backdrop of section 35(1). Therefore, in rooting the Crown's fiduciary duty in section 35(1), *Sparrow* does not ignore the historical genesis and background of the Crown-Native fiduciary relationship. Nevertheless, *Sparrow* is a significant advance beyond *Guerin* in that it constitutionally-entrenches the Crown's fiduciary obligation in section 35(1).

The *Sparrow* decision is significant, therefore, for its expansion of the scope of the Crown's fiduciary duty and the judicial entrenchment of that duty in section 35(1). It also restricts the ability of government to abrogate or derogate from the enjoyment of section 35(1) rights by legislation. Furthermore, the *Sparrow* decision suggests that the Crown's fiduciary duty be purposively applied:

> The nature of s.35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.[173]

The implications of this conclusion in subsequent decisions are yet to be

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[173] *Ibid.*, at p.407.

observed. In the interim, the purposive application of the governmental duty in *Sparrow* forms the basis for speculation as to its future implementation and resultant effects upon the Crown-Native relationship.[174]

(d) The Crown's Duty in the Aftermath of *Sparrow*

In the brief period following the Supreme Court's expanded understanding of the Crown's fiduciary obligation in *Sparrow*, there have been other considerations of the Crown's duty which bear considerable similarity to the overall nature of the decisions considered between the *Guerin* and *Sparrow* judgments. With the exception of *Kruger*, the cases in the time period between *Guerin* and *Sparrow* evidence only a superficial knowledge and understanding of fiduciary doctrine. Accordingly, they apply a very limited, restrictive view of the judgments in *Guerin*. The essence of the cases decided after *Sparrow* appear to adopt the same tendencies. Furthermore, as with the judgments between *Guerin* and *Sparrow*, the decisions after *Sparrow* are often incompatible with each other; their individual assertions as to the nature and extent of the Crown's responsibilities to the aboriginal peoples are widely divergent and share little, if any, common thread.

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[174]See the section entitled "Is the Crown's Fiduciary Duty Purposive?" Ch. V(e), *infra*.

i. *Bruno v. Canada (Minister of Indian Affairs and Northern Development)/Cree Regional Authority v. Robinson*

The Federal Court, Trial Division's consideration of the fiduciary responsibilities of the Crown in *Bruno v. Canada (Minister of Indian Affairs and Northern Development)*[175] adheres to the strict interpretation of Dickson J.'s judgment in *Guerin*. As the court states:

> It now appears clear, since the decision of the Supreme Court of Canada in *Guerin et al. v. The Queen* that there is a general fiduciary obligation owed by the Crown in right of Canada towards each Indian band *in respect of the reserve land of each band*.[176]

Upon closer examination of the court's explanation of the basis for the Crown's duty, the court's characterization of that duty is that it is not a "general fiduciary obligation owed by the Crown in right of Canada towards each Indian band in respect of the reserve land of each band," but is restricted to situations involving the surrender of lands:

> One can deduce from the protective stance taken by the Crown ever since the *Royal Proclamation, 1763* that the Crown kept to itself the exclusive right to acquire and dispose of Indian title because it had the unique power and responsibility to act as an appropriate protector of the interests of

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[175][1991] 2 C.N.L.R. 22 (F.C.T.D.).

[176]*Ibid.*, at p.27. [References omitted, emphasis added]

> the people who inhabited this land before the arrival of Europeans. It is wholly consistent with this view that the Crown should exercise these governmental powers which only it has, where this may reasonably and lawfully be done to perform adequately the specific fiduciary obligation it owes to a given band *whose Indian title has been surrendered to the Crown.*[177]

Therefore, while *Bruno* recognizes the desire of the Crown to protect aboriginal interests, it improperly limits the scope of the Crown's protection to Indian land interests. The court's leap in reasoning from its characterization that the Crown kept to itself the exclusive right to acquire and dispose of Indian title "because it had the unique power and responsibility to act as an appropriate protector of the interests of the people who inhabited this land before the arrival of Europeans," to its view that the Crown should exercise its exclusive governmental powers "where this may reasonably and lawfully be done to perform adequately the specific fiduciary obligation it owes to a given band *whose Indian title has been surrendered to the Crown*," is faulty.

While it is true that the Crown kept to itself the exclusive right to acquire and dispose of Indian lands due to its desire to protect aboriginal interests from the encroachment of white settlers, as we have seen, the Crown's protection of aboriginal interests, through its fiduciary obligations to the aboriginal peoples, has never been restricted exclusively to aboriginal land interests.[178] The necessity of the Crown interposing itself between aboriginal

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[177]*Ibid.*, at p.29. [Emphasis added]

[178]Refer to notes 117 and 118, *supra*, and their accompanying text.

people and prospective purchasers of aboriginal lands is based upon the intermeshing of aboriginal spiritual, cultural, and other interests with their land interests, as well as the fundamental inalienability of their other interests. In order to monitor and protect aboriginal interests, which, as the court in *Bruno* recognizes, underlies the Crown's motivation, the Crown's fiduciary obligation must be continual and all-encompassing; it must not merely arise upon the surrender of land in respect of that land. The court's conclusion in *Bruno* is therefore fundamentally incompatible with its understanding of the basis of the Crown's duty.

One particularly noteworthy aspect of *Bruno* is the court's determination that it is "the Crown in right of Canada," or the Federal government, which owes the fiduciary duty to the aboriginal peoples. This determination is not conclusive, however. It is similar to the situation in *Guerin*, where the Crown's fiduciary duty was restricted to situations involving the surrender of aboriginal land interests because that was the extent of the subject of determination before the court. In the absence of any limitation upon the application of the Crown's fiduciary duty to aboriginal peoples, it cannot be inferred that the extent of the Crown's duty is limited to situations in which it has been found to exist.[179]

In *Cree Regional Authority v. Robinson*,[180] the Federal Court, Trial Division was once again confronted with the issue of the Crown's fiduciary duty. In keeping with its decision in *Bruno*, the court in *Cree Regional*

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[179]Refer to the section entitled "The Categories of Fiduciary Relationships Are Never Closed," Ch. IV(c), iv, 2, *infra*.

[180][1991] 4 C.N.L.R. 84 (F.C.T.D.).

Authority holds that "*Guerin* is authority for the proposition that where an Indian band surrenders its interest in land to the federal government, the federal government assumes a fiduciary obligation towards the Indian band in question."[181]

As with *Bruno*, the fiduciary duty owed to the aboriginal peoples in the *Cree Regional Authority* case arises only upon the surrender of aboriginal lands. More importantly, both *Bruno* and the *Cree Regional Authority* decision boldly insist that the duty is binding upon the Federal government. Only the latter case mentions Provincial obligations and, even then, does not categorize those obligations as being fiduciary in nature. What should be emphasized is that, as in *Guerin*, these findings are due to the nature of the cases before the courts rather than any authoritative determination of the limits of the application of the Crown's fiduciary duty towards Native peoples in Canada.

ii. Bear Island

The most recent treatment of the Crown's fiduciary obligations to Native peoples by the Supreme Court of Canada is the court's decision in

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[181]*Ibid.*, at p.99. It is interesting to note that while the court does not state that the Provinces owe fiduciary obligations to Native peoples, the court agrees with Crown counsel's submission that the *Sparrow* decision does not distinguish between the Federal and Provincial Crowns and that "the provincial authorities are also responsible for protecting the rights of the Native population": *Ibid.*, at p.106.

Ontario (Attorney-General) v. Bear Island Foundation.[182] In an exceedingly brief judgment for a case of its magnitude, the court holds that "the Crown" breached its fiduciary obligations towards the Teme-Augama Anishnabai people but does not elaborate upon how the Crown breached its obligations or what the extent of those obligations are.

Of particular interest is the court's holding that the breach is currently the subject of negotiations between the parties involved. While the parties involved in the negotiations are not specified by the court, they do not include the Federal Crown. The only parties to the negotiations alluded to by the court are the Teme-Augama Anishnabai and the Province of Ontario. The implications of this statement in *Bear Island*, therefore, is significant for its ramifications upon the understanding of who is bound by the Crown's fiduciary obligations towards Native peoples in Canada.[183]

iii. *Delgamuukw v. R.*

The *Delgamuukw* decision,[184] which is currently under appeal to the British Columbia Court of Appeal, was widely anticipated for its consideration of many prominent aboriginal rights issues, including the Crown's fiduciary duty to Native peoples. The Gitksan and Wet'suwet'en

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[182]Note 3, *supra*. The *Bear Island* case will be discussed further in Ch.V(b), iii, 3, *infra*.

[183]See the further discussion of this topic in the section entitled "Who Is Bound by the Fiduciary Obligation to Aboriginal Peoples?" Ch. V(b), *infra*.

[184]Note 3, *supra*.

hereditary chiefs commenced an action seeking a declaration that they possess jurisdiction over and ownership of their traditional lands. British Columbia maintained that the lands in dispute belong to the Province, which possesses jurisdiction over them. In finding in favour of the Province, McEachern C.J.B.C. addresses many issues of importance to Canadian aboriginal rights jurisprudence. For the purposes of this thesis, our discussion will be restricted to his consideration of the Crown-Native fiduciary relationship.

The lengthy judgment in the case is plagued by numerous judicial errors and fundamental misunderstandings of vital aboriginal rights issues and precedents which negate its jurisprudential value. McEachern C.J.B.C.'s discussion of the Crown's fiduciary duty to Native peoples demonstrates his profound misunderstanding of its basis and substance. The basis of the Crown's fiduciary obligation, according to McEachern C.J.B.C., is:

> ... [T]o permit aboriginal people, but subject to the general law of the province, to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose.[185]

In other words, the extent of the Crown's fiduciary duty to Native peoples is to allow them to use vacant Crown lands, and then only until those lands are required for use by the Crown. He does hold that the Crown must not arbitrarily limit the aboriginal use of vacant Crown land or else will be in breach of its duty.[186] He does not, however, specify the ramifications of such

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[185]*Ibid*., at p.482.

[186]*Ibid*.

a breach upon the Crown.

McEachern C.J.B.C.'s characterization of the aboriginal peoples' right to use vacant Crown land is not at all consistent with fiduciary doctrine. The "fiduciary" right of the aboriginal peoples to use the land, as he characterizes it, is not protected by section 35(1) and is, therefore, not subject to the *Sparrow* justificatory test for any abrogation or limitation of that right. The right may simply be legislated away by the Province at any time, subject only to the provision that such legislation must not arbitrarily limit the aboriginal use of vacant Crown land. Moreover, the Crown's fiduciary duty, as defined by McEachern C.J.B.C., "should be confined to issues which call the honour of the Crown into question with respect to the territory as a whole."[187] Consequently, the Crown's duty is, as in Le Dain J.'s characterization of it in *Guerin* at the Federal Court of Appeal level, "not intended to impose an equitable obligation or duty to deal with the land in a certain manner."[188]

Essentially, then, McEachern C.J.B.C.'s characterization of the Crown's fiduciary duty in *Delgamuukw* is no different that the political trust formulation proffered by Le Dain J. in the Federal Court of Appeal's decision in *Guerin*, which was overturned by the Supreme Court of Canada. The duty is incapable of being enforced since it may be eliminated simply by dedicating vacant Crown land to some use. Its presence in the *Delgamuukw* decision, therefore, is more symbolic than real.

What is interesting about *Delgamuukw*, however, is that it indicates

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[187] *Ibid.*, at p.490.

[188] Refer to note 76, *supra*.

that the Crown's fiduciary duty is a duty of both the Federal and Provincial Crowns. In dismissing the Province's counterclaim, which sought a declaration that the aboriginals' cause of action could seek compensation only from the Federal Crown, McEachern C.J.B.C. holds that since the aboriginals have the Crown's promise that it will permit them to use vacant Crown land and since that promise may only be enforced against the Province due to the operation of section 109 of the *British North America Act, 1867*,[189] the Province is bound by it.[190]

(e) Summary and Conclusions

It may be seen from the cases presented herein that there is no one clear judicial understanding of the nature and extent of the Crown's fiduciary obligation toward Native peoples in Canada which currently exists. Of the cases decided after the first judicial characterization of the Crown's duty in *Guerin*, only *Kruger* and *Sparrow* are able to adequately address the subject matter being dealt with. The majority of the other judgments merely apply Dickson J.'s judgment in *Guerin* in a conservative and restrictive manner without attempting to understand the basis or the actual breadth of his

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[189]Further discussion of the effects of section 109 may be seen in Ch. V(b), iii, *infra*. It should be noted that the *British North America Act, 1867*, following the passage of the *Constitution Act, 1982*, is now known as the *Constitution Act, 1867* -- see section 1 of the *Constitution Act, 1867*. To avoid confusion which may be caused by references to the 1867 Act previous to its name change in 1982, the 1867 Act will be described herein as the *British North America Act, 1867*.

[190]Note 3, *supra*, at p.536.

judgment.

Even where a court attempts to understand the rationale of the *Guerin* decision, as in *Bruno*, the conclusions which follow do not penetrate the literal translation of the judgment. Our earlier analysis of the *Guerin* decision demonstrates that a narrow, or strict, interpretation of its judgments, particularly that of Dickson J., is insufficient to garner a true understanding of the court's formulation of the Crown's obligations to Native peoples. The adoption of such an interpretation has led to the number of judicial decisions which incorrectly hold that the Crown's duty is restricted in its application to situations involving Indian lands, either with or without the necessity of a surrender.

One of the peculiar aspects of the *Guerin* decision is that its judgments detail the grounding of the relationship between the Crown and the Musqueam and the concomitant obligations which it entails without actually discussing the specifics of the relationship. Nevertheless, judicial consideration of fiduciary law within the confines of Native rights has followed *Guerin*'s precedent -- namely, to impose a fiduciary duty upon the Crown in its dealings with aboriginal peoples -- without discussing or detailing the specifics of the Crown's obligation. What is gathered from *Guerin*, then, is that the Crown owes a fiduciary duty to aboriginal peoples, but it is left unclear what effects the existence of this duty has upon the parties directly affected by it.[191]

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[191]Remembering, of course, that the characterization of the Crown's duty by Wilson J. as a trust obligation is grounded, at a macroscopic level, in a land surrender situation and, at a microscopic level, upon the specific terms of the surrender agreed to by the Musqueam. In the absence of the specific situation

Of the judicial considerations of the Crown's duty since *Guerin*, *Sparrow* provides the most insightful analysis of the nature of the duty. Nevertheless, in spite of *Sparrow*'s additions to the judicial understanding of the Crown-Native fiduciary relationship, the judgment is fundamentally similar to *Guerin* and possesses the very same basic flaws. *Sparrow* is akin to *Guerin* in that it also fails to address the question of what is actually encompassed within the Crown's fiduciary duty. While it entrenches the Crown's fiduciary obligations in section 35(1) of the *Constitution Act, 1982* and determines that the Crown's duty must be acted upon purposively -- both of which are significant advances beyond the duty discussed in *Guerin* -- *Sparrow* does not elaborate any further upon the nature of the duty itself.

By not providing any insight into the rationale behind the initial judicial application of fiduciary doctrine to the Crown-Native relationship in *Guerin*, *Sparrow* provides little aid to future cases in which courts will be faced with determining whether the Crown's fiduciary obligation in a particular scenario has been properly fulfilled. The *Bear Island* decision, meanwhile, merely follows the path previously marked out by *Guerin* and *Sparrow*. It illustrates the Supreme Court's comfort with applying fiduciary doctrine to the Crown-Native relationship without explaining what the application of fiduciary law to that relationship entails.

The impact of these judgments concerned with the Crown's duty to Native peoples and the Canadian judiciary's handling of the fiduciary

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which arose in *Guerin*, the Crown owes a general fiduciary duty to aboriginal peoples based upon a number of factors, including entities as diverse as the historical and political interaction between the Crown and its representatives and the aboriginal peoples and the characteristics of aboriginal title.

question has been twofold. The most obvious effect has been to entrench fiduciary law as an important element of Canadian aboriginal rights jurisprudence. However, in securing a place for fiduciary law in the law of aboriginal rights, the judiciary has managed to add an additional, unexplained piece to the aboriginal rights puzzle.

The judiciary's failure to elaborate upon the implications of its finding that the Crown has a fiduciary obligation to the aboriginal peoples is significant. This basic failure of the courts points to the existence of a definite problem which the judiciary is either unwilling or unable to address. This problem revolves around the courts' inability to properly understand or characterize the historic relationship between the Crown and Native peoples in Canada. The ability to understand this historic relationship in its proper conceptual framework is the key to understanding the nature of modern Crown-aboriginal relations and the fiduciary obligations which are an integral part of them.

Both *Guerin* and *Sparrow* acknowledge that the Crown's fiduciary obligation is ultimately rooted in this relationship, which dates from the time of initial British contact[192] in North America. It should be emphasized,

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[192]The word "contact" has been purposely used in place of the more common term "discovery" to describe the meeting of European and aboriginal peoples. This is due to the historical fact that what is now known as Canada was occupied by indigenous peoples who inhabited, hunted, fished, trapped, and farmed the land from time immemorial, well before Europeans were ever aware of the New World's existence or possessed the ability to travel to its shores.

To suggest that any European nation "discovered" North America is to presuppose that the continent had previously been completely uninhabited, or *terra nullius*. In contrast, "contact" suggests "the reciprocity of discovery

however, that the fiduciary relationship between the Crown and Native peoples in Canada is neither rooted in nor created by law, but is merely recognized and protected by law.

Fiduciary relationships exist on two independent, but interconnected planes -- the legal and the extra-legal. The legal plane of fiduciary relationships includes all relationships which are recognized by law as fiduciary. The extra-legal plane includes only "true" fiduciary relationships -- those relationships which are properly recognized by law as fiduciary, as well as other relationships which are fiduciary due to their facts and circumstances, but have yet to be recognized by the law as such. Unfortunately, the distinction between "true" fiduciary relationships and law-created fiduciary relationships is not always recognized. Chapter IV will seek to clarify this distinction in greater detail. In the interim, however, it is sufficient to say that only "true" fiduciary relationships are appropriately classified as fiduciary. Other relationships which have been deemed to be fiduciary by the courts are largely responsible for much of the confusion which presently surrounds fiduciary doctrine.

The independence of these two planes of fiduciary relationships is reflected in the fact that some relationships which are fiduciary on one plane may not be fiduciary on the other. For example, a relationship which is wrongfully characterized by law as fiduciary (*i.e.* merely to facilitate the equitable remedy of tracing) exists as a fiduciary relationship only on the legal

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that followed upon European initiatives of exploration; as surely as Europeans discovered Indians, Indians discovered Europeans": Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest*, (Chapel Hill: University of North Carolina Press, 1975), at p.39.

plane, while a relationship which, by its nature and circumstances, is fiduciary, but has yet to be recognized as such by law (*i.e.* the Crown-Native relationship prior to the *Guerin* decision) exists as a fiduciary relationship only on the extra-legal plane. It is possible, however, for a relationship to be fiduciary on both planes -- as with the Crown-Native relationship after *Guerin*, for example.

Recognition by law does not render any relationship a true fiduciary relationship. True fiduciary relationships may only be classified as such as a result of the facts and circumstances unique to the intercourse between two or more persons or groups. In this sense, true fiduciary relationships are extra-legal. Characterized in this way, it may be seen that a court of law which describes a particular relationship as fiduciary does not transform it into a true fiduciary relationship where no such relationship existed previously. Rather, the courts' description of a true fiduciary relationship as fiduciary means only that the law recognizes the relationship as fiduciary and imparts its protection to it. In accordance with this understanding, it may be seen that the fiduciary relationship between the Crown and aboriginal peoples was not "created" by the Supreme Court in *Guerin*; *Guerin* only marks the first judicial recognition and protection of this historic relationship.

The difference between a duty which is created by law and one which is recognized and affirmed by law is that the former, as a positive creation of law, relies upon the law for its existence and vitality. The latter, on the other hand, is merely a positive affirmation of a pre-existing duty. As such, it does not depend upon law for its existence, although its existence without affirmation by law is then not a legal one. Where the latter does depend

upon law is for its implementation and protection against competing interests by legal mechanisms such as courts.[193]

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[193]See, for example, the judgment of Marshall C.J. in *Johnson and Graham's Lessee v. M'Intosh*, 8 Wheat. 541 (U.S. 1823) at pp.593, 605:

> If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages ... still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. ... The plaintiffs do not exhibit a title which can be sustained in the courts of the United States.

In "The Concept of Native Title," (1974), 24 *U.T.L.J.* 1, J.C. Smith discusses this very same point (at p.13):

> The courts have generally ... referred to native title within the legal system of the dominant society, as a communally held 'usufructuary' interest which is a burden on the legal estate of the crown and is inalienable except to the crown.
>
> The legal effect of these rulings is that, vis à vis the crown or government of the dominant society, the servient society has a legal claim to the land. Vis à vis the members of the dominant society, it does not. The rights of the servient society are not in rem. The courts thus have recognized the property relation as existing between the dominant and servient societies, but have also

The ability of the Crown to alter the nature and extent of any pre-existing right belonging to the aboriginal peoples or any pre-existing duty owed to them by the Crown which is merely recognized or affirmed by law is less than what it would possess if the right or duty had been created by law since, in the former situation, the right or duty exists independently of law. Whereas the law, in certain circumstances, is not obligated to recognize a pre-existing, non-legal duty, in other situations, such as with the Crown-Native relationship, the law must recognize the pre-existing duty due to the nature and origins of the relationship and law's obligation to protect it, as expressed by fiduciary doctrine.

The nature and origins of the fiduciary relationship between the Crown and Native peoples date back well over three hundred years in the historical intercourse between the groups. It is derived from a number of historical, political, social, and legal events and occurrences which date from the time of Contact. The Crown's fiduciary obligation is rooted primarily in

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> recognized that this property relation has not been incorporated into the property system of the dominant society so as to give the servient society property rights against everyone in the legal system.

Refer also to *Mabo v. Queensland*, note 7, *supra*, at p.59, where Brennan J. states that:

> The common law cannot enforce as a proprietary interest the rights of a putative alienee whose title is not created either under a law which was enforceable against the putative alienor at the time of the alienation and thereafter until the change in sovereignty or under the common law.

See, in addition, the discussion of the inherent rights approach to aboriginal rights in Canada in Asch and Macklem, "Aboriginal Right and Canadian Sovereignty: An Essay on *R. v. Sparrow*," note 137, *supra*.

the totality of its relationship with the aboriginal peoples, but it may also be accounted for in a number of documentable events.

Some of the events which give rise to the Crown's fiduciary responsibilities include: the reciprocally-enriching, interdependent relationship between the Crown and aboriginal peoples characterized by the recognition of the independence of its actors, mutual respect, need, and political expediency (especially in the immediate post-Contact period);[194] the military and political alliances forged between the Crown and aboriginal peoples; the ongoing process of treaty negotiations; the *Royal Proclamation of 1761*[195] and the *Royal Proclamation of 1763*,[196] which reflect the Crown's unilateral acceptance of a fiduciary responsibility towards the Native

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[194]There are a wealth of sources available which document in detail the interdependency of the relationship between the British and aboriginal peoples in North America. One fine, legally-based account which focuses upon the relationship of the Iroquois with the British and French from contact to the mid-Eighteenth Century is John D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia*, (Ph.D. Thesis, Cambridge University, 1985, reprinted, Saskatoon: University of Saskatchewan Native Law Centre, 1985). A useful historical accompaniment to Hurley's thesis is Francis Jennings, *The Ambiguous Iroquois Empire*, (New York: W.W. Norton, 1984). See also Johnston, note 5, *supra*, at p.308.

Reproductions of some accounts of particular historical events may be seen in Virgil J. Voger, ed, *This Country Was Ours: A Documentary History of the American Indian*, (New York: Harper & Row, 1972). See also Slattery, note 2, *supra*, at pp.753-755; note 118, *supra*, at pp.271-272.

[195]*Order of the King in Council on a Report of the Lords of Trade*, 23 November 1761, in Edmund Bailey O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, VII, (Albany: Weed, Parsons, & Co., 1856-1861), at p.472.

[196]Note 55, *supra*.

peoples;[197] the assertion of this fiduciary responsibility through section 91(24) of the *British North America Act, 1867*; the promulgation of specific legislation to govern aboriginal peoples which eventually became consolidated as the *Indian Act* in 1876,[198] and; section 35(1) of the *Constitution Act, 1982*.

In short, the Crown's fiduciary duty towards aboriginal peoples is a

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[197] Note also the conclusions of the *Report of the Select Committee on Aborigines, 1837*, Volume I, Part II, (Imperial Blue Book, 1837 nr VII.425, Facsimile Reprint, C. Struik (Pty) Ltd., Cape Town, 1966), at pp.75-76, where it was said that:

> This, then, appears to be the moment for the nation to declare, that with all its desire to give encouragement to emigration, and to find a soil to which our surplus population may retreat, it will tolerate no scheme which implies violence or fraud in taking possession of such a territory; that it will no longer subject itself to the guilt of conniving at oppression, and that it will take upon itself the task of defending those who are too weak and too ignorant to defend themselves.

This conclusion is based upon the Committee's positive adoption of the sentiments included in a dispatch from Sir G. Murray dated 25 January 1830:

> Whatever may have been the reasons which have hitherto recommended an adherence to the present system, I am satisfied that it ought not to be persisted in for the future; and that so enlarged a view of the nature of our connexions with the Indian tribes should be taken as may lead to the adoption of proper measures for their future preservations and improvement; whilst, at the same time, the obligations of moral duty and sound policy should not be lost sight of.

[198] S.C., 1876, c.18.

product of historic relationships, the actions of the Crown and its representatives, British and Canadian governmental practice, treaties, and legislative recognition.[199] It cannot be traced to one particular point in time. Therefore, while the Crown's fiduciary duty may not have been recognized by Canadian courts prior to the *Guerin* decision, that does not imply that the duty did not exist prior to *Guerin*.

Throughout this chapter, the judicial expression of the Crown's fiduciary duty has been shown to be a very limited and incomplete one in need of elaboration. To remedy this fundamental deficiency, our discussion will now turn to an examination of the general principles of the law of fiduciaries from which the *sui generis* nature of the Crown-Native fiduciary relationship may be more adequately understood.

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[199]See Slattery, note 118, *supra*, at pp.271-272:

> This relationship is grounded in historical practices that emerged from dealings between the British Crown and Aboriginal nations in eastern North America, especially during the formative period extending from the founding of the colonies in the early 1600s to the fall of New France in 1760. By the end of this period, the principles underlying these practices had crystallized as part of the basic constitutional law governing the colonies, and were reflected in the Royal Proclamation issued by the British Crown on October 7, 1763.

Due to the fact that the Crown's fiduciary obligation may be recognized in the totality of its relationship with the aboriginal peoples or in specific events or circumstances, a claim against the Crown for a breach of fiduciary obligation may be based either on the totality of the events giving rise to the Crown's general fiduciary obligation or upon the duty arising out of any one particular event or occurrence.

IV. GENERAL PRINCIPLES OF FIDUCIARY DOCTRINE

Fiduciary doctrine is a rather elusive entity within the realm of law. Due to its equitable origins, fiduciary doctrine is not beset with steadfast rules and precedents. For this reason, it has often been the subject of misunderstanding and misapplication by courts and commentators since its English common law origins in the celebrated case of *Keech v. Sanford*.[200] As Robert Cooter and Bradley Freedman comment in their recent article "The Fiduciary Relationship: Its Economic Character and Legal Consequences":

> Fiduciary relationships have occupied a significant body of Anglo-American law and jurisprudence for over 250 years, yet the precise nature of the fiduciary relationship remains a source of confusion and dispute. Legal theorists and practitioners have failed to define precisely when such a relationship exists, exactly what constitutes a violation of this relationship, and the legal consequences generated by such a violation.[201]

Ironically, despite the general confusion surrounding fiduciary doctrine, it has experienced a rapid growth in use by litigants, judges, and legal academics. As Mark Ellis states, "It is somewhat ironic that this area -- one of the most rapidly expanding and powerful areas of law -- is probably

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[200](1726), 25 E.R. 223 (Ch.).

[201]Robert Cooter and Bradley J. Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences," (1991), 66 *N.Y.U. L. Rev.* 1045, at pp.1045-1046. See also Finn (1989), note 6, *supra*, at p.24: "It is striking that a principle so long standing and so widely accepted should be the subject of the uncertainty that now prevails."

one of the least understood."[202] As a result of the fundamental lack of understanding of fiduciary doctrine, fiduciary arguments have become a "catch-all" remedy in law: if all other claims are meritless or there exists no other viable cause of action, a claim of breach of fiduciary duty is always viewed as a possibility.[203] Lambert J.A. warns about the inherent danger of using fiduciary doctrine in this manner in *Burns v. Kelly Peters & Associates Ltd.*:

> The danger, of course, with such a flexible remedy, is that it should be used as a catch-all for cases which offend against some of the more exacting standards of commercial morality. So the extra flexibility should promote a sense of caution in determining whether the fiduciary relationship exists. Or, as Viscount Haldane said in *Nocton v. Ashburton*, at p.596: "... the special relationship must ... be clearly shown to exist ...".[204]

The paradoxical increase in the use of fiduciary arguments despite the lack of understanding of fiduciary principles has not escaped notice by the

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[202]Mark V. Ellis, *Fiduciary Duties in Canada*, (Toronto: De Boo, 1988), at p.1-8.

[203]In fact, one commentator has gone so far as to suggest that the fiduciary argument is one that every litigant should consider: see Mark D. Talbott, "Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies," (1959), 20 *Ohio St. L.J.* 320.

[204](1988), 41 D.L.R. (4th) 577 (B.C.C.A.), at p.599. See also Finn (1989), note 6, *supra*, at p.10 (discussing in particular the fiduciary's duty of disclosure), and, more generally, at pp.24-25: "A compliant judiciary, particularly in some North American jurisdictions, has been prepared on occasion to use the fiduciary principle to provide desired solutions in situations where the law is otherwise deficient or is perceived to be so."

judiciary. In *Girardet v. Crease & Co.*, Southin J. notes that 'The word "fiduciary" is flung around now as it if applied to all breaches of duty by solicitors, directors of companies and so forth.'[205] In one of the Supreme Court of Canada's most recent considerations of fiduciary doctrine in *LAC Minerals v. International Corona Resources Ltd.*, La Forest J. comments that "There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship."[206]

The lack of understanding of fiduciary doctrine is partly to blame for its present misuse. Moreover, due to the perceived absence of strict regulations regarding their application, fiduciary principles are often invoked in inappropriate areas or in places where they simply do not belong:

> The vagueness of the fiduciary principle has caused many of the rules themselves to be vague or logically unsound, leading to applications which, viewed from a more general perspective, do not sit well with the fiduciary principle as a whole. Further, the interrelationships between the various rules result in their application across the natural boundaries within which they were intended to be applied.[207]

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[205](1987), 11 B.C.L.R. (2d) 361 (S.C.), at p.362.

[206]Note 46, *supra*, at p.26. Refer also to Finn (1977), note 6, *supra*, at p.1:

> ... [T]he term "fiduciary" is itself one of the most ill-defined, if not altogether misleading terms in our law. Yet it retains a large currency being often used as though it were full of known meaning and despite judicial warnings to the contrary.

[207]Shepherd, note 6, *supra*, at p.8.

What has often purported to be an application of fiduciary principles by the courts has too often been an amalgamation of unrelated rules, some of which may be a part of fiduciary doctrine, but which, on the whole, result in the improper description of a relationship as fiduciary when it actually has little or no resemblance to a fiduciary relationship at all.[208]

As if to hide its lack of understanding of fiduciary doctrine, the judiciary has been prone to discuss fiduciary law in a perfunctory manner. This curt and superficial approach has been routinely accepted in spite of its obvious deficiencies.[209] The legacy of this judicial tendency is the confusion surrounding fiduciary doctrine which currently exists.[210]

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[208]See the discussion of *Chase Manhattan Bank v. Israel British Bank*, note 40, *supra*, and *Goodbody v. Bank of Montreal*, note 40, *supra*, in Ch. IV(a), *infra*.

[209]Including the absence of any discussion or demonstrated understanding of what makes a relationship fiduciary. Although the common law's case-by-case approach may be appropriate for many areas of law, it is untenable for fiduciary law. In order to properly describe a relationship as fiduciary, with all that that description entails, the basic principles and precepts of fiduciary doctrine must first be understood *in toto*, not on a piecemeal basis. Fiduciary principles cannot be properly implemented unless they are understood in a general fashion so that they may be applied to the specifics of a particular relationship when their application is warranted.

[210]See Hon. J.R. Maurice Gautreau, "Demystifying the Fiduciary Mystique," (1989), 68 *Can. Bar Rev.* 1, at p.1: "A legal paraleipsis [*sic*] has lurked about the courts when it comes to stating what constitutes a fiduciary relationship."

Gautreau's sentiment is consistent with the explanation given by Eileen Gillese in "Fiduciary Relations And Their Impact on Business and Commerce," Unpublished paper delivered at *Insight* Conference on "Trusts

(a) The Wrongful Application of Fiduciary Doctrine

The judiciary's misunderstanding of fiduciary concepts has generally resulted in its failure to recognize its wrongful application of fiduciary law. In fact, judges have misapplied fiduciary law in a variety of instances: for remedial purposes in instances where there has been no demonstrated existence of a fiduciary relationship; where the demonstration of a fiduciary relationship would prove impossible, or; where heads of obligation exist independently of the fiducial relation.

An example of the latter instance may be seen in *Chase Manhattan Bank v. Israel British Bank*.[211] The plaintiff had transferred two million dollars to the defendant's account. Due to a clerical error, a second payment in the same amount was made by the plaintiff to the defendant that same day. Upon discovering this error, the plaintiff gave instructions to stop payment, but the instructions were not received quickly enough. The defendant bank

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and Fiduciary Relations in Commercial Transactions," April 14, 1988, where she explains the lack of attempts to understand or define the fiduciary relation in the following fashion (at p.7):

> ... [I]n times gone by we really were not troubled by the absence of a coherent definition. When pushed to answer the question of who a fiduciary is, we simply rattled off the standard categories of fiduciaries: trustee-beneficiary; agent-principle [*sic*]; director-company; guardian-ward and solicitor-client. The traditional approach, in other words, was that although we could not define "the beast", we could recognize one when we saw it so lack of a definition was not a problem.

[211] Note 40, *supra*.

was put into receivership shortly thereafter.

Since the plaintiff's money was indistinguishable from the other monies belonging to the defendant, it could not be recovered through common law remedies. As Donovan Waters explains, "Identifiability ceases at law ... when the claimant's asset finds its way as money into a fund which includes both the converted property of the claimant and the moneys of another."[212] The only method of recovering the mistakenly-forwarded funds was through the equitable remedy of tracing, which allows for the following of money by means beyond those available through common law remedies: "The equitable remedies presuppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund."[213]

To trace funds in Equity, a claimant "has traditionally been required to show that the original wrongful act with his property was perpetrated by a person who stood in a fiduciary relationship to himself."[214] If such a relationship is found to exist, the funds may then be traced as an "equitable

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[212]Waters, note 106, *supra*, at p.1040.

[213]*Re Diplock*, [1948] Ch. 465, at p.521 (per Lord Greene M.R.), aff'd (*sub nom. Min. of Health v. Simpson*), [1951] A.C. 251 (H.L.). See also Waters, note 106, *supra*, at p.1037.

[214]Waters, note 106, *supra*, at p.1043. This traditional requirement, however, is based solely upon the existence of the fiduciary relationship as the traditional basis of the jurisdiction of Equity prior to the *Judicature Acts*: see Waters, note 106, *supra*, at p.1044. See also note 221, *infra*, and its accompanying text.

proprietary interest"[215] belonging to the claimant.

In finding for the plaintiff, Goulding J. held that a fiduciary relationship existed between the parties as a result of the incorrect payment of the money to the defendant. Before the mistaken payment, there was no existing fiduciary relationship between the parties. Nevertheless, in arriving at his conclusion, Goulding J. determines that to allow for the tracing of the mistakenly-forwarded funds, it is necessary to find a "continuing right of property recognised in equity or what I think to be its concomitant, 'a fiduciary or quasi-fiduciary relationship'."[216]

Similarly, in *Goodbody v. Bank of Montreal*,[217] the Ontario High Court of Justice declared that the bank of a thief had a fiduciary relationship with the thief's victim to enable the tracing of proceeds from stolen property. A number of share warrants of a company were alleged to have been stolen from the plaintiff's premises. The defendant, Lester, claimed to be a *bona fide* purchaser of the warrants, having purchased them from another individual while innocent of any defects in their title.[218] After selling the warrants, Lester opened a bank account (under an assumed name) and deposited the proceeds from the sale of some of the stolen shares in it.

In arriving at its conclusion, the court declared the bank to be a

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[215] *Re Diplock*, note 213, *supra*, at p.530.

[216] *Chase Manhattan*, note 40, *supra*, at p.119, based upon Goulding J.'s adherence to the precedent established in *Re Diplock*, note 213, *supra*.

[217] Note 40, *supra*.

[218] Although, at p.336, the court describes his explanation as "highly improbable."

fiduciary for the plaintiffs to enable the tracing of the proceeds from the stolen share warrants. There is no discussion of the fiduciary nature of the relationship. As Lacourciere J. explains for the court, "On the authority of *Sinclair v. Brougham et al.*, [1914] A.C. 398 ... the Court will establish a fiduciary relationship to enable the plaintiffs to follow their property in equity into Lester's bank account."[219]

As will become more evident after our consideration of fiduciary characteristics and principles, in neither of these cases was the imposition of fiduciary relationships appropriate in the respective contexts. Neither of them could be properly classified as "true" fiduciary relationships. Indeed, there was nothing "fiduciary" about either of them. The inference from both the *Chase Manhattan* and *Goodbody* decisions is that the fiduciary relationships were imposed by the courts merely to allow for the tracing of funds. In attempting to right perceived wrongs, the courts availed themselves of whatever remedial action they could possibly find so that justice would be done. Clearly, these two cases are examples of fitting a round peg into a square hole -- the round peg may be made to fit into the square hole, but it does not truly belong there.

The more appropriate resolution of these cases would have been to find for the plaintiffs on the basis of unjust enrichment. As Waters explains, the *Chase Manhattan* and *Goodbody* type of "*ad hoc* fiduciary relationship for all intents and purposes is a pseudonym for an unjust enrichment

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[219]*Ibid.*, at p.339.

situation."[220] Since unjust enrichment is now recognized as an independent head of obligation by the Supreme Court of Canada,[221] there is no longer a need for the judicial "creation" of fiduciary relationships to allow for the equitable tracing of funds where no such relationship actually exists.[222]

If fiduciary law is to have any meaningful existence of its own, it must be confined to its own sphere. The fiduciary law "peg" has its own hole to fit into. This "hole" needs to be more adequately understood so that the fiduciary peg will only find its way into its own hole, not any hole which it may happen to fit into given the right amount of persuasion.[223]

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[220]Waters, note 106, *supra*, at p.1045.

[221]See *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257 (S.C.C.) and the affirmation of its principles in *Sorochan v. Sorochan* (1986), 29 D.L.R. (4th) 1 (S.C.C.), *Hunter Engineering Co. v. Syncrude Canada Ltd.* (1989), 57 D.L.R. (4th) 321 (S.C.C.), and *Rawluk v. Rawluk* (1990), 65 D.L.R. (4th) 161 (S.C.C.). As Waters note 106, *supra*, explains at p.1045: "... [T]he circuitry of *Chase Manhattan* is not needed in common law Canada, and with it has gone the need for a fiduciary relationship." See also Waters, note 106, *supra*, at pp.1044-1045; Gautreau, note 210, *supra*, at p.6.

[222]Although the fiduciary relationship, where it legitimately exists, may still be invoked to allow for the equitable tracing of funds. See Gautreau, note 210, *supra*, at p.6; Waters, note 106, *supra*, at p.1045.

[223]See *Fonthill Lumber v. Bank of Montreal*, note 40, *supra*, and the court's finding of a "transmitted fiduciary obligation" of the bank based upon its knowledge of a breach of trust by one of its depositors. Refer as well to the discussion of "Utility Theory," Ch. IV(c), ii, 6, *infra*.

(b) The Historic Roots of Fiduciary Law[224]

The modern law of fiduciaries derives it existence from its origins in public policy. Fiduciary doctrine is premised upon the desire to protect certain types of relationships which are deemed to be socially important and in need of preservation.[225] The common element to these protected relationships is the trust (in the generic sense) placed by one person in another within a given context.

It is this reposing of trust by one person in the honesty, integrity, and fidelity of another and the reliance of the former upon the latter's care of that trust which societies have attempted to protect through the promulgation of fiduciary and quasi-fiduciary laws, including what has evolved into the modern law of Trusts.[226] Fiduciary and quasi-fiduciary laws seek to ensure

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[224]The history referred to within this section is not intended to be comprehensive. It focuses only upon the desire for societies to protect certain relationships through legal means and the resultant promulgation of fiduciary and quasi-fiduciary laws to achieve those ends. For a more particular history of fiduciary law which examines its legal genesis in the courts of England see Shepherd, note 6, *supra*, at pp.12-20.

[225]As Finn (1989), note 6, *supra*, explains, at p.26:

> It has been used, and is demonstrably used, to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society. And it is used to protect interests, both personal and economic, which a society is perceived to deem valuable.

[226]See *Nocton v. Ashburton*, [1914] A.C. 932 (H.L.),at p.963 (per Lord Dunedin): "... [T]here was a jurisdiction in equity to keep persons in a fiduciary capacity up to their duty." See also *Canson Enterprises Ltd. v.*

the equitableness of the dealings between the parties to these relationships which, by their nature, are particularly susceptible to fraud, undue influence, and other activities which run afoul of public policy:

> It is 'public policy', or their [judges'] view of it, which justifies this [legal] jurisdiction. It is against public policy to abuse the trust of another. The interests of the community are furthered by maintaining the integrity of trusting relationships. The judges are very confident in the legitimacy of this policy and so have not felt pressed to associate their work with some sort of autonomous 'legal principle'.[227]

The reason for the creation of fiduciary principles is the necessity for interdependence in human affairs. As J.C. Shepherd describes it, "the law of fiduciaries is the legal system's attempt to recognize the more blatant abuses of the trust we place in each other."[228]

Boughton & Co., note 37, *supra*, at p.544 (per McLachlin J.).

[227]Flannigan, note 6, *supra*, at pp.321-322. See also Ernest Vinter, *A Treatise on the History and Law of Fiduciary Relationship and Resulting Trusts*, Third Edition, (Cambridge: W. Heffer & Sons, 1955), at p.2:

> The Court of Chancery has, when the interests of the public generally were concerned ... entertained jurisdiction on grounds of public policy, irrespective of the particular circumstances of the case, to declare void transactions which have taken place under circumstances where, independently of other considerations, from the condition of the parties and the difficulty which must exist of obtaining positive evidence as to the fairness of the transaction, they are particularly open to fraud and undue influence.

[228]Shepherd, note 6, *supra*, Preface, at p.v.

There are numerous relations between persons within any given society which entail some form of dependence or potential for one person to affect the interests of another, whether positively or negatively. These interrelationships take a variety of forms. Not all of them involve the reposing of trust, however. Moreover, they are not all fiduciary in nature. The potential for one person's interest to be affected by the actions of another varies in degree according to a number of criteria. These criteria include, among other things, the nature and scope of the relationship, and the degree of trust reposed by one person in another.[229]

In simple terms, fiduciary and quasi-fiduciary laws which have existed over time all seek to monitor the relationship between the entrustor and the trustee. In other words, these laws regulate the intercourse between those who give their trust and those who accept and care for that trust:

> ... [F]iduciary law's concern is to impose standards of acceptable conduct on one party to a relationship for the benefit of the other where the one has a responsibility for the preservations of the other's interests.[230]

The history of fiduciary law may be traced back to Roman law. Certain relations in Roman society -- such as those of husband and wife, physician and patient, guardian and ward -- had rules imposed upon them to regulate their interaction. Other relationships were regulated as well. Noblemen and

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[229]These criteria will be discussed in greater detail in the later sections entitled "Some Theoretical Definitions of Fiduciary Relations," Ch. IV(c), ii, *infra*, and "A New Theory of Fiduciary Doctrine," Ch. IV(c), iii, *infra*.

[230]Finn (1989), note 6, *supra*, at p.2.

capitalists were prohibited from carrying on retail businesses. Tutors could not transact with their pupils where a question was raised as to profit accruing to the tutors or their families.[231] Certain relationships were even regulated by canon law. For example, clerks in orders (clerics) could not engage in trade under canon law.[232]

The roots of the fiduciary obligation in English common law are derived from Equity.[233] Reasons of public policy often initiated or governed the actions of Equity. As with the rise of regulations governing fiduciary and quasi-fiduciary relationships in Roman law, Equity developed its own law of fiduciaries which governed the interdependent relationships between persons in English society. The primary objective of these laws was to ensure the fairness of dealings between individuals which, by their nature, were particularly susceptible to fraud, undue influence, and other unacceptable dealings:

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[231]Unless such a transaction was done without risk and by public auction. In the absence of such a scenario, transactions between tutors and pupils were valid only where the consent of a co-tutor or 'curator named "ad hoc"' was obtained. See Vinter, note 227, *supra*, at p.3.

[232]*Ibid*.

[233]A background on the origins and history of Equity has been sufficiently dealt with by others and will not be attempted here. For more information on the background of Equity, see, for example, D.M. Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery*, (Cambridge: Cambridge University Press, 1890); G.B. Adams, "The Origins of English Equity," (1916), 16 *Columbia L. Rev.* 87; Adams, "The Continuity of English Equity," (1916-17), 26 *Yale L.J.* 550; Ashburner, note 37, *supra*; 16 *Halsbury's Laws of England*, Fourth Edition, (London: Butterworth & Co., 1976.), at pp.807-812 (para.1201-1207); Sir William S. Holdsworth, *A History of English Law*, 16 Vols., (London: Methuen, 1964).

> ... [T]he principle of public policy thus applied by the Court was that, if such transactions were permitted to stand, it might afford an inlet to fraud or unfair or improper practices without the means of their being detected, or might enable one of the parties to obtain an advantage, even unknowingly, which he ought not to be permitted to retain. Thus the Court of Chancery would not permit any person standing in a fiduciary relation, or who from the relation in which he stood to another is capable of exercising undue influence over his mind, to derive profit from any transaction which took place during the continuance of such fiduciary character, in the one case, or which may be supposed to have taken place by reason of such opportunity of such undue influence, in the other.[234]

With its basis in public policy and characterized by principles of flexibility, adaptability, fairness, and reason, Equity was quite distinct from the harsh, rule-oriented, and inflexible common law. Therefore, while similar issues arose in both jurisdictions, the results would often be quite different:

> The Court of Chancery and the courts of common law dealt with precisely the same controversies; but they decided them in many cases on contradictory principles. The courts of law, in the exercise of their jurisdiction, ignored, not only the doctrines, but also the existence of the Court of Chancery.[235]

This dissimilarity of law and Equity proved to be problematic upon the fusion

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[234]Vinter, note 227, *supra*, at p.2.

[235]Ashburner, note 37, *supra*, at p.12.

of their jurisdictions under the *Judicature Acts*.[236]

The *Judicature Acts* mandated more than merely the merger of legal and equitable jurisdictions; they forced the merger of two very different strands of thought. Those who were accustomed to the rigid, rule-oriented procedure of the common law were often befuddled by the practice of Equity. Due to its non-adherence to the form and structure so characteristic of the common law, Equity was sometimes viewed as being bereft of rules or procedure.[237] Equity was often viewed as a system of uncertainty whose decisions were disparagingly said to have varied with the length of the Chancellor's foot.[238]

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[236]See note 39, *supra*.

[237]In fact, the courts of Chancery was viewed by many as being so devoid of any semblance of rationality or procedure that the phrase "in Chancery" soon became a common manner of describing a "helpless or embarrassing position." The *Oxford English Dictionary*, Second Edition, (Oxford: Clarendon Press, 1989), Volume III, at p.13, describes this understanding of Chancery as follows:

> 7. *Pugilism*. [From the tenacity and absolute control with which the Court of Chancery holds anything, and the certainty of cost and loss to property 'in Chancery'.] A slang term for the position of the head when held under the opponent's left arm to be pommelled severely, the victim meanwhile being unable to retaliate effectively; hence sometimes figuratively used of an awkward fix or predicament.

[238]For a modern contrasting view, see *Steadman v. Steadman*, [1976] A.C. 536 (H.L.), at p.560, per Lord Simon: "... [T]here seems to have been a hardening of Equity's arteries, an increasing technicality until quite recent times. The Chancellor's foot evolves into the Vice-Chancellor's footrule."

The dissimilarity in the practices and procedures of law and Equity may well be somewhat responsible for the present, confused state of fiduciary law. In the aftermath of the intertwining of legal and equitable jurisdictions, the law attempted to impart its sense of order to fiduciary doctrine by imbuing it with precise definitions to facilitate its understanding and application by the judiciary. This attempt proved to be fruitless. The failure of such taxonomic endeavours stems from the foundation of equitable doctrines in public policy and principles of fairness, intangible qualities which have proven to be quite resistant to precise definition.[239]

Note also the criticism of Equity by the renowned author Charles Dickens, who once worked as a shorthand reporter in the Court of Chancery and whose criticism may be traced to his position as a plaintiff in five successful Chancery actions to restrain breaches of copyright in which he failed to recover his costs from the defendants. Dickens once described the Court of Chancery as a place:

> ... [W]hich has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give -- who does not often give -- the warning, 'Suffer any wrong that can be done you, rather than come here!'

Dickens, *Bleak House,* Norman Page, ed., (Middlesex: Penguin, 1984), at p.51. See also Sir William S. Holdsworth, *Charles Dickens as Legal Historian,* (New Haven: Yale University Press, 1929).

[239]See note 45, *supra,* and its accompanying text.

The confusion and uncertainty which presently surrounds the law of fiduciaries may also be partially due to the obfuscation of fiduciary doctrine over time by its incorrect and oftentimes confused application by judges who were unfamiliar with its principles or attempted to ignore its equitable basis. Later adherence to the precedents created by these inadequately-prepared judges only served to heighten this confusion, which remains to the present day.

The law of fiduciaries, while possessing certain principles of general applicability, may only be properly decided within a particular context. Since no two cases share identical fact situations, fiduciary principles must be implemented on a case-by-case basis to reflect the *sui generis* nature of individual relationships. As La Forest J. states in *Canson Enterprises Ltd. v. Boughton & Co.*:

> ... [E]quity cannot be rigidly applied. Its doctrines must be attuned to different circumstances. Quite obviously not all fiduciary obligations are the same. It would be wholly inappropriate to interpret equitable doctrines so technically as to displace common law rules that achieve substantial justice in areas of common concern, thereby leading to harsh and inequitable results.[240]

The general principles of fiduciary law, however, govern the application of fiduciary principles -- in conjunction with the particulars of the specific fact situation -- in all circumstances.

Although the malleability and situation-specificity of fiduciary doctrine

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[240]*Canson Enterprises v. Boughton & Co.*, note 37, *supra*, at p.588.

are among its greatest assets, they are simultaneously among its greatest liabilities. The wrongful application of fiduciary doctrine illustrated in the *Chase Manhattan* and *Goodbody* cases is emblematic of the confusion and uncertainty which presently surrounds the law of fiduciaries. While the situation-specificity of fiduciary doctrine prevents the fiduciary relation from being defined in the absence of context, it does not entail the inability to understand fiduciary principles in a general fashion. By examining fiduciary principles in this manner, they may then be properly applied to specific situations without sacrificing their inherent flexibility.

The two-step application of fiduciary doctrine becomes important within this context.[241] Accordingly, the following three sections of this thesis will mirror this two-step approach. The first section will document the first step of the approach -- the determination of whether a relationship is fiduciary -- by focusing upon what constitutes a fiduciary relation. The third section follows the second step of the process -- the application of fiduciary principles and guidelines in the face of a breach of fiduciary duty -- by discussing the general principles which apply to a relationship which is deemed to be fiduciary. In the midst of these two sections, a new theory of fiduciary doctrine is proposed which acts as a transition between the two steps of the process.

(c) What Constitutes a Fiduciary Relation?

A number of judicial and academic commentators have attempted to

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[241]Refer back to the initial discussion of this process in Ch. I, *supra*.

describe or define the fiduciary relation. These commentators may be placed within three broad categories or schools of thought: (1) the *concretists* ; (2) the *skeptics*, and; (3) the *contextualists*.

The *concretists* are those who attempt to precisely or absolutely define the fiduciary relation. The adherents of this school of thought are generally those who are uncomfortable with the imprecision of equitable doctrines and wish to concretize the principles of fiduciary doctrine so that it may be more easily understood. *Concretists*, then, attempt to achieve an understanding of fiduciary doctrine through taxonomy. A noteworthy *concretist* is Ernest Vinter, whose book *Fiduciary Relationships and Resulting Trusts* is premised upon his desire to concretize fiduciary doctrine:

> ... [T]here will always be borderland cases where the most careful consideration of the authorities may be required to determine whether the relief will be given or not. Certainty of the law is a desideratum, and the reduction of the borderland to as narrow a tract as possible is one of the aims of this book.[242]

The second category, the *skeptics*, conclude that it is impossible to define the fiduciary relation in a general fashion. *Skeptics* are perhaps more varied than those who inhabit any of these three schools of thought. While they commonly believe in the impossibility of defining the fiduciary relation, they do not agree upon the reason why. Some argue that the fiduciary relation cannot be generally defined, but may be defined by classes, for which

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[242]Vinter, note 227, *supra*, at p.369.

particular rules may be devised.[243] Others suggest that the fiduciary relation cannot be defined at all.[244] Still others insist that the fiduciary relationship cannot be defined because it is an illogical creature created by loosely tied or entirely unrelated principles which have been improperly grouped together for the sake of jurisprudential convenience.[245]

The *contextualists,* while sufficiently different to comprise a separate category of their own, are, in many ways, similar to the *skeptics.* Like the *skeptics, contextualists* believe that the fiduciary relation cannot be defined in a general fashion. What the *contextualists* do believe is that it is possible to describe and understand the general principles underpinning fiduciary doctrine.[246] These general principles come into play when specific relationships or situations are "plugged in" to them at a later date by the courts. Of these three schools of thought, the *contextualist* school is most

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[243]Such as L.S. Sealy, whose article "Fiduciary Relationships," [1962] *Camb. L.J.* 69 states, at p.73 that: "It is obvious that we cannot proceed any further in our search for a general definition of fiduciary relationships. We must define them class by class, and find out the rule or rules which govern each class."

[244]Such as Stanley M. Beck, who writes in "The Quickening of Fiduciary Obligation," (1975), 53 *Can. Bar Rev.* 771, at p.781: "... [C]lear definition is simply not possible, or desirable, when one is dealing with the interaction of human conduct and an infinite variety of ... situations."

[245]For example, Finn (1977), note 6, *supra,* at p.1; L.S. Sealy, note 243, *supra,* at p.73; Sealy, "Some Principles of Fiduciary Obligation," [1963] *Camb. L.J.* 119; Talbott, note 203, *supra,* at p.324.

[246]The fiduciary theory proposed in this thesis -- which is outlined in the section entitled "A New Theory of Fiduciary Doctrine," Ch. IV(c) iii, *infra* -- belongs to the *contextualist* school of thought.

closely related to the equitable foundation upon which fiduciary doctrine is based.

The situation-specificity of fiduciary doctrine is a requisite part of the doctrine's theoretical basis. The determination of whether a particular relationship is fiduciary -- the first stage of the two-step process -- is a matter of fact which may be determined only by reference to the particular circumstances in question.[247] Once a relationship is found to be fiduciary, the determination of the nature and extent of the relationship and the principles and guidelines which apply to it -- or the second step -- is a question of law. It is, therefore, incorrect to state that there are no benefits to be obtained from a general understanding of fiduciary doctrine as long as this general understanding is properly augmented by the specifics of the particular situation being examined.

The determination of fact in the first step of the fiduciary process is made by referring to the general understanding of fiduciary characteristics and principles encompassed within the second step. This determination of fact must not be restricted to such generalizations, however, due to the open-endedness of fiduciary doctrine.[248] In other words, while the determination

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[247]*International Corona Resources Ltd. v. Lac Minerals Ltd.* (1988), 62 O.R. (2d) 1 (Ont. C.A.), at p.44. See also at p.46: "Whether or not fiduciary obligations arise depends on the course of dealings between the parties and the proof of facts which give rise to such obligations." See also Waters, note 106, *supra*, at p.407; Ronald G. Slaght, "Proving a Breach of Fiduciary Duty," in *Fiduciary Duties*, Law Society of Upper Canada Special Lectures, 1990, (Toronto: De Boo, 1991), at p.38.

[248]See the further discussion of this point in the section entitled "The Categories of Fiduciary Relationships Are Never Closed," Ch. IV(c), iv, 2, *infra*.

of whether a relationship is fiduciary may be made by reference to general principles and understandings of what constitutes a fiduciary relation, the categories of relationship which are fiduciary must not be restricted to the limits of those understandings.[249]

i. The Strict Definition of a Fiduciary Relationship

The strict definition of the word "fiduciary" is a good place from which to commence an examination of the general understandings of the concept and its application to specific types of relationships.

Definitions of "fiduciary" tend to focus upon the similarity of the fiduciary and the trustee and of the fiduciary relationship with the trust relationship.[250] In defining what is meant by "trust," the *Oxford English Dictionary* (*OED*) emphasizes the element of confidence reposed in one person by another, as well as the former's obligation to act in the other's best interests.[251] Within the specifically legal context, *Black's Law Dictionary* describes the term "fiduciary" as being:

> ... [D]erived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee,

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[249]If fiduciary relations were restricted to the limits of the general principles and understandings of what constitutes fiduciary relations, that would entail an adherence to the *concretist* school of thought, which has been shown to be inconsistent with the equitable basis of fiduciary doctrine.

[250]Note 237, *supra*, Volume V, at p.878.

[251]*Ibid.*, Volume XVIII, at pp.624-625.

> in respect to the trust and confidence involved in it, and the scrupulous good faith and candor which it requires. A person having a duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking.[252]

From these definitions, a number of important points may be gleaned. The fiduciary relationship is trust-like and the actors involved -- fiduciary and beneficiary (or *cestui que trust*) -- are akin to those who are party to a trust relationship (trustee and beneficiary). Both the fiduciary and trust relationship entail similar duties, benefits, and liabilities. The fiduciary relation involves the reposing of trust and confidence by the beneficiary in the fiduciary to act -- with the utmost good faith, integrity, candour, and fidelity -- in the former's best interests. Furthermore, the fiduciary is legally bound to act selflessly for the benefit of the beneficiary and must not take unfair advantage of the beneficiary so as to prejudice the latter's interests.[253]

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[252]Note 20, *supra*, at p.563. Examples of fiduciary relations illustrated include: attorney and client, guardian and ward, principal and agent, executor and heir, trustee and *cestui que trust*, landlord and tenant, etc. (p.564). The legal implications which arise out of the existence of a fiduciary relationship are rules which hold that:

> ... [N]either party may exert influence or pressure upon the other, take selfish advantage of his trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other, business shrewdness, hard bargaining, and astuteness to take advantage of the forgetfulness or negligence of another being totally prohibited as between persons standing in such a relations to each other. (p.564)

[253]*Ibid.*, at p.564. A person in a "fiduciary capacity" is described, at p.564,

By its very nature, the fiduciary relationship involves a situation of dependence by the beneficiary upon the fiduciary. This occurs as a result of the beneficiary's grant of certain powers to the fiduciary (*i.e.* the ability to

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as one who acts:

> ... [F]or the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. The term is not restricted to technical or express trusts, but includes also such offices or relations as those of an attorney at law, a guardian, executor, or broker, a director of a corporation, and a public officer ...

while a "fiduciary relation" is described, at p.564, as:

> A very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one man trusts in or relies upon another. One founded on trust or confidence reposed by one person in the integrity and fidelity of another. A "fiduciary relation" arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal. Such relationship exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.
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> ... It exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests [*sic*] of one reposing the confidence. A relation subsisting between two persons in regard to a business, contract, or piece of property, or in regard to the general business of estate of one of them, of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith. [References omitted]

control the beneficiary's assets) in exchange for enumerated benefits (the fiduciary's duty to act in the beneficiary's best interests). This inequality provides an opportunity for unscrupulous fiduciaries to take advantage of their positions for their own benefit or for the benefit of persons other than their beneficiaries. To discourage such actions and to provide compensation for the victims of such occurrences, fiduciary law provides remedial aid to beneficiaries who have suffered a breach of duty by their fiduciaries.[254] Fiduciaries who do not subscribe to this manner of conduct may be found in breach of their duties and liable to their beneficiaries for losses caused by or as a result of such a breach.[255]

This basic definitional information has been augmented by judges and legal commentators over the course of time. To further our understanding, we must turn our attention to some of these other characterizations.

ii. Some Theoretical Definitions of Fiduciary Relations

What are described herein as "theoretical" definitions of the fiduciary relation may be more accurately described as categories formulated from the

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[254]Although it should be emphasized that fiduciary law is not merely remedial. While fiduciary law does not actually come into effect until there is *prima facie* proof of a breach of fiduciary duty, fiduciary law underlies every fiduciary relationship, monitoring them for their conformance with fiduciary principles, and providing aid in the face of a breach. For more discussion on this topic, see the later section entitled "Is the Crown's Fiduciary Duty Purposive?" Ch. V(e), *infra*.

[255]Refer to the section on fiduciary remedies, Ch. IV(e), i, *infra*.

definitions attributed to fiduciary relationships by judges and legal scholars. Due to the equitable nature and situation-specificity of fiduciary doctrine, there is no one theory of fiduciary doctrine which is wholly agreed upon or perceived to be better than others:

> ... [O]ur present uncertainty is thought to be exacerbated by the lack of a workable and unexceptionable definition of a fiduciary. We have no shortage of rival approaches, but none has carried the day.[256]

There is debate in academic circles surrounding the various theoretical frameworks from within which these definitions of fiduciary relations arise. The theory, or theories, of fiduciary doctrine adhered to dictate which general principles of fiducial relationships receive the most emphasis by courts and commentators. Some of the more notable theories of fiduciary doctrine include: *Property Theory, Reliance Theory, Inequality Theory, Contract Theory, Unjust Enrichment Theory, Utility Theory, Power and Discretion Theory*, and *Rule-based Theories*.[257] In practice, many judges and commentators subscribe to a combination of one or more of them or their derivatives in formulating their own theories of fiduciary doctrine.

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[256]Finn (1989), note 6, *supra*, at p.26.

[257]For the sake of simplicity, the names of the theories used here reflect their major points of emphasis. They are adapted from the examples used by Shepherd, note 6, *supra*, in his discussion of competing theories of fiduciary doctrine at pp.51-91, although they do not conform entirely to those used by Shepherd.

1. Property Theory

The Property theory of fiduciary doctrine holds that a fiduciary relationship exists only where one person possesses *de facto* or *de jure* control over property which belongs to another. This may occur by virtue of one person possessing legal title or control, or both, over the property of another.

De facto control may be obtained simply by virtue of one person's ability to control property whose legal and equitable title belongs to another, such as directors of a corporation who possess the ability to control corporation assets which belong to the corporation which, in turn, is owned by its shareholders. The directors have no claim to title over the corporation's assets, but, by virtue of their positions, possess the ability to control those assets. *De jure* control may be obtained in any situation where a person has been assigned legal title or legal control over property whose equitable title remains in another.

This theory of fiduciary doctrine may be seen to have its origins in Trust law, where the existence of a trust *corpus*, or *res*, is a prerequisite for the existence of a trust relationship. Although Shepherd comments that Property theory is no longer a popular one in judicial circles,[258] it is the starting point of most economic analyses of fiduciary doctrine. One such example is the theory formulated by Cooter and Freedman, who describe a fiduciary relation as existing in any situation where "a beneficiary entrusts a fiduciary with

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[258]Note 6, *supra*, at p.52.

control and management of an asset."[259]

Property theory is also a substantial basis of Dickson J.'s formulation of the Crown's fiduciary obligations in *Guerin*.[260] Dickson J.'s emphasis upon the nature of aboriginal title and the requirement of its surrender to the Crown by the Musqueam band indicates his adherence to this framework. His statement that the Crown-Native relationship cannot amount to a trust due to the absence of any *res* existing in the Musqueam, is another indication, even though his characterization is an incorrect one.[261]

The fundamental difficulty with the Property theory of fiduciary doctrine is that, unlike Trust law, there is no absolute necessity that a property interest, in the traditional legal understanding of what constitutes property, be the subject of a fiduciary relationship:

> ... [I]f a relationship does give one party access
> to what both parties would reasonably acknowledge

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[259]Cooter and Freedman, note 201, *supra*, at p.1046. For more "Law and Economics" perspectives on fiduciary doctrine, see W. Bishop and D.D. Prentice, "Some Legal and Economic Aspects of Fiduciary Remuneration," (1983), 46 *Mod. L. Rev.* 289; Kenneth B. Davis, Jr., "Judicial Review of Fiduciary Decisionmaking -- Some Theoretical Perspectives," (1985-86), 80 *Nw. U. L. Rev.* 1; Brian R. Cheffins, "Law, Economics and Morality: Contracting Out of Corporate Law Fiduciary Duties," (1991), 19 *C.B.L.J.* 28.

[260]Although elements of Inequality theory and Power and Discretion theory are also evident. While the decision in *Guerin* has been demonstrated not to be restricted to property situations, due to the nature of the considerations in the case Dickson J.'s primary emphasis is upon Property theory -- which his focus upon the requirement of surrender indicates. The surrender requirement is the catalyst for Dickson J., not the Crown's discretion; the latter occurs only as a result of the former.

[261]See note 103, *supra*.

> to be a thing of value in the circumstances, is there any justifiable reason for allowing the custodian to utilize it disloyally for his own profit and without being accountable therefor, simply because that "thing" does not fall within our conventional conceptions of property?[262]

Indeed, many fiduciary relationships exist which do not have a property component to them. As La Forest J. notes in *Canson Enterprises Ltd. v. Boughton & Co.*:

> There is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one where a person is under a fiduciary duty to perform an obligation where equity's concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on.[263]

Perhaps the prime examples of relationships which are understood to be fiduciary in nature, yet do not possess a property component are those between a doctor and patient or between a religious leader (rabbi, clergyman, etc.) and a congregation member. In the former, there is a certain amount of

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[262]Finn (1989), note 6, *supra*, at p.37. See also Peter D. Maddaugh, "Definition of Fiduciary Duty," in *Fiduciary Duties*, Law Society of Upper Canada Special Lectures, 1990, (Toronto: De Boo, 1991), at p.17:

> ... [A] fiduciary relationship is more than a "trust" relationship, it is a "trust-like" relationship. The technical difference being there is no requirement that a fiduciary hold legal title to property in the wider context.

[263]Note 37, *supra*, at p.578.

trust (in the generic sense) placed in the doctor by the patient regarding the latter's health. This trust is based upon respect for the doctor's knowledge, expertise, and ability in the area of medicine, as well as the patient's dependence upon the doctor to cure an ailment or heal a wound. The fiduciary character of the relationship stems from the patient's dependence upon the doctor. The only interest which might be characterized as property in this relationship is the patient's health.

In the relationship between the religious leader and the congregation member, there is also reliance by the latter upon the knowledge, expertise, and ability of the former. Again, the only possible property interest is the latter's spiritual well-being. While both health and spiritual well-being may, in a limited sense, be defined as "property," insofar as they are "possessions" which "belong" to a person, they are not "property" as it is traditionally defined by law. Nevertheless, this fact has not prevented these relationships from being classified as fiduciary.[264]

Returning to the *Guerin* situation, while the nature of aboriginal title may be one element of the fiduciary character of that relationship, it is not the

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[264]See, for example, *Rowe v. Grand Trunk Railway Co.* (1866), U.C.C.P. 500; *Mitchell v. Homfray* (1881), 8 Q.B.D. 587 (C.A.); *Williams v. Johnson*, [1937] 4 All E.R. 34 (P.C.); *Hunter v. Mann*, [1974] Q.B. 767; *Tannock v. Bromley* (1979), 10 B.C.L.R. 62 (S.C.); *Nixdorf v. Hicken*, 612 P.2d 348 (S.C. Utah 1980); *Krueger v. San Francisco Forty Niners*, 234 Cal. Rep. 579 (C.A. 1987); *Weisenger v. Mellor* (1989), 16 A.C.W.S. (3d) 260 (B.C.S.C.); *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; Ellis, note 202, *supra*, at pp.10-1 to 10-22; Vinter, note 227, *supra*, at pp.77-85 [doctors/medical advisers -- patients]; *Huguenin v. Baseley* (1807), 33 E.R. 526 (Ch.); *Parfitt v. Lawless* (1872), 2 L.R. P. & D. 462; *Allcard v. Skinner* (1887), [1886-90] All E.R. Rep. 90 (C.A.); *Morley v. Loughnan*, [1893] 1 Ch. 736; Vinter, note 227, *supra*, at pp.16-29 [religious advisers -- followers].

only one. Due to the Supreme Court's failure in *Guerin* to recognize that it is not necessary to ground a trust relationship in an equitable estate, the court's focus upon the nature of the Musqueam's land interest -- particularly in the judgment of Dickson J. -- becomes less of a factor to determining the nature of the Crown-Musqueam relationship than it may have been perceived to be at that time by the court .

These illustrations of fiduciary relationships which are not based upon traditional legal property interests segue into a discussion of another theory of fiduciary principles -- Reliance theory.

2. Reliance Theory

The Reliance theory of fiduciary doctrine is the most straightforward of the theories presented here. It is also the most often-used theory, both on its own and in conjunction with elements of other fiduciary theories.[265] Reliance theory insists that a relationship is fiduciary where one person reposes trust and confidence in another. Those who place their trust and confidence in another rely upon the honesty, integrity, fidelity, and good faith of the other not to breach that trust and confidence. Reliance theory is theoretically similar to the strict definitions of fiduciary principles cited

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[265] It should be noted that reliance is also the basis of other independent heads of obligation, such a negligent misrepresentation, which are not a part of fiduciary doctrine. For a more detailed discussion of the relationship between fiduciary law and some of these other concepts which are often confused by the judiciary, see Felicity Anne Reid, *The Fiduciary Concept -- An Examination of Its Relationship With Breach of Confidence, Negligent Misrepresentation and Good Faith,* Unpublished LL.M. Thesis, Osgoode Hall Law School, 1989.

earlier and is closely related to the Inequality theory of fiduciary doctrine.[266]

The basis of Reliance theory may be seen to be intrinsically moral or public policy-oriented rather than purely legal. Yet, the promulgation of fiduciary laws, as illustrated earlier, is rooted in public policy and the desire of society to protect certain interdependent relationships which have been deemed to be socially valuable. Subsequently, fiduciary law is no less "legal" than any other law.[267]

The mere fact that reliance is a part of a relationship is not, in itself, determinative of the fiduciary character of the relationship: "Just as there may be a fiduciary relationship without direct reliance, there may be reliance without a fiduciary relationship."[268] Indeed, while reliance is an important facet of a fiduciary relation, many relationships which are not fiduciary in nature also contain a degree of reliance: "... [N]ot all relationships will be held to be fiduciary, even though they involve reliance upon integrity and the presumption that a party will fully disclose his position."[269]

One example of a relationship which contains a degree of reliance, yet is not fiduciary in nature is the relationship between a judge and a litigant in

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[266]Which is discussed in Ch. IV(c), ii, 3, *infra*.

[267]Note the discussion to the contrary in Shepherd, note 6, *supra*, at pp.57-58, especially his discussion of the relationship between moral and legal rules at p.57, note 36. See also his statement, at p.60, that: "Whatever our criticisms of applying moral rules to legal fact situations, we cannot lose sight of the moral foundation upon which many of our legal rules have been erected, including those in the area of fiduciaries."

[268]Shepherd, note 6, *supra*, at p.58.

[269]Waters, note 106, *supra*, at p.405.

a civil proceeding or between a judge and an accused in a criminal proceeding. For the purposes of clarification in this discussion, both the litigant and the accused in this illustration will be referred to as "the civilian." The civilian relies upon the judge to act fairly, impartially, and in accordance with the dictates of law and justice and is entitled to do so. Judges are duty bound to uphold the honour and integrity of the law in the carrying out of their judicial functions. However, judges owe no greater duty to civilians other than the aforementioned duty. Judges do owe a collective duty to the public at large to act in accordance with the law, but this duty does not extend to a duty to act in the best interests of particular civilians in the course of specific judicial proceedings. Therefore, while a civilian relies upon the judge, the judge does not owe fiduciary obligations to that civilian to act in the latter's best interests.

3. Inequality Theory

Inequality theory is premised upon the notion that beneficiaries are generally inferior in power vis-à-vis their fiduciaries in fiduciary relationships. A common illustration of Inequality theory's characterization of a fiduciary relationship is the relationship between guardian and ward.

The theory of inequality is problematic in that it is often misunderstood by those who seek to implement its principles to further their understanding of fiduciary doctrine. The difficulties associated with the wrongful application of Inequality theory and its ramifications upon the understanding of fiduciary law cannot be overemphasized.

There is nothing inherent in the fiduciary relation which necessitates that it exist between dominant and subservient parties. In fact, the only true requirement of the fiduciary relation is that it must entail some form of dependence or potential for one party to affect the interests of another.[270] However, this may apply as easily to parties on an equal footing, as with partners in a business venture, spouses, directors of corporations, and partners in a professional services firm (*i.e.* law, accounting, architecture) as to parties in an unequal relationship, such as employer and employee. While the nature of any given fiduciary relationship may result in an inequality in power between the fiduciary and the beneficiary *within that relationship*, there is no requirement or need for any inequality to exist *outside* of that relationship.

The reason for this misunderstanding of the nature of fiduciary relationships may be due to the excessive categorization of acceptable classes of fiduciary relationships by the judiciary and legal commentators. In an unfortunate wave of circularity, attempts to explain the nebulous fiduciary relation have resulted in the misunderstanding and perversion of that relation through the very vehicle which has attempted to explain it. The attempt by some to explain the fiduciary relationship through illustration has not only failed to explain what comprises a fiduciary relation, but it has led many to believe that fiduciary relations are restricted to the paradigms established in those illustrations. This end-result is unfortunate, as it has led

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[270]As Ernest J. Weinrib explains in "The Fiduciary Obligation," (1975), 25 *U.T.L.J.* 1, at p.7: "... [T]he hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion.

to the adoption of patently incorrect assumptions.

By and large, relationships which are cited as examples of fiduciary relationships tend to be relationships between observably stronger and weaker parties. The examples of this occurrence in fiduciary law jurisprudence are too numerous to mention. However, McTague J.A.'s explanation of what constitutes a fiduciary relationship in *Follis v. Albemarle TP.* bears repeating for its ability to capture the essence of the wrongful characterization of fiduciary relations:

> It seems to me ... that there must be established some inequality of footing between the parties, either arising out of a particular relationship, as parent and child, guardian and ward, solicitor and client, trustee and *cestui que trust*, principal and agent, etc., or on the other hand, that it can be established that dominion was exercised by one person over another, no matter how the particular relationship may be categorized.[271]

Other unequal relationships which are often cited as examples of fiduciary relations include doctor and patient, employer and employee, director and shareholder, and clergy and layperson. Within each of these relationships, there is a marked inequality of power. The aforementioned person in each of these relationships enjoys a position of superior power and influence vis-à-vis the other. Although this slighting of similarly-situated persons or relative equals may not always be deliberate, it has improperly tinted the way that fiduciary relationships are perceived. This occurrence has

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[271] [1941] 1 D.L.R. 178 (Ont. C.A.), at p.181.

had a negative effect on many who are involved in fiduciary relationships, in particular the aboriginal peoples of Canada in their relationship with the Crown.

Within the context of fiduciary law as it applies to the Crown-Native relationship, the mistaken adherence to Inequality theory has led to the belief that the fiduciary relationship is yet another replication of the subordinate status of aboriginal peoples vis-à-vis the Crown. As Patrick Macklem explains in "First Nations Self-Government and the Borders of the Canadian Legal Imagination":

> The attachment of fiduciary obligations on the Crown in its dealings with native lands ensures that native interests will be respected and protected by the Crown in its dealings with third parties. Yet *Guerin*, by not questioning the hierarchical relationship inherent in the property interest created by the common law, simply reproduces native dependency in a new form. ... A fiduciary relationship by its very nature assumes a hierarchical relationship, in that "one party is at the mercy of the other's discretion."[272]

A subsidiary effect of adhering to Inequality theory to characterize the Crown-Native fiduciary relationship is the suggestion that the inequality in position of the aboriginals vis-à-vis the Crown stemming from the fiduciary relationship frustrates the ability of the aboriginal peoples to achieve self-

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[272](1991), 36 *McGill L.J.* 382, at pp.411-412. Note also Macklem's link between the hierarchical relationship inherent in common law property interests and the Crown-Native fiduciary relationship, which suggests that he adheres to a theory of fiduciary doctrine which is based upon both Inequality Theory and Property Theory.

government. Macklem suggests that:

> By seeking to ameliorate some of the adverse consequences that flow from the establishment of a legal relationship of inequality ... *Guerin* leaves intact the underlying hierarchical relation between the Crown and First Nations in the context of property entitlements. In so doing, and despite its intentions to the contrary, *Guerin* frustrates rather than facilitates the quest for a greater degree of self-government for Canada's First Nations.[273]

The notion that fiduciary relationships exist only between unequal parties has been advocated by the Supreme Court of Canada in *Frame v. Smith*.[274] In that case, Wilson J. lists three general characteristics which she

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[273]*Ibid.*, at p.412. See also Macklem, generally, at pp.410-414; *Apsassin*, note 3, *supra*, at p.92 (note 129); David R. Lowry, "Native Trusts: The Position of the Government of Canada as Trustee for Indians, A Preliminary Analysis," Unpublished report prepared for the Indian Claims Commission and the Union of Nova Scotia Indians, 1973, at p.10:

> ... [I]f the view is taken that native people of Canada are an independent and sovereign nation, then there can be no trust relationship.

It should be noted, however, that these suggestions that the Crown's fiduciary relationship to Native peoples will frustrate the self-government aspirations of the aboriginal peoples are mistaken and based upon a fundamental misunderstanding of fiduciary doctrine. There is nothing inherent in the fiduciary relationship between the Crown and aboriginal peoples in Canada which renders its continuation repugnant to the latter's ability to achieve self-government. In fact, the fiduciary nature of the Crown-Native relationship, under the *prescriptive* vision of fiduciary doctrine, is predisposed to encourage aboriginal self-government should the aboriginal peoples desire it and may, in such circumstances, require that aboriginal peoples achieve self-government.

[274](1988), 42 D.L.R. (4th) 81 (S.C.C.).

deems to apply to all fiduciary relationships:

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[275]

In elaborating upon the third characteristic, Wilson J. explains that:

> This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in dealings of experienced businessmen of similar bargaining strength acting at arm's length.[276]

Wilson J.'s "vulnerability" requirement therefore entails an inequality of power between the fiduciary and the beneficiary which is not itself evident

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[275]*Ibid.*, at p.99.

[276]*Ibid.*, at p.100. Although Wilson J. does not state that fiduciary obligations are *never* present in dealings of experienced businessmen of similar bargaining strength acting at arm's length, only that they are *seldom* present, her characterization is still not a necessary or logical implication of the vulnerability of beneficiaries to their fiduciaries as expressed in her third characteristic.

from a straightforward reading of her third characteristic of fiduciary relationships. The implication of her third characteristic -- that the beneficiary is vulnerable to the fiduciary's discretion -- does not necessarily indicate a requirement of inequality in bargaining power between the parties engaged in a fiduciary relationship.

In fact, it is entirely possible for a beneficiary to be vulnerable to the actions of a fiduciary regardless of the relative strength of the parties outside of or prior to the existence of the fiduciary relationship. For example, the relationship between a director of a corporation and its shareholders is a fiduciary one due to the position of the director vis-à-vis the shareholders. As Laskin C.J.C. explains in *Canadian Aero Service Ltd. v. O'Malley* :

> Strict application [of fiduciary obligations] against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day accountability [*sic*] to owning shareholders and which comes under some scrutiny only at annual general or at special meetings.[277]

The fiduciary relationship between director and shareholder exists whether the shareholder owns a minimal amount of penny-stock or is a significant stockholder in a major corporation. Under such an arrangement, it is entirely possible, and quite probable, that the director's actions will affect the interests of the shareholder even where both persons are "experienced businessmen of similar bargaining strength."

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[277](1973), 40 D.L.R. (3d) 371 (S.C.C.), at p.384.

The subsequent decision of the Supreme Court in *LAC Minerals v. International Corona Resources Ltd.*[278] only heightens the confusion surrounding that court's understanding of fiduciary relations. La Forest J. insists that "vulnerability is not ... a necessary ingredient in every fiduciary relationship," although he agrees with Wilson J. that "when determining if new classes of relationship should be taken to give rise to fiduciary obligations then the vulnerability of the class of beneficiaries of the obligation is a relevant consideration."[279] He then elaborates upon his view of the "vulnerability" requirement by way of allusion:

> Each director of General Motors owes a fiduciary duty to that company, but one can seriously question whether General Motors is vulnerable to the actions of each and every director. None the less, the fiduciary obligation is owed because, as a class, corporations are susceptible to harm from the actions of their directors.
>
> I cannot therefore agree with my colleague, Sopinka J., that vulnerability or its absence will conclude the question of fiduciary obligation. ... [T]he issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that

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[278]Note 46, *supra*. For more specific commentary on the *LAC Minerals* case itself, see Donovan W.M. Waters, "Lac Minerals Ltd. v. International Corona Resources Ltd.," (1990), 69 *Can. Bar Rev.* 455; Peter D. Maddaugh, "Confidence Abused: LAC Minerals Ltd. v. International Corona Resources Ltd.," (1990), 16 *C.B.L.J.* 198; Madam Justice Beverley M. McLachlin, "A New Morality in Business Law?" (1990), 16 *C.B.L.J.* 319.

[279]Note 46, *supra*, at p.39.

other.[280]

From his stance in *LAC Minerals,* La Forest J.'s understanding of "vulnerability" within the context of a fiduciary relationship is neither that beneficiaries must be inferior in power to their fiduciaries nor that they must be vulnerable to the actions of the latter. Rather, his understanding suggests that, *having regard to all the facts and circumstances,* fiduciaries must be *capable* of adversely affecting their beneficiaries' interests by virtue of their positions vis-à-vis their beneficiaries. La Forest J.'s emphasis upon the facts and circumstances of individual fiduciary relationships appears to demonstrate his understanding of the situation-specificity of fiduciary doctrine. While fiduciaries do possess the ability to affect, either positively or negatively, the interests of their beneficiaries as a result of their positions as fiduciaries, the mere fact that a person possesses the power to act in a manner contrary to the interests or desires of another does not necessarily give rise to a fiduciary relationship.[281] However, La Forest J.'s statement that "as a class, corporations are susceptible to harm from the actions of their directors," though often true, is emblematic of the problem of overclassification illustrated earlier which contravenes the situation-specificity that lies at the heart of fiduciary doctrine.

Although the status of the Supreme Court's understanding of

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[280]*Ibid.*, at p.40.

[281]For example, two people bidding against each other in an auction possess the ability to act in a manner contrary to the other's interests -- by increasing the price of the object being bid upon -- but neither may be said to be bound by fiduciary duties to each other or to other interested bidders.

"vulnerability" is left unclear by the *LAC Minerals* decision, the Supreme Court's more recent consideration of fiduciary doctrine in *Canson Enterprises Ltd. v. Boughton & Co.* affirms Wilson J.'s formulation of "vulnerability" in *Frame v. Smith*, albeit not in altogether convincing terms.[282]

It is an inherent aspect of the fiduciary relation that fiduciaries have the ability, by virtue of their positions as fiduciaries, to affect the interests of their beneficiaries. The effect of the fiduciary's ability vis-à-vis the beneficiary's interests may be positive or negative. Fiduciary law mandates that the fiduciary's actions adhere to the former; when they result in the latter, the beneficiary has legal recourse to seek appropriate sanctions against the fiduciary.[283]

As a result of the fiduciary's ability to affect the interests of the *cestui que trust*, many judges and commentators have described the latter's position as one of vulnerability. Due to the pejorative connotations associated with the word "vulnerability" in many judicial and academic considerations of fiduciary doctrine which are not necessarily germane to the situation of the beneficiary in a fiduciary relationship,[284] its use will be avoided herein other than in direct quotations.

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[282]Note 37, *supra*, at pp.543-544 (per McLachlin J.). It should be noted that McLachlin J. indicates her belief that the judgments of La Forest and Sopinka JJ. in *LAC Minerals*, note 46, *supra*, are compatible, whereas this is by no means evident, especially in light of La Forest J.'s express rejection of Sopinka J.'s vulnerability requirement in *LAC Minerals* illustrated above.

[283]Some of these will be discussed in the later section entitled "Fiduciary Remedies," Ch. IV(e), i, *infra*.

[284]Such as in *Frame v. Smith*, note 274, *supra*.

Essentially, then, the existence of a fiduciary relationship has as its foundation the ability of the fiduciary to affect the interests of the beneficiary and create a situation of unequal power relations between the two:

> Just as reasonable reliance, and through it, vulnerability, is at the root of liability under the *Hedley Byrne* principle [of negligent misrepresentation]; so vulnerability, arising through justifiable reliance or in some other way, is at the root of liability for breach of fiduciary obligation.[285]

The acknowledgment of this essential premise of fiduciary doctrine has only recently achieved support from legal commentators. In his article "Fiduciary Law," Tamar Frankel expressly recognizes the truth of this position:

> It is important to emphasize that the entrustor's vulnerability to abuse of power does not result from an initial inequality of bargaining power between the entrustor and the fiduciary. In no sense are fiduciary relations and the risks they create for the entrustor similar to adhesion contracts or unfair bargains. The relation may expose the entrustor to risk even if he is sophisticated, informed, and able to bargain effectively. Rather, the entrustor's vulnerability stems from the *structure* and *nature* of the fiduciary relation.[286]

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[285]*Burns v. Kelly Peters & Associates Ltd.*, note 204, *supra*, at p.600 (per Lambert J.A.).

[286]Frankel, note 6, *supra*, at p.810. Refer also to Weinrib, note 270, *supra*, at p.6, where he explains that:

More recently, Maurice Gautreau has expressed essentially similar sentiments when discussing the nature of the fiduciary's ability to affect the interests of the beneficiary when he states that "vulnerability":

> ... [I]s not an element leading to a fiduciary relationship, but rather, it is a characteristic of the result of the relationship. In other words, the vulnerability is the natural result of the reliance by the principal on the undertaking given by the fiduciary. It is nothing more than a description of the victim's situation when the fiduciary can affect his lawful interests by exercising his position of power. However, vulnerability may be present in advance and frequently is (for example, an infant in relation to a guardian), *but it does not have to be present, as in the case of a sophisticated businessman who takes in a junior partner.*[287]

The beneficiary is not, as some might suggest, powerless against the actions of the fiduciary. The existence of fiduciary law provides a protective mechanism for beneficiaries who are involved in fiduciary relations from the potential for indecorous activities against their interests by unscrupulous fiduciaries. In the absence of fiduciary law, beneficiaries wronged by their fiduciaries would have little recourse available to them; however, in such an instance, it is unlikely that anyone would voluntarily enter into such

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> It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. ... The fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement.

[287]Gautreau, note 210, *supra*, at p.5. [Emphasis added]

arrangements. Hence, the existence of fiduciary laws accomplishes more than the protection of a beneficiary's interests; it allows for the continuation and proliferation of interdependent relationships which carry the inherent possibility for *mala fide* action.

In summary, a fiduciary relationship may or may not originate out of an unequal power relationship, but, by virtue of the nature of the fiduciary relationship, an inequality in power results from the discretionary powers held by the fiduciary. It is these discretionary powers which have the potential to affect the beneficiary's interests.

The simplest method for understanding fiduciary principles and the relationships which they govern is to think of the fiduciary relationship as a transfer of powers from the beneficiary to the fiduciary. The powers which have been transferred by the *cestui que trust* to the fiduciary originally belonged to the former and, in fact, still do. The *cestui que trust* has merely *loaned* the powers to the fiduciary; they do not become the fiduciary's own possession. The fiduciary then uses these powers in the same manner as the beneficiary would.[288] When the fiduciary relationship is terminated, the powers return to the beneficiary.

To further our illustration, let us suppose, in accordance with the above, that the power which exists in a fiduciary relation is a transfer of powers from the beneficiary (*B*) to the fiduciary (*F*), with the stipulation that *F* uses those powers only in *B*'s best interests. Originally, both *B* and *F* have complete powers (*Q*). For business reasons, it is advantageous for *B* to

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[288]Subject, of course, to any limits on the use of those powers imposed by the *cestui que trust*.

transfer some powers (*P*) to *F*, who is a shrewd investor. Once the transfer of powers is completed, a fiduciary relationship exists between *B* and *F*. Subsequently, the power relations between *B* and *F* which were once equal are now tilted in favour of *F*. Prior to the existence of the fiduciary relationship, both *B* and *F* possessed equivalent powers (*Q*). The extent of *B*'s powers after transferring some of them to *F* is now (*Q-P*), whereas *F*'s powers now amount to (*Q+P*), an arrangement which favours *F*.

Although the beneficiary's interests are protected by the law of fiduciaries and regulated by the judiciary, this protection serves only as a check on the fiduciary's potential to abuse the power granted by the beneficiary. Fiduciary law does not grant any additional power to the beneficiary to balance out the power relations in the fiduciary arrangement.

Using this model, it is easier to understand why the fiduciary must only use fiduciary powers in the best interests of the beneficiary. The fiduciary's use of these powers must be directed towards the same end as if the beneficiary personally invoked them. Moreover, the fiduciary is burdened by any constraints which the beneficiary places on the powers delegated. The fiduciary may not exceed these imposed limits or else be liable for breach of duty -- the purpose of the duty is to act in the manner established by the beneficiary through the transfer of powers, not to exceed it.[289]

4. Contract Theory

The Contract theory of fiduciary doctrine is rooted in the view that the

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[289]Hence, for example, the Crown's breach of fiduciary duty in *Guerin*.

fiduciary relationship is founded upon a contractual or quasi-contractual situation, whereby one person undertakes to act in the best interests of another. The beneficiary in this scenario exchanges certain powers to the fiduciary in return for the fiduciary's promise of fidelity to the beneficiary's best interests:

> Where one party has placed its "trust and confidence" in another and the latter has accepted -- expressly or by operation of law -- to act in a manner consistent with the reposing of such "trust and confidence," a fiduciary relationship has been established.[290]

The contract analogy has some obvious flaws in that while a contract necessarily requires an offer and acceptance, a fiduciary relationship may arise in situations entirely devoid of such formalities. For example, a fiduciary relationship may arise by the unilateral actions of a would-be fiduciary[291] or simply as a result of the nature of the intercourse between persons.[292] Also, while a gratuitous undertaking is unenforceable in contract law, it is enforceable under fiduciary law. Moreover, a fiduciary relationship may be found to exist by a court where neither of the parties intended to create such a

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[290]Ellis, note 202, *supra*, at p.1-1.

[291]Finn, (1977), note 6, *supra*, at p.201: "... [T]he undertaking may be officiously assumed without request." See also Austin W. Scott, "The Fiduciary Principle," (1949), 37 *Cal. L. Rev.* 539, at p.540.

[292]For both of these scenarios, the most pertinent and appropriate example for our purposes may be drawn from the relationship between the Crown and Native peoples in Canada which, as has been illustrated, is based upon a combination of historical, political, social, and legal factors.

relationship:

> ... [T]he factual circumstances of a relationship may make it fiduciary. ... A fiduciary responsibility can arise simply from the factual assumptions the law makes about the respective positions of the parties in certain types of relationships and about the expectations one party in consequence is entitled to have as to how the other will act therein.[293]

As with Reliance theory, Contract theory is often used in conjunction with other theories of fiduciary doctrine. Its essence is to demonstrate a binding of obligation by the fiduciary to the beneficiary, but its analogy to the law of Contract is both faulty and misleading. As Deborah De Mott explains:

> Resorting unreflectively to contract rhetoric is insidiously misleading and provides no rationale for further development of the law of fiduciary obligation. ... [E]ven considering the obligation's elusive nature, descriptions drawn exclusively from contract principles are surely mistaken.[294]

The methods by which parties are bound to a contract do not at all coincide with the obligations of fiduciaries to their beneficiaries. The most blatant differences between the two areas of law may be observed through an

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[293]Finn (1989), note 6, *supra*, at p.41. Finn's explanation suggests, however, that the law will impose fiduciary obligations only where there is an inequality in power in the relationship such that one person is at the mercy of the other. As the previous section on Inequality Theory explains, it is important to understand that the inequality of powers in a fiduciary relationship need not extend beyond the confines of that relationship.

[294]De Mott, note 30, *supra*, at pp.879-880.

examination of what binds the contractual relationship as opposed to the fiduciary relationship. The contract itself is the centre of judicial attention to determine the adherence or lack thereof to the bargain made between parties,[295] whereas fiduciary law examines, among other things, the relationship of the parties to each other, their undertakings and reliances -- whether express or implied -- and the nature and characteristics of the relationship as a whole.

The origins of Contract theory may be traced to Austin Scott's article entitled "The Fiduciary Principle,"[296] which was the first modern theoretical piece on fiduciary law. Scott's use of Contract law as a source of analogy may be due to an attempt to attach the nebulous principles which underlie the law of fiduciaries to the more concrete understanding of the law of Contract. It is symbolic of the taxonomic endeavours of law to create certainty.[297] In any event, the contract analogy is severely limited and potentially dangerous in

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[295]Which is enforced by the Parol Evidence Rule.

[296]Note 291, *supra*.

[297]Note also that the analogy to Tort law has also been used. See the unanimous judgment of La Forest J. in *Canson Enterprises Ltd. v. Boughton & Co.*, note 37, *supra*, and the refutation of his analogy of fiduciary doctrine to Tort law by McLachlin J. at p.545: "The danger of proceeding by analogy with tort law is that it may lead us to adopt answers which, however easy, may not be appropriate in the context of a breach of fiduciary duty."

The understanding of fiduciary doctrine by analogy with Tort law is problematic in that, while both entail legal obligations by one person to another which arise independently of Contract, the onus of proof in Tort law rests with the person alleging an injury, while in fiduciary law the onus of proof is upon the fiduciary charged with a breach of duty once a *prima facie* indication of breach is alleged by the beneficiary and accepted by the court. See the discussion on this point by McLachlin J. at pp.545-547.

its use to aid in the understanding of fiduciary doctrine. Its relevance exists primarily in relation to the binding nature of the fiduciary relationship and then only in conjunction with other fiduciary theories.

5. Unjust Enrichment Theory

Unjust Enrichment theory insists that fiduciary relationships exist where beneficiaries are able to obtain remedial aid from their fiduciaries where the latter use their powers to the detriment of the former. The unjust enrichment arises where fiduciaries, who receive powers from their beneficiaries to use in the latter's best interests, use the powers in a manner which is adverse to their beneficiaries' best interests. Should fiduciaries use these powers in any manner which is adverse to their beneficiaries' interests, they are in breach of their duties to their beneficiaries and are liable for the amount of their unjust enrichment, or the unjust enrichment of others whom they have wrongfully benefited.

Unjust Enrichment theory, unlike the other theories illustrated, is remedy-driven. As a remedy-driven theory, Unjust Enrichment theory reasons from the remedy to the breach of duty instead of from the breach of duty to the remedy. The remedy is that fiduciaries must disgorge any benefits they have received by virtue of their unjust enrichment; the duty is that fiduciaries must not take advantage of their acquisition of dominance over their beneficiaries -- through the transfer of powers from the beneficiaries to the fiduciaries -- or else be liable to disgorge the advantage taken. The foundation of this theory is illustrated by Fry J. in *In re West of England and*

South Wales District Bank, Ex parte Dale and Co.:

> What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*.[298]

Unlike the other theories illustrated herein, Unjust Enrichment theory is circular in its reasoning. The duty cannot be defined without reference to the remedy. This criticism of Unjust Enrichment theory is supported by Ernest Weinrib, who comments that:

> This definition in terms of the effect produced by the finding of a fiduciary relation begs the question in an obvious way: One cannot both define the relation by the remedy and use the relation as a triggering device for the remedy.[299]

Unjust Enrichment theory may be contrasted with Reliance theory, for example, where the reliance of beneficiaries upon their fiduciaries provides a basis for the fiduciaries' liability for the breach of that reliance. Under Reliance theory, fiduciaries' duties are based upon their utmost good faith, integrity, and fidelity to the best interests of their beneficiaries who rely upon the fulfillment of their fiduciaries' duties; the remedy is derived from the fiduciaries' failure to carry out their obligations.

A different theory of unjust enrichment is proffered by J.C. Shepherd,

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[298]Note 105, *supra*, at p.778.

[299]Weinrib, note 270, *supra*, at p.5.

who explains that the basis of this theory is more than "a routine begging of the question,"[300] as suggested by Weinrib. This alternative view attempts to minimize the importance of the fiduciary relationship itself: "Implicit in the notion of finding liability first is a rejection of the fiduciary relationship's significance."[301] According to this view, the fiduciary relationship is not the basis for liability, rather the unjust enrichment of the fiduciary is. The courts' equitable jurisdiction allows it to find liability based upon its determination of the fiduciary's unjust enrichment, not whether a fiduciary relationship actually exists. The characterization of the relationship as fiduciary is merely descriptive and has no legal significance.[302]

This view of unjust enrichment is not truly a theoretical framework of fiduciary doctrine; rather, it stands on its own as an independent head of equitable action. As an independent head of action, unjust enrichment does not necessarily indicate the existence of a fiduciary relationship; it merely indicates that a person has been unjustly enriched at the expense of another:

> Unjust enrichment is undoubtedly a useful concept in many situations that raise perplexing questions of fiduciary obligation. ... But the principle of unjust enrichment cannot explain as a general matter why some people are under the fiduciary constraint and others are not.[303]

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[300]Shepherd, note 6, *supra*, at p.72.

[301]*Ibid*.

[302]*Ibid*., at p.73.

[303]De Mott, note 30, *supra*, at p.913.

Since this view of unjust enrichment is not dependent upon the prior determination of the existence of a fiduciary relationship, its relevance to fiduciary theory is limited. Therefore, while there may be merits to this view of Unjust Enrichment theory, they exist as one basis of a discussion of theories of Restitution, not fiduciary doctrine.[304]

6. Utility Theory

The basis of Utility theory is closely related to the origins of fiduciary law. As discussed earlier, the promulgation of fiduciary and quasi-fiduciary laws came about as the direct result of society's desire to protect the integrity of certain interdependent relationships. Utility theory carries on this historic rationale. Utility theory holds that fiduciary relationships will be found by the courts in situations where there is a determined need to protect the integrity of particular types of relationships. The standards of fiduciary law will be imposed upon the participants in such relationships to effectuate this desired result.

The application of Utility theory is widespread. It may be used in conjunction with any interdependent relationship which has been deemed to be socially valuable. Accordingly, it covers the entire range of relationships which may be deemed to be fiduciary -- from the public relationship between elected officials and their constituents to the private relationship between

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[304]While there is a clear nexus between fiduciary law and the law of restitution, the two are, at present, independent, though contiguous, areas of law.

doctor and patient.[305] The obvious drawback to this approach is that it is particularly susceptible to incorrect usage. More specifically, Utility theory may be improperly applied to all socially valuable interdependent relationships, whether or not they are fiduciary in nature.[306]

7. Power and Discretion Theory

There are many similarities between Power and Discretion theory, Reliance theory, and Inequality theory. Essentially, Power and Discretion theory holds that a fiduciary relationship exists where one person possesses power and discretion over the interests of another. As John McCamus explains in "The Recent Expansion of Fiduciary Obligation":

> The fiduciary is likely either to have stewardship of some of the assets of the person to whom the duty is owed, or will hold an office in which there are uniquely-available opportunities for self-interested activity or, the relationship is likely to be one in which the fiduciary has considerable authority or influence over the individual to whom the duty is owed.[307]

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[305]As will become evident, the categories of potential fiduciary relationships are limitless. See the section entitled "The Categories of Fiduciary Relationships Are Never Closed," Ch. IV(c), iv, 2, *infra*.

[306]This may occur in a similar fashion as in the application of fiduciary doctrine in inappropriate circumstances discussed earlier in the *Chase Manhattan* and *Goodbody* cases, Ch. IV(a), *supra*.

[307](1987), 23 E.T.R. 301, at p.304. See also Weinrib, note 270, *supra*.

Portrayed in this fashion, Power and Discretion theory is the reverse image of Reliance theory, where the beneficiary relies upon the power and discretion of the fiduciary to act with integrity, fidelity, and loyalty to the beneficiary's best interests. Power and Discretion theory also documents the inequality of the relationship between fiduciary and beneficiary.[308]

Power and Discretion theory, like many of the other theories discussed herein, overlaps with its counterparts. For example, the power and discretion basis of the theory may exist within the realm of Property theory -- such as through the power and discretion of the fiduciary over property belonging to the beneficiary -- or it may be completely devoid of any relationship to property interests.

The basis of Power and Discretion theory is deceptive. It infers that one's power and discretion over the interests of another necessarily gives rise to a fiduciary relationship. This is simply untrue. Not all relationships where one person possesses power and discretion over the interests of another may be properly characterized as fiduciary.

A prime example of a relationship where one person possesses power and discretion over the interests of another, yet is not fiduciary in nature, may be illustrated by the relationship between a judge and a civilian in a civil or criminal proceeding illustrated in our discussion of Reliance Theory.[309] As was illustrated, the judge-civilian relationship possesses some of the characteristics of a fiduciary relationship without being fiduciary. Judges, by

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[308]Refer back to the illustration of the powers possessed by the fiduciary and beneficiary in Ch. IV(c), ii, 3, *supra*.

[309]See Ch. IV(c), ii, 2, *supra*.

virtue of their positions, possess power and discretion over the interests of civilians in judicial proceedings. Nevertheless, this does not entail the existence of fiduciary obligations on the part of the judges to act in the best interests of the civilians. Judges owe no duty to these civilians other than a duty to act fairly and impartially, as well as a duty to base their decisions solely on the merits of the arguments put before them.

8. Rule-Based Theories

Rule-based theories are arrived at by judges or scholars from their considerations of the variety of theories of fiduciary doctrine which exist. They attempt to create a taxonomy of fiduciary relations by devising an absolute "checklist" of the necessary elements of a fiduciary relationship. The requirements included in such a checklist are the touchstones of fiduciary relationships according to that particular theory. Once the checklist's criteria are fulfilled, a fiduciary relationship is deemed to exist.

Rule-based theories are favoured by the *concretists*, who seek to concretize the vague principles which surround fiduciary doctrine. All theories, whether fiduciary or otherwise, must either be rule-based or principle-based, yet the distinction between them is an important one. The difference between a rule and a principle, generally, is that a rule must be followed in the precise manner in which it is stated, whereas a principle allows for the particularities of a relationship to tailor it to the specific needs or situation of that relationship.

The difference between Rule-based theories and the other theories

illustrated herein is that the former are much more strict in their application than the latter. However, while a principle from a more general theory of fiduciary doctrine may not be as definite in its application as a rule from a Rule-based theory, they are still guidelines which must be followed for a fiduciary duty to exist -- at least within the confines of that particular theory.

The other theories illustrated herein are much more adaptable and place greater emphasis upon the particulars of individual relationships than do Rule-based theories. These other theories are, therefore, more consistent with the equitable basis of fiduciary doctrine, whereas Rule-based theories are derived from law's need for taxonomy. Subsequently, any Rule-based theory which may be formulated is, *prima facie*, fundamentally incompatible with the foundation of fiduciary doctrine and its requirement of situation-specificity.

iii. A New Theory of Fiduciary Doctrine

The conclusion which may be drawn from our discussion of the various theories of fiduciary doctrine is that no single one of them is entirely satisfactory on its own. The basis of each of the theories is one point of reference for the determination of the fiduciary nature of a relationship. Each basis, however, is neither absolute nor singly determinative of the fiduciary character of a particular relationship. The principles underlying each theory may exist to varying extents in a given relationship without the fact of its presence indicating that the relationship is fiduciary:

> It is obviously not enough that one is in an

> ascendant position over another: such is the invariable prerequisite for the unconscionability principle. It is obviously not enough that one has the practical capacity to influence the other: representations are made, information is supplied (or not supplied) as of course with the object of, and in fact, influencing a host of contractual dealings. It is obviously not enough that the other party is in a position of vulnerability: such is the almost inevitable state in greater or lesser degree of all parties in contractual relationships. It is obviously not enough that some degree of trust and confidence are there: these are commonly placed in the skill, integrity, fairness and honesty of the other party in contractual dealings. It is obviously not enough that there is a dependence by one party upon the other: as the good faith cases illustrate, a party's information needs can occasion this. Indeed elements of all of the above may be present in a dealing -- and consumer transactions can illustrate this -- without a relationship being in any way fiduciary.[310]

The primary problem with these various theories is that none of them are applicable to all relationships which are properly characterized as fiduciary. A workable general theory of fiduciary doctrine cannot be subject to exceptions; it must be capable of application to all relationships which are properly described as fiduciary. Since the classification of relationships which may be considered to be fiduciary is open-ended,[311] the theory must be broad enough to encompass the wide-range of potential fiduciary relationships.

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[310]Finn (1989), note 6, *supra*, at p.46. See also Slaght, note 247, *supra*, at p.48.

[311]See the further discussion of this point in the section entitled "The Categories of Fiduciary Relationships Are Never Closed," Ch. IV(c), iv, 2, *infra*.

The theory suggested here fulfills this vital qualification.

A fiduciary relationship may be seen to exist when *all* three of the following criteria are satisfied:

> (1) One or more persons (*A*) possess the ability to affect -- positively or negatively -- the interests of one or more others (*B*).
>
> (2) *B*'s interests *within the confines of the particular relationship* may only be served -- directly or indirectly -- through the actions of *A*.[312]
>
> (3) *B* relies upon the honesty, integrity, and fidelity of *A* towards *B*'s best interests as a result of their interdependent relationship.

Once a fiduciary relationship is found to exist, there are a number of duties owed by fiduciaries as a result of their possession of fiduciary powers and restrictions upon their use of those powers. These include:

> (1) Fiduciaries must act with honesty, integrity, and the utmost good faith (*uberrima fides*) towards the best interests of their beneficiaries.

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[312]Although one may be a fiduciary without directly affecting another's interests, such as in the relationship between a corporate director and a shareholder, one's indirect actions may affect another's interests and therefore give rise to a fiduciary relationship.

It should be remembered that the reliance of B upon the actions of A results in an inequality in position of B vis-à-vis A *within the confines of the particular relationship* which does not necessarily extend beyond that relationship. Refer back to the discussion of Inequality Theory in Ch. IV(c), ii, 3, *supra*.

(2) Fiduciaries must *purposively* act to further their beneficiaries' best interests (a *prescriptive* duty).

(3) Fiduciaries must not act in conflict of interest -- *i.e.* fiduciaries: (i) must not benefit from their positions; (ii) must provide full disclosure of their actions, and; (iii) may not compromise their beneficiaries' interests.

(4) Fiduciaries may delegate or transfer authority over their beneficiaries' interests, but may not delegate absolute responsibility for those interests.

(5) Fiduciaries are personally liable for their breach of duty to their beneficiaries or the wrongful action of their appointees which results in a breach of duty.[313]

Simultaneously, beneficiaries possess certain rights and benefits obtained in exchange for their delegation of powers to a fiduciary:

(1) Beneficiaries may rely upon their fiduciaries' honesty, integrity, and fidelity and are not bound to inquire into the fiduciaries' activities.[314]

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[313]In some instances, there may also be third party liability. For example, a corporation may incur liability if corporate fiduciaries, such as directors, breach their fiduciary duties while acting as directors of the corporation. Moreover, where the actions of a fiduciary's appointee results in a breach of the fiduciary's duty to act in the beneficiary's best interests, joint and several liability of both the fiduciary and the appointee may be found.

[314]See, for example, *Carl B. Potter Ltd. v. Mercantile Bank of Canada* (1980), 8 E.T.R. 219 (S.C.C.), at p.228 where the Supreme Court unanimously held that a beneficiary wronged by a defaulting trustee was under no obligation to inquire into the trustee's actions: "I know of no authority for the proposition that a cestui que trust owes a duty to its trustee to ensure that

(2) Beneficiaries may commence legal action for any breach of fiduciary duty once the cause of action is discovered.[315]

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the terms of the trust are observed." Although this case involved a trust situation, the principle applies equally to fiduciary relationships: refer to note 105, *supra*. Note also the statements of Dickson J. (as he then was) in *Guerin*, note 1, *supra*, at p.345.

Potter overrules the earlier precedent in *Inglis v. Beaty* (1878), 2 O.A.R. 453, at pp.463-464, where it was held that the passage of time may assist in demonstrating the beneficiary's acceptance of a fiduciary breach. It also dispels the notion that beneficiaries have no duty to inquire into the actions of a trustee unless there is cause to raise their suspicion: *Re Gabourie; Casey v. Gabourie* (1887), 13 O.R. 635 (Ch.); *In re Vernon, Ewens, & Co.* (1886), 33 Ch.D. 402 (C.A.), at p.410:

> ... [T]he *cestui que trust* is entitled to trust in and place reliance upon his trustee, and is not bound to inquire whether he has committed a fraud against him unless there is something to raise his suspicion.

As Ellis, note 202, *supra*, comments, at p.2-22, the rationale behind the pre-*Potter* understandings of the beneficiary's duty to inquire is not only "repugnant to the basic duty of utmost good faith owed by the trustee," but "it is doubtful that such a proposition -- silence by the beneficiary -- can be effective to protect the trustee." As *Potter* clearly demonstrates, these earlier propositions are invalid.

[315]Since the beneficiary is not bound to inquire into the fiduciary's activities, as illustrated in note 314, *supra*, it is questionable whether a beneficiary's ability to commence an action may be barred by a lapse of a statutory limitations period. Although the precedent established in *City of Kamloops v. Nielsen* (1984), 10 D.L.R. (4th) 641 (S.C.C.), a Tort case, holds that a statutory limitations period begins to run only once the beneficiary discovers, or ought reasonably to have discovered, the cause of action, its analogy to a situation of a breach of fiduciary duty is not straightforward.

Unlike the Tort scenario, it cannot be plausibly judged at what date a beneficiary should have reasonably discovered the existence of a breach of fiduciary duty since the beneficiary is under no duty to inquire into the actions of the fiduciary. Therefore, it would appear as if the applicability of a

(3) Beneficiaries need not prove a breach of fiduciary duty, but only allege it; the onus of discharging an allegation of breach of fiduciary duty rests with their fiduciaries.

(4) Beneficiaries may obtain remedial aid upon a finding of breach of duty by their fiduciaries.

Underlying this theory is the situation-specificity of fiduciary doctrine. It is the catalyst which extracts the theory from the abstract and places it firmly in reality. By lending itself to the particulars of any relationship, the theory never becomes inappropriate or inapplicable to any one relationship. Whereas a rule-based theory may be found to be inappropriate to the needs of a particular fiduciary relationship and cannot accommodate its uniqueness, our principle-driven theory cannot encounter the same fate.

Devoid of context, our theory's three criteria are the only true

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limitations period would only begin to run, if at all, once the beneficiary has actually discovered that a breach of fiduciary duty has occurred, *entailing that the beneficiary had both the knowledge of the fiduciary obligations owed to it and of the breach of those obligations by the fiduciary*. See Ellis, note 202, *supra*, Cumulative Supplement, at pp.104-105. That the beneficiary's discovery that a breach of fiduciary obligations has occurred entails that the beneficiary both knew of the existence of the fiduciary obligations owed to it -- *i.e.* that it was owed certain duties by another which were of a fiduciary nature -- and that a breach of those obligations by the fiduciary occurred is particularly relevant within the context of the Crown-Native relationship.

In a great many instances, aboriginal groups only "discover" or are advised by their legal counsel that they are owed specific fiduciary duties by the Crown one hundred or more years after the signing of a treaty which created those specific obligations. It must also be remembered within this context that the fiduciary nature of the Crown-Native relationship was not judicially sanctioned until 1984 in *Guerin*. Under these circumstances, it appears to be implausible that an action by a band against the Crown for breach of fiduciary obligations stemming from a mid-Nineteenth Century treaty may be held to be statute-barred.

requirements of a fiduciary relationship. In the absence of the situation-specificity of a particular relationship, any theory which entails more than these three criteria is superfluous.

iv. General Characteristics of Fiduciary Relations

Now that existing theories of fiduciary doctrine have been examined and a new theory of fiduciary law has been suggested, the conclusion of the two-step process of our approach must be to illustrate the characteristics of relationships which are fiduciary in nature. There are four general characteristics of fiduciary relations: (1) the necessity of utmost good faith (*uberrima fides*); (2) categorical open-endedness; (3) the reverse onus of proof, and; (4) the situation-specificity of fiducial relations. It is towards these characterizations that our discussion will now turn.

1. The Fundamental Principle of Fiduciary Doctrine: Utmost Good Faith (*Uberrima Fides*)

The necessity of *uberrima fides*, or utmost good faith, is the foundation of fiduciary doctrine. It is not only the fundamental premise around which fiduciary law is built, but it is the hallmark of the fiduciary relation. In order to allow the proper functioning of the fiduciary relation, the utmost good faith of the parties, in particular that of the fiduciary, must be observed and cannot be deviated from.

To prevent deviations from the fiduciary standard of *uberrima fides*,

there are sanctions which govern fiduciaries' actions while acting in their capacities as fiduciaries. Where fiduciaries act contrary to the duties imposed by their fiduciary offices and against the best interests of their beneficiaries, these sanctions are imposed upon them to protect the interests of the beneficiaries who are entitled to rely upon their fiduciaries' *uberrima fides*. These sanctions are used also to punish fiduciaries for their improper activities. The fiduciary obligation is, as Ernest Weinrib describes it, "the law's blunt tool for the control of [the fiduciary's] discretion."[316] It exists to deter or discipline those who seek to contravene the principle of *uberrima fides*.

The legal concept of *uberrima fides* possesses an entirely separate existence from the concept of good faith in law.[317] Whereas good faith is an

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[316]Weinrib, note 270, *supra*, at p.4.

[317]The difference between the two concepts is that *uberrima fides* is not merely good faith, but good faith magnified to its highest extreme -- *i.e.* the utmost good faith. Good faith is defined in *Black's Law Dictionary*, note 20, *supra*, at p.623, as:

> An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction [*sic*] unconscientious.

Uberrima fides, on the other hand, is characterized, at p.1363, as:

> The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight.

An example of *uberrima fides* may be seen in insurance contracts, where a continuing duty of the utmost good faith exists between the insurer and insured due to the nature of insurance contracts and the possibilities which

important aspect of many areas of law, *uberrima fides* is the very heart of fiduciary doctrine. Unfortunately, discussions of the legal principle of good faith are sometimes mistaken by the judiciary as necessitating the existence of a fiduciary relation. Indeed, where a fiduciary relation exists, there is necessarily the existence of utmost good faith. This differs from the legal concept of good faith, however. Where good faith exists in a relationship, there is no need for there to be a fiduciary relation.[318]

The distinctions between *uberrima fides* and the legal concept of good faith must be kept intact or else fiduciary doctrine, breach of confidence, and negligent misrepresentation risk being dumped into a generic category of equitable remedies and becoming indistinguishable from each other. While the equitable basis of these contiguous areas is the same, the categories themselves describe entirely different scenarios. It is important, therefore, to distinguish between these areas to both strengthen their existence and avoid the confusion which has arisen from their intertwining by the judiciary:

> From the fiduciary viewpoint it is an unfortunate development if the intertwining of breach of confidence and the fiduciary concept occurs as a result of an attempt to introduce standards of good faith into the marketplace, even though it is a worthy cause. Inappropriate

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exist therein for *mala fide* activity. See, for example, *Carter v. Boehm* (1766), [1558-1774] All E.R. Rep. 183 (K.B.). The seminal case on insurance contracts in Canada is *Fine's Flowers Ltd. v. General Accident Assurance Co.* (1974), 5 O.R. (2d) 137 (H.C.), aff'd (1977), 81 D.L.R. (3d) 139 (Ont. C.A.), where the Ontario High Court of Justice, at p.139, described the relationship between insurer and insured as "a close and continuing relationship."

[318]Instead, there could be an instance of breach of confidence or negligent misrpresentation. See Reid, note 265, *supra*.

> application of the fiduciary concept simply serves to stunt the development of breach of confidence and make the fiduciary concept even more unwieldly. It is therefore important to recognise and apply the distinctions between the two concepts.[319]

The requirement of *uberrima fides* insists that fiduciaries carry out their duties of fiduciary office to a high and ultimately objective standard.[320] It entails the duty of fiduciaries to act in the best interests of their beneficiaries

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[319]*Ibid.*, at p.125.

[320]While fiduciaries are given the autonomy to decide for themselves what is in the best interests of their beneficiaries, they are, nevertheless, subject to the governing principles of Equity if a beneficiary claims a breach of fiduciary duty. Finn (1977), note 6, *supra*, explains this basis of the fiduciary's standard of duty at p.16:

> As a general rule, it is the province of the fiduciary to determine what actions *are in the interests of his beneficiaries.* The courts are not entrusted with this decision. On the other hand, it is the province of the courts to determine what actions *are not in the beneficiaries' interest.*

What follows from Finn's characterization is that in determining what actions *are not* in the beneficiary's best interests, the courts are leaving open only those actions which *are* in the beneficiary's best interests. There is, ultimately, no actual difference in effect from what Finn classifies as two separate and distinct endeavours. Therefore, even if Finn's characterization is accepted, the courts effectively supervise the fiduciary's duty as if they were actually determining what actions are in the beneficiary's best interests:

> To the extent that he [the fiduciary] has discretions, he can make choices. Equity's concern is to ensure that if and when choices are to be made, they will be made by the fiduciary, and will be made for and in the beneficiaries' interests.

Finn (1977), note 6, *supra*, at p.16; see also generally, at pp.15-16.

whose interests the fiduciaries both hold and serve: "... [T]he hallmark of fiduciary relationship is that the fiduciary, at least within a certain scope, is expected to pursue the best interest of the client."[321] The fiduciary standard of *uberrima fides* also allows beneficiaries to rely upon the undertakings of their fiduciaries to act in the beneficiaries' best interests. Beneficiaries are under no compulsion or obligation to inquire into the actions of their fiduciaries to ensure that the fiduciaries are not in breach of their duties.[322] This factor, as we have seen, is directly related to the ability of beneficiaries to avoid limitation periods.[323] Due to the difficulty in discovering a fiduciary breach, the ability of beneficiaries to rely upon the integrity of their fiduciaries' actions allows them to commence legal action against indecorous fiduciaries once they discover the existence of the breach.[324]

The importance of *uberrima fides* to the vitality of fiduciary doctrine will be re-emphasized in the section entitled "General Principles Governing Fiduciary Relations."[325] As will become evident, the rule against conflict of interest, for example -- namely, that fiduciaries must: (1) not profit from their positions; (2) provide full disclosure of their fiduciary dealings; (3) not compromise their beneficiaries' interests; (4) treat all beneficiaries fairly and

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[321]McLachlin J. in *Canson Enterprises Ltd. v. Boughton & Co.*, note 37, *supra*, at p.554.

[322]See note 314, *supra*.

[323]See note 315, *supra*.

[324]Note 314, *supra*.

[325]Ch. IV(d), *infra*.

equally, and; (5) not delegate fiduciary responsibilities -- is designed to protect, deter, and/or sanction those who seek to deviate from the fiduciary standard of *uberrima fides*.

2. The Categories of Fiduciary Relationships Are Never Closed

No relationship is precluded from being classified as fiduciary as long as it possesses the general characteristics which are a requisite part of the fiduciary relation:

> The existence of fiduciary obligations does not depend on the existence of identifiable classes of relationships. It is the nature of the relationship rather than the category of actor involved that gives rise to the duty. Because of this, the categories of fiduciary obligations, like those of negligence, are never closed.[326]

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[326]Gautreau, note 210, *supra*, at p.8. See also Ellis, note 202, *supra*, at p.1-7: "It is readily apparent that the Courts will not -- indeed, cannot -- create an exhaustive list of fiduciary categories"; Sealy, note 239, *supra*, at p.135; J.R.F. Lehane, "Fiduciaries in a Commercial Context," in Finn, note 44, *supra*, at p.96; Mason, note 44, *supra*, at p.246; *Tate v. Williamson* (1866), 2 L.R. Ch. App. 55 (Ch.), at pp.60-61:

> The jurisdiction exercised by Courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exacts limits of its exercise.

It should be remembered, though, that although a relationship is fiduciary if it possesses certain general characteristics, the limits of a fiduciary relation should not be absolutely defined by those characteristics.[327] As Sir Eric Sachs J. explains in *Lloyd's Bank v. Bundy*, "As was pointed out in *Tufton v. Sperni*, [1952] 2 T.L.R. 516, the relationships which result in such a duty must not be circumscribed by reference to defined limits."[328] This is what is truly meant by the open-endedness of the fiduciary relation: the categories of fiduciary relations are never closed and neither are their limits.

The open-endedness of fiduciary categorization is well-recognized in Canadian jurisprudence. In *Laskin v. Bache & Co.*, the Ontario Court of Appeal explains that "the category of cases in which fiduciary obligations and duties arise from the circumstances of the case and the relationship of the parties is no more closed than the categories of negligence at common law."[329] The Court of Appeal's holding has subsequently been upheld in *Canadian Aero Service Ltd. v. O'Malley*,[330] and, more recently, by the Ontario Court of Appeal in *International Corona Ltd. v. Lac Minerals Ltd.*: "The circumstances which give rise to such a relationship have not been fully defined nor are they forever closed.[331]

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[327]For to do so offends the situation-specificity of fiduciary doctrine.

[328][1975] 1 Q.B. 326 (C.A.), at p.341.

[329](1971), 23 D.L.R. (3d) 385 (Ont. C.A.), at p.392.

[330]Note 277, *supra*, at p.383.

[331]Note 247, *supra*, at p.44. See also at p.46, referring to the judgment of

The determination of whether a relationship is fiduciary on the legal plane of fiduciary relations ultimately belongs to the judiciary.[332] While academic commentaries may aid in the understanding of what constitutes a fiduciary relation and the general characteristics and principles which govern those relations, the ultimate determination of whether or not a relationship is fiduciary on the legal plane rests not with the parties to the relationship or with the dictates of commentators on the subject but with the judiciary.[333]

Even where particular types of relationships have previously been accepted as fiduciary, that does not necessarily entail that every instance of those relationships is fiduciary or that every aspect or component of any one particular relationship is fiduciary.[334] As La Forest J. recognizes in *LAC Minerals*, it is far more important to look at the particulars of the relationship to ascertain whether it is fiduciary rather than simply observing who the parties to the relationship are:

> The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As

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Dickson J. in *Guerin*, note 1, *supra*, at p.341.

[332]"A fiduciary responsibility, ultimately, is an imposed not an accepted one." Finn (1989), note 6, *supra*, at p.54. See also Slaght, note 247, *supra*, at pp.39, 44, 49.

[333]Whose decisions are strongly influenced by practice. Refer back to the distinction between fiduciary relationships which exist on the legal plane versus those which exist on the extra-legal plane in Ch. III(e), *supra*.

[334]See Shepherd, note 6, *supra*, at p.21; Finn (1977), note 6, *supra*, at p.4; Sealy, note 243, *supra*, at p.81.

> such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected.[335]

The failure to observe this basic premise, however, has resulted in the unfortunate assumption by many that fiduciary relationships are relationships which exist exclusively between decidedly stronger and weaker parties. This assumption is unfounded and simply untrue, as our earlier discussion of the Inequality Theory of fiduciary doctrine illustrates.[336]

3. The Reverse Onus

A third characteristic of all fiduciary relationships is the courts' presumption of a breach of duty by the fiduciary upon the allegation of such by a *cestui que trust*.[337] This reverse onus characteristic of fiduciary law is illustrated by Lord Penzance in *Erlanger v. New Sombrero Phosphates Ltd.*:

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[335]Note 46, *supra*, at p.29. Note the recognition of this point in *Guerin* at note 26, *supra*. See also Slaght, note 247, *supra*, at p.40 "... [A relationship may be fiduciary in nature for only some specific purposes or in respect of some specific property, idea or action, or concerning only one of a number of joint undertakings."; *N.Z. Netherland Society v. Kuys*, [1973] 2 All E.R. 1222 (H.L.), at p.1225: "A person ... may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at."

[336]Ch. IV(c), ii, 3, *supra*.

[337]The reverse onus is only one means of a court determining whether a fiduciary breach has occurred. For a more complete discussion of other methods of determination, see Shepherd, note 6, *supra*, at pp.125-137.

> The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relationship and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that [fiduciary] position, the burden of shewing that he has not used it to his own benefit.[338]

In other words, the courts are inclined to accept beneficiaries' allegations of fiduciary breach once the fiduciary nature of their relationships have been accepted. Beneficiaries need only demonstrate, *prima facie*, the existence of a fiduciary relationship between the parties and the circumstances which gave rise to the alleged breach of duty. The *prima facie* inference of a fiduciary breach is made merely by alleging its occurrence as against the nature of the intercourse between the parties. Once the court accepts that the relationship is fiduciary and that a breach may have occurred, the burden of proof then shifts to the fiduciary to demonstrate that it did not, in fact, breach its duties:

> Because a fiduciary's misappropriation is profitable and difficult to prove, it is appropriate for fiduciary law to infer disloyalty from its appearance. Once the appearance of disloyalty is established, the burden shifts to the fiduciary who must prove her

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[338](1877-78), 3 A.C. 1218 (H.L.), at p.1230. See also *Allcard v. Skinner*, note 264, *supra*, at p.93; *Zamet v. Hyman*, [1961] 3 All E.R. 933 (C.A.), at p.938; Ellis, note 202, *supra*, at pp.1-3 to 1-4; Shepherd, note 6, *supra*, at pp.126-127; Gautreau, note 210, *supra*, at pp.26-27; Slaght, note 247, *supra*, at pp.42-43.

innocence.[339]

This sentiment is more graphically enforced in *Girardet v. Crease & Co.*, where Southin J. states that "[A]n allegation of breach of fiduciary duty carries with it the stench of dishonesty -- if not of deceit, then of constructive fraud."[340]

Fiduciaries may only rebuff allegations of breach by demonstrating that they did not act in any manner other than in the best interests of their beneficiaries. Fiduciaries may not remove their liability for breaching their duties by illustrating that their actions also benefited their beneficiaries. This is true regardless of whether the actions were entered into in good or bad faith.[341] As long as fiduciaries place their own interests before or equal to those of their beneficiaries, they are liable for breaching their fiduciary duties.[342]

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[339]Cooter and Freedman, note 201, *supra*, at p.1048; see also Slaght, note 247, *supra*, at pp.42-43.

[340]Note 205, *supra*, at p.362.

[341]According to the principle *Quod ab initio non valet in tractu temporis non convalescet*: "That which is bad in its commencement improves not by the lapse of time." *Black's Law Dictionary*, Fifth Edition, note 20, *supra*, at p.1126. See Vinter, note 227, *supra*, at p.11; *Parfitt v. Lawless*, note 264, *supra*, at p.468.

[342]Refer to note 356, *infra*.

4. The Situation-Specificity of Fiduciary Doctrine

The one notion that has been consistently reinforced throughout our discussion of fiduciary doctrine is that a relationship is fiduciary only if its nature and the particular circumstances under which it exists warrant its classification as fiduciary:

> What must be shown ... is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement.[343]

This sentiment is taken one step further by Sir Eric Sachs J. in *Lloyd's Bank v. Bundy*, where he states that not only is the determination of the fiduciary nature of a relationship dependent upon the particularities of a specific situation, but that any attempt to create a precise definition of the fiduciary relation in the absence of context is impossible or, at the very least, unwise:

> Everything depends on the particular facts, and such a relationship has been held to exist in unusual circumstances as between purchaser and vendor, as between great uncle and adult nephew, and in other widely differing sets of circumstances. Moreover, it is neither feasible nor desirable to attempt closely to define the relationship, or its

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[343]Finn (1989), note 6, *supra*, at p.46.

> characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does.[344]

Our theory of fiduciary doctrine pays heed to Sachs J.'s warning. It does not attempt to precisely or absolutely define fiduciary relationships in the absence of context. All that it presumes to do is to provide a general definitional guideline for relationships which may be deemed to be fiduciary which is subject to the situation-specificity of the particular relationship under scrutiny. As the catalyst which acts as the essential element of our theory, the situation-specificity of fiduciary doctrine is able to avoid excessive categorization and the misapplied drawing of absolute boundaries which delimit fiduciary relations.

5. Summary

All fiduciary relationship possess, in varying degrees and extents, these four general characteristics just discussed; without them, a relationship may be fiduciary-like, but it is not truly fiduciary. Since the determination of a relationship as fiduciary is ultimately dependent upon the particulars of the interaction between the parties involved, in the absence of context it is possible only to illustrate the general principles which lie at the foundation of every relationship which is properly described as fiduciary. These general principles will now be outlined in greater detail.

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[344] *Lloyd's Bank v. Bundy*, note 328, *supra*, at p.341. See also *Re Craig*, [1971] Ch. 95, at p.104.

(d) General Principles Governing Fiduciary Relations[345]

There are a number of fundamental tenets which govern the relationship between fiduciary and beneficiary. These are designed simultaneously to protect the beneficiary and to preserve the integrity of socially-valuable and necessary interdependent relationships. They are all derived or adapted from four fundamental principles which exist at the foundation of fiduciary doctrine. As illustrated earlier, these four essential tenets governing fiduciaries' behaviour mandate that fiduciaries: (1) must not benefit from their positions; (2) must provide full disclosure of their actions; (3) may not compromise their beneficiaries' interests, and; (4) may not delegate absolute authority and/or responsibility over their beneficiaries' interests.

i. Fiduciaries Must Not Benefit From Their Positions

The most basic of these governing principles is that fiduciaries may not benefit from their positions as fiduciaries.[346] This rule is a part of the larger rule prohibiting fiduciaries from placing themselves in conflict of interest.

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[345]This section describes the basic principles governing fiduciary relations from which all others are drawn. For a more detailed analysis, refer to Finn (1977), note 6, *supra*; Shepherd, note 6, *supra*; Ellis, note 202, *supra*.

[346]The starting point for any discussion of the rule that fiduciaries must not profit from their positions is *Keech v. Sanford*, note 200, *supra*, especially at pp.223-224.

This larger rule has been stated quite bluntly on a number of occasions, such as in *Davis v. Kerr*, where Taschereau J. explains that:

> ... [N]o one having duties of a fiduciary character to discharge shall be allowed to enter into engagements or assume functions in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those he is bound to protect.[347]

Not only may fiduciaries not benefit personally, but they may not benefit a third party at the expense of their beneficiaries' own interests. The prohibition against personal gain also applies to situations where there is an *opportunity* for personal gain.[348] The reason for the prohibition against personal gain by fiduciaries when acting in their roles as fiduciaries is twofold: to prevent any semblance of shady dealings or improper activities and to avoid having the courts investigate the nature of fiduciaries' dealings by forbidding these occurrences before they arise.

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[347](1890), 17 S.C.R. 235, at p.246. See also *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (H.L.), at p.381:

> The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect.

[348]Such as in *Canadian Aero Service Ltd. v. O'Malley*, note 277, *supra*, and *LAC Minerals v. International Corona Resources Ltd.*, note 46, *supra*. This principle also applies to the opportunity for third part gain. Refer to the discussion of the principle that fiduciaries may not benefit a third party at their beneficiaries' expense in the section entitled "Fiduciaries Must Not Compromise Their Beneficiaries' Interests," Ch. IV(d), iii, *infra*.

Perhaps the most-recognizable judicial expression of this rule is that of Lord Herschell in *Bray v. Ford*:

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.[349]

An equally noteworthy characterization of the rule is eloquently stated by Cardozo J. in *Meinhard v. Salmon*:

> Many forms of conduct permissible in a work-a-day world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity had been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. ... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.[350]

The rigour with which the judiciary continues to enforce the rule against conflict of interest demonstrates its essentialness to the continued

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[349][1896] A.C. 44 (H.L.), at p.51. See also Shepherd, note 6, *supra*, at pp.147-151; Finn (1977), note 6, *supra*, at pp.199-258.

[350]164 N.E. 545 (N.Y.C.A. 1928), at p.546.

efficacy of fiduciary doctrine.[351] If fiduciaries were allowed to place other concerns above or on par with those of their beneficiaries, the very basis of fiduciary relationships -- that fiduciaries take on responsibilities *to act in the best interests of their beneficiaries* -- would cease to exist. As much as Equity has refused to pin down the fiduciary relation, it has seen fit to rigidly define certain rules which are essential to the vitality of fiduciary doctrine.

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[351]Indeed, the passage of time has not dampened the fervency with which the rule against conflict of interest has been enforced by the courts. More recently, the sentiments of Lord Herschell and Cardozo J. have been affirmed by the House of Lords in *Phipps v. Boardman*, [1967] 2 A.C. 46 (H.L.), at p.123, where Lord Upjohn warns that:

> ... [A] person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and interest may conflict.

The rule against conflict of interest has also received significant approbation in Canada. One of the best explanations of the basis of the rule may be seen in *Standard Investments Ltd. v. C.I.B.C.* (1983), 5 D.L.R. (4th) 452 (Ont. H.C.), at p.483:

> Although the courts have refrained judiciously from attempting a general definition of the fiduciary relationship, the common elements that must be present are the reposing of trust and confidence in one who undertakes to act for or on behalf of the person reposing the trust. Equity then imposes a duty on the fiduciary to act in good faith and with due regard to the interests of the one imposing the confidence. It is the undertaking to act for and on behalf of another which imports the fiduciary responsibility. The conflict of duty and interest rule applies not simply because of the placing of trust and confidence, but, in my view, because of the undertaking of the fiduciary to act for or on behalf of his principal.

ii. The Requirement of Full Disclosure

A corollary to the rule against conflict of interest is that fiduciaries must fully disclose their actions to their beneficiaries. There is a significant debate as to whether fiduciaries who fully disclose their personal interests in decisions made while acting as fiduciaries are exempt from the conflict of interest rule.[352]

In *Regal (Hastings) Ltd. v. Gulliver,*[353] Lord Russell of Killowen explains that the conflict of interest rule is generally applicable and not restricted to situations where there has been wrongful action. Fiduciaries are bound to account for profits derived from any type of activity related to their positions -- whether the activity is *bona fide*, with their beneficiaries' full knowledge and consent, or otherwise -- simply due to the fact that profit was made:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides*: or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has

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[352]For different sides to this debate, see Finn (1977), note 6, *supra*, at p.51; Gautreau, note 210, *supra*, at p.20; Ellis, note 202, *supra*, at p.1-3.

[353]Note 347, *supra*.

> in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.[354]

The debate over the ability of fiduciaries to avoid conflict of interest liability by giving full disclosure of their actions to their beneficiaries is a complicated one. As Lord Herschell explains in *Bray v. Ford*:

> It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based upon the consideration that, human nature being what it is, there is danger of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.[355]

The cynicism of Lord Herschell regarding human nature aside, there is an ethical question over the ability of fiduciaries, who are bound to act selflessly in the best interests of their beneficiaries while forsaking their own personal interests, to exonerate themselves from conflict of interest liability by disclosing their personal interests to their beneficiaries.

The *raison d'être* of the conflict of interest rule is to protect the integrity of interdependent relationships from the malevolent side of human

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[354]*Ibid.*, at p.386. See also at p.381.

[355]Note 349, *supra*, at pp.51-52.

nature.[356] This rationale is consistent with the basis for the determination of a breach of fiduciary obligations. A breach of fiduciary duty occurs simply by way of the fiduciary's departure from the beneficiary's best interests. It does not require malevolent action or improper motive on the part of the fiduciary.[357]

As Viscount Mowat explains in *Harrison v. Harrison*, in potential conflict of interest situations the presumption of fraud or wrongdoing is so high that all transactions occurring under such auspices, though perhaps completely innocent and free of conflict, must be rendered void by law:

> Such transactions are so dangerous that, to prevent them, they are wholly forbidden, and are not merely declared void where damage has arisen from them, or where fraud was mixed up with

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[356]Ellis, note 202, *supra*, at p.1-3:

> Even where the fiduciary acts in good faith and in fact reaps a profit for the beneficiary, then, his actions will constitute a breach of fiduciary duty where he places his own interests ahead of, or equal to, the party to whom he owes the duty. The single-mindedness of his intentions must be directed toward the beneficiary to the detriment of his own self-interest.

[357]*Ibid.*, at pp.1-2 to 1-3:

> It is the fact of a departure from adherence to the beneficiary's best interests, rather than an evaluation of the fiduciary's motive in the departure, that constitutes a breach of fiduciary duty. It is in this sense that the absence of malice will not validate a repugnant act.

them.[358]

The conflict of interest rule originates in public policy and accordingly cannot be contracted out of.[359] Where exculpatory provisions exist which allow fiduciaries to contract out of liability for breach of their duties to their beneficiaries, they will be struck down by the courts as contrary to public policy. The notion that fiduciaries, whose duties to their beneficiaries are kept in check through their legal liability for breach of duty, may contract out of this liability is fundamentally incompatible with the basis of fiduciary doctrine: "Giving literal effect to a broad exculpatory provision, then, seems inconsistent with the situation-specificity of fiduciary obligation itself."[360]

A circular situation arises in the fiduciary's attempt to escape liability for a breach of duty through an exculpatory clause. By invoking such a clause

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[358](1868), 14 Gr. 586 (P.C.), at p.592.

[359]Reference may be made to the rule that exculpatory clauses in trust documents which seek to remove liability from a trustee for breach of trust are invalid for being contrary to public policy (remembering, of course, that trust law is generally applicable by analogy to the law of fiduciaries, note 105, *supra*). See, for example, *Re Poche* (1984), 6 D.L.R. (4th) 40 (Alta. Surr. Ct.), at p.55:

> In my opinion a trustee must be held responsible for any loss resulting from his gross negligence, regardless of any provision in the trust instrument relieving him from such liability.

See also *Knox v. Mackinnon* (1888), 13 A.C. 753 (H.L.), at p.765; *Rae v. Meek* (1889), 14 A.C. 558 (H.L.), at pp.572-573; *Carruthers v. Carruthers*, [1896] A.C. 659 (H.L.), at pp.664, 667; *Wyman v. Patterson*, [1900] A.C. 271 (H.L.), at pp.278, 280-281, 285-286, 287.

[360]De Mott, note 30, *supra*, at p.922.

to escape fiduciary responsibility, a fiduciary is, by the very act of invoking the clause, in breach of duty even before the clause may be taken advantage of.[361] Fiduciaries are bound to act selflessly in the best interests of their beneficiaries. Any fiduciary who attempts to escape liability for the non-commission of fiduciary duties contravenes the duty to act selflessly and in the beneficiary's best interests. Therefore, by attempting to remove liability for a breach, the fiduciary is actually instigating a breach -- the fiduciary invokes liability while simultaneously trying to avoid it.

iii. Fiduciaries Must Not Compromise Their Beneficiaries' Interests

Another rule related to conflict of interest holds that fiduciaries may not compromise the interests of their beneficiaries. This rule applies regardless of the number of beneficiaries which exist in relation to the same fiduciary duty. In other words, where, for example, directors of a corporation owe fiduciary duties to the corporation's shareholders, they owe the same duty to each and every shareholder, regardless of their number. These identical duties are derived from the fiduciaries' ability to affect the shareholders' interests through their positions as directors. Fiduciaries may not compromise their beneficiaries' interests for personal benefit or gain, or for the benefit or gain of a third party or another *cestui que trust*. Where more than one beneficiary exists, fiduciaries must treat them fairly and equally or else risk being found in breach of their fiduciary duties.

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[361] If, indeed, fiduciary law allowed a fiduciary to do so.

Fiduciaries must also not derogate from their duties to act in the best interests of their beneficiaries. A concrete example of a breach of this duty may be seen in *Guerin*. The failure of the Crown, through its agents, to secure lease arrangements according to the terms specified by the Musqueam band constitutes a breach of the Crown's fiduciary duty to not compromise the interests of its beneficiary. The *Guerin* scenario also illustrates how fiduciaries are in breach of their duties for not obtaining optimum benefits for their beneficiaries where they sell their beneficiaries' properties at lower prices than could have legitimately been obtained.

iv. Fiduciaries' Delegation of Authority

Finally, fiduciaries may not absolutely delegate their fiduciary authority to others. Although they may delegate the entirety of their fiduciary *powers* to act in their beneficiaries' best interests, they cannot divest themselves of the totality of their fiduciary *obligations* to their beneficiaries. Once fiduciaries undertake their positions, they are responsible for carrying them out to an objectively high standard.[362] The rationale behind the rule against delegations is illustrated in *Turner v. Corney*, where it was held, in the context of a trust, that:

> ... [T]rustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons; and if they employ an agent, they remain subject to responsibility towards their *cestuis que trust*, for

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[362]See note 320, *supra*.

whom they have undertaken the duty.[363]

The basis of the ruling in *Turner v. Corney* stems from the maxim *delegatus non potest delegare* -- a delegate must not re-delegate. In other words, where a person has been delegated a duty, it is improper for that person to re-delegate that same duty to another.[364] While this generally holds true of persons occupying the role of fiduciaries, it is not a steadfast rule. In certain circumstances where it is to the beneficiary's advantage for the fiduciary to delegate decision-making authority to another, such as in the instance of delegating authority over investments to an investment broker or financial specialist, delegating authority will not automatically result in a breach of fiduciary duty. As Donovan Waters explains, even though the fiduciary:

> ... [M]ust perform his duties personally [and] the principle of delegation is not recognized by Equity ... if the nature of his trust duties, given the nature of the trust property and the terms of the trust, are such that in the ordinary course of affairs businessmen would employ agents, that freedom will be extended to him.[365]

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[363](1841), 5 Beav. 515 (Ch.), at p.517.

[364]See Finn (1977), note 6, *supra*, at p.20: "Any donee of a discretion, who has trust and confidence reposed in his personal judgment in exercising that discretion, cannot delegate it to another in the absence of an express authority to do so." The maxim *delegatus non potest delegare* also has particular application in Administrative Law: see John Willis, "Delegatus Non Potest Delegare," (1943), 21 *Can. Bar Rev.* 257.

[365]Waters, note 106, *supra*, at p.32. Refer back to *Turner v. Corney*, note 363, *supra*.

Fiduciaries remain responsible, however, for the results of their delegations. For example, if a fiduciary appoints an agent and the agent commits an improper act, the fiduciary:

> ... [M]ay be liable for the agent's wrongdoing. Similarly, he is not entitled to shrug off the wrongful actions of a co-trustee on the basis that he knew nothing of what the other was doing; as a fiduciary he is responsible for all acts of trusteeship, and he therefore carries a several as well as joint liability for all that is done in the name of the trust or through the exercise of the office of trustee.[366]

Since the act of delegation itself does not remove the fiduciary's responsibility, a fiduciary should only delegate with great caution.

(e) <u>The Advantages of Fiduciary Law</u>

The great advantage to pursuing the fiduciary route in litigation is the avoidance of many troublesome restrictions which are evident elsewhere in law. Perhaps the most obvious of these is the avoidance of limitation periods.[367] Another is the ability to circumvent the rules of remoteness of damages. Still another is the reverse onus placed on fiduciaries, once a fiduciary breach of duty is -- in light of the particulars of the situation -- *prima facie* demonstrated to exist by a beneficiary, to prove that they did not breach

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[366]Waters, note 106, *supra*, at p.32.

[367]See note 315, *supra*, and its accompanying text.

their obligations to their beneficiaries.[368] Moreover, the malleability of fiduciary doctrine -- due to its situation-specificity -- has also contributed to its popularity. Despite all of these advantages, what is often viewed as the greatest advantage of fiduciary law is the wealth of remedies available in conjunction with a finding of a fiduciary breach.

i. Fiduciary Remedies

The number of potential remedies available to a *cestui que trust* who is the victim of a breach of fiduciary duty is one of the primary reasons for the fiduciary argument's tremendous popularity in use. The range of available remedies for a breach of fiduciary duty is far wider than that available in contiguous areas such as breach of confidence and negligent misrepresentation. Moreover, the remedies available for a breach of fiduciary obligation are much more elastic than those available at common law.[369]

Consistent with the situation-specificity of fiduciary doctrine, fiduciary remedies vary according to the nature of the relationship under examination and the method of breach involved.[370] No two breaches of fiduciary duty are identical, just as no two fiduciary relationships are identical. This is something which is not often recognized by the judiciary, as Lambert J.A.

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[368]See Ch. IV(c), iv, 3, *supra*.

[369]See *Nocton v. Ashburton*, note 226, *supra*, at p.952.

[370]As Cardozo J. explains in *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380 (N.Y.C.A. 1919), at p.389: "The equity of the transaction must shape the measure of relief."

illustrates in *Canson Enterprises Ltd. v. Boughton & Co.*:

> The rubric "breach of fiduciary duty" has come to encompass so many different types of liability that it is not now possible to determine the appropriate remedy by defining the wrong simply as a "breach of fiduciary duty". It is necessary, instead, to look through the categorization of the wrong as a "breach of fiduciary duty" to the true nature of the wrong, and to move from there to the determination of the remedy. The nature of the wrong and the nature of the loss, not the nature of the cause of action, will dictate the scope of the remedy.[371]

Potential remedies which may be invoked upon a finding of a breach of fiduciary obligation include restitutionary, personal, proprietary, and deterrent remedies. These may include: equitable remedies -- such as constructive trust, injunction, rescission, accounting for profits, equitable damages (such as compensation for losses, which differs from common law damages in that it is not limited by foreseeability or remoteness), and *in rem*

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[371]Note 105, *supra*, at p.182, cited with approval by La Forest J. in *Canson Enterprises Ltd. v. Boughton & Co.*, note 37, *supra*, at p.563. See also the reasons given by McLachlin J. at p.546, affirming the analogy between fiduciary and trust damages in *Guerin* (see also McLachlin J.'s discussion of *Guerin* at pp.549-551):

> Differences between different types of fiduciary relationships may, depending on the circumstances, dictate different approaches to damages. ... However, such differences must be related in some way to the underlying concept of trust -- the notion of special powers reposed in the trustee to be exercised for the benefit of the person who trusts.

restitution -- and/or liability based upon negligence, fraud, coercion, undue influence, profiteering, economic duress, negligent misrepresentation, or third party liability.[372] A court may also grant interest on financial proceeds awarded to remedy a breach of fiduciary duty which is payable from the date of the breach, not the date of the beneficiary's knowledge of the breach or the judicial finding of the breach.

In addition to the remedies listed above, a wronged beneficiary may also obtain the advantage of being able to trace funds (in appropriate circumstances).[373] Moreover, in situations of potential conflict of interest where a beneficiary cannot unilaterally dismiss a fiduciary -- such as with trustees or public officials -- and demonstrates grounds for the fiduciary's removal,[374] the beneficiary may seek a court order to remove the fiduciary.[375]

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[372]For more on fiduciary remedies, see Ellis, note 202, *supra*, at pp.20-1 to 20-26; John D. McCamus, "Remedies for Breach of Fiduciary Duty," in *Fiduciary Duties*, Law Society of Upper Canada Special Lectures, 1990, (Toronto: De Boo, 1991); The Hon. Mr. Justice W.M.C. Gummow, "Compensation for Breach of Fiduciary Duty," in Youdan, note 5, *supra*; Timothy G. Youdan, "The Fiduciary Principle: The Applicability of Proprietary Remedies," in Youdan, note 5, *supra*; Ian E. Davidson, "The Equitable Remedy of Compensation," (1982), 3 *Melbourne Univ. L. Rev.* 349; 16 *Halsbury's Laws of England*, Fourth Edition, note 233, *supra*, at pp.977-989 (para. 1452-1464); *International Corona Resources Ltd. v. Lac Minerals Ltd.*, note 247, *supra*, at pp.56-67; Waters, note 278, *supra* .

[373]See notes 40 and 306, *supra*, and their accompanying text; 16 *Halsbury's Laws of England*, Fourth Edition, note 233, *supra*, at pp.983-989 (para.1460-1464); Ellis, note 202, *supra*, at pp.20-14 to 20-17.

[374]Such as the result of irreparable harm to the beneficiary by not removing the fiduciary, although no past misconduct is necessary to ground an application for a fiduciary's removal. The test used by the courts in this situation is the possibility of conflict not the actual present or past existence of conflict: *Rose v. Rose* (1914), 22 D.L.R. 572 (Ont. C.A.); *Re Consiglio Trusts*

Furthermore, there is also the possibility of a finding of cumulative damages in situations where the fiduciary is liable for damages flowing from more than one action. One such example is a fiduciary's acceptance of a bribe from a third party to act in a manner contrary to the beneficiary's best interests. In such a scenario, the fiduciary should be found liable to the beneficiary for both the amount of the bribe and damages flowing from the breach of duty. While the payment of what amounts to double recovery by the beneficiary for the fiduciary's improprieties is troublesome, in light of the alternative of having the indecorous fiduciary not be fully punished for the breach of duty, there is no other viable alternative which is consistent with the equitable basis of fiduciary doctrine.

ii. An Illustration

Let us suppose that the fiduciary (*F*) is approached by a third party (*X*), who wishes to purchase the beneficiary's (*B*'s) parcel of land in order to resell it to a land developer (*D*). *X* knows that *D* is willing to pay $100,000 for the land. *X* offers *F* $10,000 and a 10% share of any profits from the sale of *B*'s property -- a secret profit -- if *F* will sell the property to *X* for $60,000. *F* accepts *X*'s offer and sells *X* the land for $60,000, whereupon *X* sells the land to *D* for

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(No. 1) (1973), 36 D.L.R. (3d) 659 (Ont. C.A.), at p.660: "It is our view that misconduct on the part of a trustee is not a necessary requirement for the Court to act."; see Shepherd, note 6, *supra*, at p.342, note 18.

[375]See Shepherd, note 6, *supra*, at pp.342-343; Ellis, note 202, *supra*, at p.2-3; *Rose v. Rose*, note 374, *supra*; *Toronto (City of) v. Bowes*, note 17, *supra*; *Hawrelak v. City of Edmonton*, note 17, *supra*; see also the discussion in note 17, *supra*.

$100,000. *X* then gives *F* the "secret profit" of $14,000 ($10,000 + 10% of the $40,000 profit) as per their agreement. Under this scenario, *B*'s loss is measured by the damages sustained as a result of *F*'s transfer of loyalty to an interest other than *B*'s own. More specifically, *B*'s loss is measured by the difference between the price *B* receives for the sale of the land ($60,000) and the price obtained by *X* for the sale of the land to *D* ($100,000), or $40,000.[376] The secret profit is merely the means by which *F*'s transfer of loyalty is effectuated.[377]

The situation arises, however, that if *B* is permitted only to recover damages for *F*'s breach of duty, *F*, while liable for the $40,000 loss suffered by *B*, retains the $14,000 paid by *X* to breach that duty. Since fiduciary laws were promulgated to protect the integrity of socially-valuable interdependent relationships, fiduciary doctrine insists that unscrupulous fiduciaries who attempt to profit from breaching their duties to their beneficiaries by taking

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[376]The quantum of damages *B* receives may also be augmented by the imposition of deterrent remedies by a court against *F*.

[377]Although it, too, may be, and often is, ordered by a court to be disgorged by *F* as a personal profit wrongfully obtained through *F*'s position as *B*'s fiduciary: see *Alexandra Oil & Development Co. v. Cook* (1908), 11 O.W.R. 1054 (C.A.), where the Court of Appeal, at p.1060, states that: "... [A] person occupying a fiduciary position of any kind cannot by any possibility be permitted to secretly make to himself a profit in the transactions in which he was concerned in his fiduciary capacity."

See also *Lavigne v. Robern* (1984), 51 O.R. (2d) 60 (C.A.), where a shareholder who made a secret profit from the sale of a company he owned jointly with two other shareholders -- a sale which he alone orchestrated -- was forced to disgorge the profit. Since he orchestrated the sale on behalf of himself and the other shareholders in the company, he was deemed to be a fiduciary to the other two shareholders and was forced to disgorge his secret profit due to his disloyalty.

bribes must disgorge not only the amount of the loss suffered as a result of such breach, but also the amount of the bribe obtained by which their loyalty was transferred. If *F* was allowed to keep the $14,000 bribe, *F* would gain an undeserved advantage by not being forced to personally reimburse *B* for the full value of *B*'s loss by paying out only $26,000 (the $40,000 loss minus the $14,000 bribe).

Although this situation arguably results in the beneficiary being overcompensated for the loss suffered (by gaining $54,000 while suffering a loss of only $40,000) and the fiduciary being overly punished (by receiving $14,000, yet disgorging $54,000), there is no other way that the beneficiary will be adequately compensated for the loss while the fiduciary is appropriately punished for the indiscretion. Of course, the courts possess the ability to award punitive damages against *F* for the breach on top of any other award granted to *B*.[378]

It must be remembered that the purpose of awarding damages to a *cestui que trust* affected by a breach of fiduciary duty -- in addition to compensating the *cestui que trust* for any direct loss sustained by the act of the breach itself -- is to prevent unscrupulous fiduciaries from benefiting from their positions by engaging in actions which breach their obligations to their beneficiaries. This purpose is consistent with the conflict of interest rule which holds that fiduciaries must not profit from their roles as fiduciaries.

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[378]It is not necessary for our purposes to discuss the liability of *X*, or *D* under either of these scenarios. This illustration is intended only to demonstrate the dilemma which arises in such a situation between overcompensating a wronged beneficiary and overpunishing an indecorous fiduciary.

Consequently, when choosing between two non-ideal situations, it is more consistent with the equitable basis of fiduciary doctrine to have the *cestui que trust* be overcompensated than to have the fiduciary be underpunished. Although the *cestui que trust* does not necessarily deserve to be overcompensated for the loss suffered, only the fiduciary's motives were tainted. Moreover, in accordance with the well-known credos of Equity in which the law of fiduciaries has its origins,[379] if an undeserved advantage results which must belong to either *B* or *F*, that advantage must lie with the *cestui que trust*.[380]

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[379]Namely, "He who seeks equity must do equity":

See 16 *Halsbury's Laws of England*, Fourth Edition, note 233, *supra*, at p.874 (para. 1303); Hanbury and Maudsley, *Modern Equity*, Thirteenth Edition, note 37, *supra*, at pp.27-28; *Davis v. Duke of Marlborough* (1819), 2 Swan 108 (Ch.), at p.157, per Lord Eldon LC: "The principle of this court is not to give relief to those who will not do equity."

and; "He who comes into equity must come with clean hands":

See 16 *Halsbury's Laws of England*, Fourth Edition, note 233, *supra*, at p.875 (para. 1305); Hanbury and Maudsley, *Modern Equity*, Thirteenth Edition, note 37, *supra*, at p.28; *Fitzroy v. Gwillim* (1786), 1 Term Rep. 153 (Ch.), per Lord Mansfield C.J., who said that in an equitable action, a plaintiff must "come with clean hands according to the principle that those who seek equity must do equity."

These principles insist that Equity will aid only those persons who rightfully deserve its aid; *i.e.* Equity will not aid those who act unscrupulously.

[380]See Gautreau, note 210, *supra*, at pp.22-24.

(f) Summary and Conclusions

Beginning with the strict definition of the term fiduciary and progressing through various theoretical frameworks of fiduciary law -- including the proposal of a new theory of fiduciary doctrine -- this chapter has discussed the basic principles and governing rules of the law of fiduciaries. The intention of this chapter is modest. Its goal is to enlighten the reader's knowledge of fiduciary doctrine in order to facilitate a better understanding of what is being discussed in the contextual consideration of the fiduciary relationship between the Crown and Native peoples in Canada which follows immediately after this chapter. Due to the complexity of fiduciary doctrine and the confusion surrounding the application of fiduciary law to the Crown-Native relationship, no meaningful discussion of the fiduciary character of Crown-Native relationship is possible in the absence of an adequate prior understanding of fiduciary doctrine in general.

The implications and ramifications of the application of fiduciary doctrine to the Crown-Native relationship have yet to be truly understood by judicial and academic commentators. The obligations to aboriginal peoples which the Crown holds by virtue of its position as their fiduciary are of major significance to the Crown-Native relationship. As a general duty, the Crown's obligations apply to all relations between it and aboriginal peoples. The following chapter will attempt to combine the understandings gained from the two preceding chapters to illustrate some of the specific effects of the Crown's fiduciary obligations upon the Crown-Native relationship.

V. THE CROWN'S FIDUCIARY DUTY TOWARDS ABORIGINAL PEOPLES IN CANADA

Even after the *Sparrow* decision, the courts' characterization of the fiduciary relationship between the Crown and Native peoples and the reciprocal rights and duties which it entails is not very well understood. A number of outstanding issues require consideration before a full and proper understanding of the fiduciary nature of the Crown-Native relationship may be achieved.[381]

(a) What Principles Apply to the Crown-Native Fiduciary Relationship?

It should be remembered that the situation-specificity of fiduciary doctrine renders the application of fiduciary doctrine to any relationship *specific to that particular relationship.* In this sense, all fiduciary relationships are *sui generis.* Dickson J.'s characterization of the relationship between the Crown and Native peoples as *sui generis* in *Guerin* bears out the theory of fiduciary doctrine suggested herein. Consequently, fiduciary doctrine's adaptation to the specifics of the Crown-Native relationship is accomplished in the same manner as its adaptation to any relationship which

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[381]The issues raised in this study are by no means exhaustive. The questions below are merely illustrative of the kinds of issues ignored by the courts.

is properly characterized as fiduciary.[382]

(b) Who is Bound by the Fiduciary Obligation to Aboriginal Peoples?

Next to determining which principles of fiduciary doctrine apply to the Crown-Native fiduciary relationship, the question of *who* is bound by the Crown's fiduciary obligations to the aboriginal peoples -- *i.e.* the emanations of the Crown that are responsible for carrying out the fiduciary obligations owed to the aboriginal peoples -- is the most vital question left unanswered by judicial and academic considerations of the Crown-Native fiduciary relationship. That no attempts have been made to address this basic question signifies the failure of the present method of descriptive rather than analytic investigation of the Crown-Native relationship which has been consistently implemented since the *Guerin* decision.

In the juridical context, the only direct suggestion as to who is bound by the Crown's fiduciary obligation may be made by reference to who is not bound by it. This may be illustrated by the case of *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and Others* (henceforth the *Alberta Indian Association* case).[383]

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[382]See Ch. I, *supra.*

[383][1982] 2 All E.R. 118 (C.A.).

i. The *Alberta Indian Association* Case

In the *Alberta Indian Association* case, the Indian Association of Alberta, Union of New Brunswick Indians, and Union of Nova Scotia Indians, concerned that their interests would not be served by the Constitutional repatriation process initiated by the Canadian Federal government, sought a declaration from the British Secretary of State for Foreign and Commonwealth Affairs that the Crown in right of the United Kingdom (henceforth the British Crown) was still responsible for carrying out treaty obligations signed between its representatives and the aboriginal peoples in the 1870's. The Secretary of State flatly denied such responsibility. The aboriginal groups then appealed, with leave of the English Court of Appeal, for judicial review by way of declaration that the British Crown was still responsible for carrying out the treaty obligations agreed to in the 1870's and that the decision of the Secretary of State for Foreign and Commonwealth Affairs denying any such responsibility was incorrect.

The Court of Appeal unanimously held that the British Crown is no longer responsible for the welfare of aboriginal peoples in Canada due to the transfer of that responsibility to Canada. A variety of rationales detailing the transfer of the British Crown's obligations to Canada are discussed in the judgments of Lord Denning M.R., Kerr L.J., and May L.J. What is not discussed in their judgments is which personifications of the Canadian Crown -- the Crown in right of Canada, the Crown in right of a particular Province, or both -- are now obliged to fulfill the obligations to the aboriginal peoples.

Lord Denning M.R. bases his decision upon the initial transfer of powers from the British Parliament to the Dominion of Canada through the *British North America Act, 1867,* and the gradual and complete devolution of British powers to Canada, culminating in the *Statute of Westminster, 1931.* He determines that this process of transferring powers also recognizes the transfer of British treaty obligations to Canada.[384]

Furthermore, the change in the constitutional understanding of the Crown at the Imperial Conference of 1926 from "one and indivisible" throughout the Commonwealth to "separate and divisible" for each self-governing Dominion, Province, or Territory [385] is also cited by Lord Denning M.R. to corroborate his finding that the British Crown no longer owes any duty to the aboriginal peoples of Canada. He determines that any obligations still owed to the aboriginal peoples are the obligations of either the Federal or relevant Provincial governments.[386]

Kerr L.J. agrees with Lord Denning M.R.'s findings. He states that any rights or obligations owed to the aboriginal peoples could be binding only upon a governmental representation or emanation of the Crown in the territory in which those rights or obligations exist. All rights and obligations of the Crown, other than those concerning the Queen in her personal

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[384]*Ibid.*, at p.127.

[385]*Ibid.*, at p.128.

[386]*Ibid.* It should be noted, however, that Lord Denning M.R.'s conclusion is arrived at in spite of his acknowledgment that at the time the British Crown entered into these obligations, "the Crown was in constitutional law one and indivisible." *Ibid.*, at p.129.

capacity, may arise only in relation to a particular government within the Commonwealth.[387] In relation to Canada, the responsibility of the British Crown for its obligations to the aboriginal peoples had, according to May L.J., "become the responsibility of the government of Canada with the attainment of independence, at the latest with the Statute of Westminster 1931."[388]

Leave to appeal the Court of Appeal's judgment was refused by the House of Lords. In delivering the House of Lords' brief reasons for refusing leave to the aboriginal groups, Lord Diplock explains that, as the Court of Appeal had determined, the British Crown no longer possesses any obligations to the aboriginal peoples of Canada. He emphasizes that any outstanding obligations owed to the aboriginals are the responsibility of "Her Majesty's government in Canada," and are to be determined by the Canadian courts.[389]

The decision in the *Alberta Indian Association* case clearly holds that the British Crown no longer possesses any fiduciary, or other, responsibility for the aboriginal peoples of Canada, even though it had once possessed such responsibilities. It determines that the totality of the obligations owed to the aboriginal peoples of Canada are the responsibility of the Crown in right of

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[387]*Ibid.*, at p.131.

[388]*Ibid.*, at p.140. At p.142, May L.J. finds that a limited sovereignty over Canada remained in the British Crown after the passage of the *Statute of Westminster, 1931*. Nevertheless, he finds, that this residual sovereignty does not mean that "any treaty or other obligations into which the Crown may have entered with its Indian peoples of Canada still enure against the Crown in right of the United Kingdom," but rather that "they are owed by the Crown in right of the Dominion or in right of the particular province."

[389]*Ibid.*, at p.143.

Canada and/or the Crown in right of a particular Canadian Province. However, the process by which British responsibilities for Canadian affairs, both pertaining to aboriginal peoples and otherwise, were transferred to Canada is not as straightforward as the *Alberta Indian Association* decision presents it.

The British Crown's obligations to the aboriginal peoples of Canada date back well before the *Royal Proclamation of 1763*. The treaties and military and political alliances forged between the Crown and the aboriginal peoples are the springboard from which the Crown's current obligations to the aboriginals originate. However, with the establishment of the Dominion of Canada in 1867 and the political changes in the relationship between the British Crown and Canada which came about as a result, British obligations to the aboriginal peoples began to adopt a different character.

ii. The British Crown's Obligations to the Aboriginal Peoples

The responsibility for fulfilling the obligations owed to the aboriginal peoples was, and is, clearly that of "the Crown." The constitutional understanding of "the Crown" in 1867, as the *Alberta Indian Association* decision indicates, was that the Crown was "one and indivisible" throughout the Commonwealth. Yet, a significant number of the underlying bases of the Crown's fiduciary obligations to the aboriginal peoples predate the formation of the Dominion of Canada in 1867 and virtually all of them[390] predate the

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[390]With the exception, for example, of the constitutionalization of the

change in the understanding of the Crown as "separate and divisible" throughout the Commonwealth at the Imperial Conference of 1926. This would suggest that the change in the understanding of the Crown in 1926 would have no effect upon the Crown's pre-existing fiduciary obligations, since the change in understanding of the Crown could not be held to apply *ex post facto*.[391]

Furthermore, the theoretical basis of fiduciary doctrine and the obligations and benefits which it imposes upon fiduciaries and beneficiaries in a fiduciary relationship bring into question, *prima facie*, the effect of the change in the constitutional understanding of the Crown from "one and indivisible" to "separate and divisible" upon the Crown's pre-existing fiduciary duty:

> (1) While fiduciaries may delegate the entirety of their fiduciary *powers*, they may not divest themselves of the totality of their fiduciary *obligations*.[392]
>
> (2) Beneficiaries need not inquire into the activities of their fiduciaries (*i.e.* the aboriginal peoples were not bound to discover the change in understanding of the

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Crown's fiduciary duty in section 35(1) of the *Constitution Act, 1982*, which was sanctioned by the Supreme Court of Canada in *Sparrow*. Refer to notes 143-148, *supra*, and their accompanying text.

[391]Remembering, of course, that the Crown's fiduciary obligations predate the judicial recognition of them in *Guerin*. See the discussion of this point in Ch. III(e), *supra*.

[392]See the further discussion of this point below and in the section entitled "May The Crown's Fiduciary Obligation Be Reduced in Scope," Ch V(d), *supra*.

Crown, even if it directly affected the Crown's fulfillment of its fiduciary obligations).[393]

(3) The new understanding of the Crown was not one in which the aboriginal peoples of Canada were consulted, much less asked for their approval.

Although fiduciary doctrine generally holds that fiduciaries may delegate the entirety of their fiduciary *powers*, but not their fiduciary *obligations*, the situation-specificity of fiduciary doctrine requires that this general rule be modified to adapt itself to the *sui generis* nature of the Crown-Native fiduciary relationship. Moreover, the constitutional understanding of the Crown as "single and indivisible" until 1926 must be understood in light of the division and redistribution of legislative and executive powers over Canada through the *British North America Act, 1867*.

Due to the changes in the political structure of the British Empire in the Nineteenth Century when the "single and indivisible" Crown began to divest itself of its colonial holdings and resultant obligations, a process of devolution was initiated whereby the "single and indivisible" Crown's powers and responsibilities[394] for Canada underwent a gradual process of transformation. This devolution of powers and responsibilities included the Crown's fiduciary obligations to the aboriginal peoples of Canada.[395]

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[393]See note 314, *supra*.

[394]Refer to the discussion in "The Nexus Between Governmental Power and Fiduciary Responsibility," Ch. V(b), v, *infra*.

[395]The ultimate devolution of powers and responsibilities from the

Beginning with the passage of the *British North America Act, 1867* and the formation of the Dominion of Canada, Canada became more self-governing and, consequently, more responsible for its own affairs. However, the *British North America Act, 1867* did not eliminate the entirety of the Crown's responsibility for Canadian affairs. The Crown's legislative and executive powers and responsibilities for Canada gradually evolved from being its sole responsibility[396] to the joint responsibility of the British and Canadian (comprised of the Dominion and Provincial) Crowns and, ultimately, the sole responsibility of the Canadian Federal and Provincial Crowns. Rather than there being any particular point in time upon which the British Crown divested itself entirely of its responsibilities for Canadian affairs -- as obtained from the "single and indivisible" Crown -- there was a gradual devolution of executive, legislative, and governmental powers and

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"single and indivisible" Crown to the Crown in right of Canada and the Provincial Crowns and the emerging independence and sovereignty of Canada is a very complex and contentious issue which cannot be properly entertained within the scope of this thesis. It is sufficient for our purposes merely to note that there was a transfer of powers, responsibilities, and benefits from the "single and indivisible" Crown to the Dominion and Provincial Crowns which occurred gradually over a lengthy period of time. For a more detailed discussion of this issue, see Brian Slattery, "The Independence of Canada," (1983), 5 *S.C.L.R.* 369, in particular the section entitled "Canadian Independence," at pp.390-392, and the sources cited therein, especially at notes 61, 66, and 68.

[396]The responsibility of the "single and indivisible" Crown, that is. It should be noted, however, that the only legislative powers possessed by the Crown are through its role as the Crown in Parliament or a Provincial Legislature, or as may be delegated to it by Parliament or a Provincial Legislature.

responsibilities to the Crown in right of Canada.[397]

Fiduciary powers which are transferred by a fiduciary are subject to judicial review where a beneficiary alleges that such a transfer results in a breach of the fiduciary's duties. Although it did not discuss fiduciary duties explicitly, the English Court of Appeal's review of the British Crown's continuing obligations to the aboriginal peoples of Canada in the *Alberta Indian Association* case should be understood to have included any fiduciary obligations that may have existed. While the decision's outcome perhaps oversimplifies the devolution of powers and responsibilities from the British Crown to the Canadian Crown, the complexity of the factual changes in the political structure of the British Empire and the relationship between the British Crown and Canada dictate that the British Crown's lack of continuing obligations to the aboriginal peoples is the only plausible solution to a complex scenario.

To hold that the British Crown still possesses outstanding obligations to the aboriginal peoples would bring about jurisdictional problems surrounding any attempt by the British Crown to fulfill its duties by encroaching upon the Federal government's exclusive powers over "Indians, and Lands reserved for the Indians," under section 91(24) of the *British North*

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[397]Again, as represented by the Dominion and Provincial Crowns. This period of devolution was marked by a number of different events which indicated both the transfer of increasingly greater degrees of authority from Britain and the increasing independence of Canada, including the *Statute of Westminster, 1931* and the abolishment of criminal (1933) and civil (1949) appeals from the Supreme Court of Canada to the Privy Council. See Slattery, note 395, *supra*, at pp.390-392; see also May L.J.'s finding of a limited continuing sovereignty of the British Crown over Canada in the *Alberta Indian Association* case at note 383, *supra*.

America Act, 1867. The issue of Canadian sovereignty is also questioned by the existence of any remaining obligations owed by the British Crown to Native peoples. The factual devolution of powers from the "single and indivisible" Crown to the Canadian Federal and Provincial Crowns renders the continued existence of fiduciary obligations on the part of the British Crown meaningless and incapable of enforcement.[398]

In relation to the final two factors enumerated earlier which offer *prima facie* opposition to the change in understanding of the Crown and the effects it had upon the fiduciary obligations owed to the aboriginal peoples, it is true that fiduciary doctrine does not require beneficiaries to inquire into the actions of their fiduciaries to ensure the latter's continued fidelity to the beneficiaries' interests. Therefore, the aboriginal peoples were not bound to discover the change in the constitutional understanding of the Crown, even if it directly affected the fulfillment of the Crown's fiduciary obligations.

The change in the understanding of the Crown was of no effect to the continuation of the fiduciary duties owed to the aboriginal peoples, which

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[398]To reinforce this argument, the obligations of the British Crown towards the aboriginal peoples of Canada after 1867, and especially after 1931, at least in terms of their enforceability, are as incapable of being enforced by the aboriginal peoples due to want of jurisdiction as are any pre-Conquest obligations owed to them by the French Crown. The effects of the *British North America Act 1867*'s division and redistribution of powers to the Federal and Provincial Crowns, although subject to the ultimate authority of the Imperial Parliament and the residual prerogative powers of the "single and indivisible" Crown, grants complete jurisdiction over Canada to the Federal and Provincial Crowns.

These issues have been raised here merely to substantiate the outcome of the *Alberta Indian Association* case and to illustrate why its decision is the only plausible solution. They are not intended to act as a catalyst of further discussion of these points.

were, effectively, "transferred" to the Canadian Dominion and Provincial Crowns by the *British North America Act, 1867*. Although the party or parties which owed the duties may have changed, the duties themselves still remain and must still be fulfilled. The change in understanding of the Crown also does not affect the aboriginals' right to bring an action for any breach of that duty at any time that its breach is discovered. It is only where there is a change which directly affects the nature of the duties owed to a beneficiary which provides a cause of action, not simply a change in the party or parties which owe the duties.

While the aboriginal peoples could continue to rely upon the fulfillment of the fiduciary obligations owed to them, the Crown was nevertheless obliged to inform them of the change in the understanding of "the Crown," since it affected the nature of the Crown's fiduciary duties.[399] Since the devolution of these duties gradually decreased and ultimately eliminated the British Crown's fiduciary obligations to the aboriginal peoples, thereby directly affecting the Crown's ability to fulfill its duty to the

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[399]For example, the Canadian Crown had far fewer resources and tangible assets at its disposal to discharge the fiduciary obligations to the aboriginal peoples than either the British Crown or the "single and indivisible" Crown.

It must be kept in mind, however, that the gradual transfer of powers and responsibilities from the British Crown to the Canadian Crown poses problems in its precise application at specific points in time, such as upon Confederation, when the responsibility for "Indians, and Lands reserved for the Indians," was conferred in the Dominion government in section 91(24) of the *British North America Act, 1867*. Due to the conceptual versus historical emphasis of this thesis, any detailing of the precise effects of the application of Crown fiduciary duties at specific points in time detracts from the overall theme of the thesis and consequently will not be attempted.

aboriginals, the British Crown had an obligation to consult and advise the aboriginal peoples regarding this change. The British Crown's failure to engage in consultation with the aboriginal peoples regarding this fundamental change in their fiduciary relationship, under a strict interpretation of fiduciary doctrine, constituted a breach of its fiduciary obligation.

Although this *prima facie* breach of fiduciary obligation was quite significant, and actionable, at the time at which it occurred, it is arguable that no harm could be suffered by the aboriginal beneficiaries as long as only the fiduciary or fiduciaries which owed the duty was changed and the nature and extent of the duty owed remained unaffected by such change. Nevertheless, any change in the person or entity owing fiduciary obligations to a beneficiary is a significant alteration in the relationship between fiduciary and beneficiary. In light of the lesser amount of resources available to the Dominion and Provincial Crowns in comparison to that of the British Crown, this alteration marks a significant change in the Crown's ability to carry out the fiduciary obligations owed to the aboriginal peoples.

As was illustrated in the section entitled "Fiduciaries' Delegation of Authority," a general precept of fiduciary doctrine holds that where fiduciaries transfer their fiduciary duties to others, fiduciary doctrine does not absolve those fiduciaries of their fiduciary responsibilities. However, as previously discussed, the unique scenario in which the transfer of powers and responsibilities over Canada flowed from the "single and indivisible" Crown through to the Canadian Crowns makes it constitutionally impossibly to hold the British Crown to the fiduciary responsibilities towards the aboriginal

peoples of Canada that it once held.

In any event, even if the British Crown possessed jurisdiction to fulfill any such obligations, it would be difficult to remedy this particular breach at this late date. The logical remedy for this event at the time it occurred would have been to provide the aboriginal peoples with the opportunity to be represented at an Imperial Conference to discuss their opinions and concerns on the change in understanding of the Crown and the effects that such a change would have upon them. This could have been accomplished in a manner similar to the aboriginal peoples' representation and participation in the discussions and negotiations surrounding the recent constitutional amendment discussions and proposals between the Federal and Provincial governments.

iii. The Canadian Crown's Obligations to the Aboriginal Peoples

As a Federal state, legislative powers and governmental responsibilities in Canada were divided among the Dominion and Provincial governments, primarily by sections 91 and 92 of the *British North America Act, 1867*.[400] Amid this division, the responsibility for "Indians, and Lands reserved for the Indians," was given to the Dominion government under section 91(24) of the Act.

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[400]For further discussion of the division of Federal and Provincial powers, see *The Rowell-Sirois Report*, Donald V.S. Smiley, ed., (Toronto: McClelland and Stewart, 1963).

By virtue of its powers under section 91(24), the Dominion government was empowered, in the name of the Crown, to enter into treaty negotiations with aboriginal groups across Canada. These negotiations resulted in the formation of numerous treaties which entailed a variety of obligations to the Native peoples. The obligations owed under these post-Confederation treaties, along with the pre-existing obligations stemming from pre-Confederation treaties and other undertakings such as the *Royal Proclamation of 1763*, are all part of the modern Crown fiduciary obligation.[401]

It must be remembered that both pre- and post-Confederation treaties are independent roots of the modern fiduciary obligation. They create specific duties, but do not create the basis of the Crown's general fiduciary obligation. That general obligation dates back to the period shortly after Contact. Due to the factual changes in the Crown's identity and the devolution of legislative and executive responsibilities for Canada which eliminated the British Crown's fiduciary obligations towards the aboriginal peoples of Canada, distinctions must be made between the Crown's fiduciary duties which predate Confederation and those which arise after Confederation. In circumstances where an aboriginal group was a signatory to a treaty with the Crown, the Crown owes that group both a general fiduciary duty which predates Confederation and more specific fiduciary obligations which arise from the particular circumstances of the treaty, whether the treaty is pre- or post-Confederation. The distinction between pre- and post-Confederation

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[401]See the discussion of some of the events which give rise to the Crown's fiduciary obligations to Native peoples in Ch. III(e), *supra*.

fiduciary duties may result in different effects regarding the fulfillment of those duties by the Crown.[402]

While these obligations to the aboriginal peoples were well known, the personifications of the Crown in Canada that were responsible for fulfilling them were not. With the role of the British Crown diminishing due to the establishment of a stronger governmental presence in Canada, it remained to be determined which personifications of the Crown in Canada -- the Crown in right of Canada, the Crown in right of a particular Province, or both -- were responsible for fulfilling these outstanding obligations. The judicial process of answering this question was initiated in the landmark case of *St. Catherine's Milling and Lumber Co. v. The Queen*.[403]

1. *St. Catherine's Milling and Lumber Co. v. The Queen*

The precedent established in *St. Catherine's Milling and Lumber Co. v. The Queen* has had far-reaching consequences which remain to this day. The effect of Indian land surrender treaties[404] between the Crown and aboriginal

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[402]These issues are dealt with in greater detail in the treatment of the *Robinson Treaties Annuities Case*, *Ontario Mining v. Seybold*, and the *Treaty #3 Annuities Case*, Ch. V(b), iii, 2, *infra*.

[403]Note 59, *supra*.

[404]Whether treaties actually involved the "surrender" of land is a disputed matter, as is the accuracy of the written account of treaties representing the nature of the bargains actually entered into between the Crown and aboriginal groups. See, for example, W.E. Daugherty, *Treaty Research Report: Treaty #3*, (Ottawa: Treaties and Historical Research Centre,

peoples in Canada was drastically and forever altered by the *St. Catherine's Milling* decision, which was the first major pronouncement on the effect of the division of Federal and Provincial powers under the *British North America Act, 1867* upon the surrender of lands obtained through Indian treaties.

The *St. Catherine's Milling* decision centres around a dispute between the Province of Ontario and the Dominion Government over the ownership of certain lands which had been obtained through their surrender under Treaty #3, a post-Confederation treaty signed in 1873. The St. Catherine's Milling and Lumber Company had obtained a license from the Dominion government to cut timber on certain lands which had been surrendered under Treaty #3. The Crown in right of Ontario sought to restrain the lumber company from cutting timber on those lands, which it claimed a beneficial interest in due to the effects of section 109 of the *British North America Act, 1867*. The main issue to be decided by the courts was which Crown possessed the beneficial interest in the lands surrendered by the Saulteaux Indians under Treaty #3 -- the Crown in right of Canada, through the operation of section 91(24) of the *British North America Act, 1867*, or the Crown in right of Ontario, by way of section 109 of the Act. One lingering legacy of the *St. Catherine's Milling* decision is its creation of a problematic situation which juxtaposes the Crown's acquisition of aboriginal lands and its

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Indian and Northern Affairs Canada, 1986), at p.64; Richard Price, ed., *The Spirit of the Alberta Indian Treaties*, (Edmonton: Pica Pica Press, 1987); René Fumoleau, *As Long As This Land Shall Last*, (Toronto: McClelland and Stewart, 1976). For an account of the Iroquois perspective on early treaties negotiated with European powers, see Hurley, note 194, *supra*; Jennings, note 194, *supra*.

"extinguishment" of aboriginal title by way of treaty on one hand against the personification of the Crown which gained a beneficial interest in the land once it was unencumbered by the aboriginal interest.[405]

The Privy Council's interpretation of the relevant sections of the *British North America Act, 1867* in *St. Catherine's Milling*, which was based upon the Privy Council's earlier judgment in *Attorney-General of Ontario v. Mercer*,[406] resulted in the finding that the Dominion government's power to enter into treaties and obtain surrenders of Indian lands provided for by section 91(24) did not result in the vesting of any interest in those lands in the Dominion government once their aboriginal interest was extinguished. The Privy Council determined that the effect of section 109 on unsurrendered Indian lands was to vest the underlying Crown title to the lands, which was still subject to aboriginal title, in the Province in which the lands were located. Once those lands were relieved of any aboriginal interest, the full beneficial interest in those lands became fully vested in the Province in which they were located:[407]

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[405]A discussion of the nature and extent of aboriginal title and its characterization in *St. Catherine's Milling* is beyond the scope of this thesis. The *St. Catherine's Milling* decision is examined here solely for its relevance to the determination of who is bound by fiduciary duties to the aboriginal peoples of Canada.

[406](1883), 8 A.C. 767 (P.C.).

[407]Section 109 reads as follows:

> 109. All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or

> The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown.[408]

Based upon its finding that "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden,"[409] the *St. Catherine's Milling* decision creates a difficult situation whereby exclusive power resides in the Dominion government to obtain a surrender of Indian lands through treaty while, after such a treaty, exclusive proprietary and administrative rights over the surrendered lands are vested in the Crown in right of the Province in which the lands are situated. This

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> payable for such lands, mines, minerals and royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

[408](1888), 14 A.C. 46 (P.C.), at p.57. Excepting those lands which were obtained by the Dominion government under section 108 or 117. See the discussion in Slattery, note 2, *supra*, at pp.750-751.

[409]*St. Catherine's Milling*, note 408, *supra*, at p.58. This determination was made by the Privy Council in light of its earlier determination, at p.54, that the "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign." The appropriateness of this finding is not universally accepted. See, for example, Hurley, note 5, *supra*; McNeil, note 66, *supra*. For further discussion of the characterization of the aboriginal interest in land as usufructuary, see William B. Henderson, "Canada's Indian Reserves: The Usufruct in Our Constitution," (1980), 12 *Ottawa L. Rev.* 167.

situation arises from Lord Watson's determination that the British Legislature did not intend to deprive a Province of its rights under section 109 of the *British North America Act, 1867* by conferring legislative powers over "Indians, and Lands reserved for the Indians," to the Dominion government in section 91(24) of the Act.[410]

The result of this division of powers is that while the Dominion government possesses the exclusive right to legislate in respect of "Indians, and Lands reserved for the Indians," including the ability to create and set aside Indian reserves under section 91(24), it cannot make use of Provincial Crown lands for such a purpose. Once surrendered lands pass to the Crown in right of a Province by way of section 109, the Province has exclusive administrative control over them. There are, however, two saving provisions on the operation of section 109: (1) where the land in question is subject to an interest other than that of the Province, or; (2) where the land is subject to a trust. Consequently, the only constitutionally-valid method by which the Dominion government may exercise control over surrendered

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[410]*St. Catherine's Milling*, note 408, *supra*, at p.59. Indeed, Lord Watson finds that having the beneficial interest in land after a treaty land surrender accrue to the Crown in right of the Province in which the land is located is not incompatible with having legislative control over the same land prior to the surrender reside with the Dominion government (at p.59):

> The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

lands is with the cooperation of the appropriate Provincial government.

It is useful, at this point, to illustrate the practical dilemma created by this situation. Where the terms of a treaty provide for the creation of Indian reserves, the Federal government cannot unilaterally establish those reserves from lands surrendered under the treaty which have been relieved of their Indian title. Once the Indian title to the land is removed, the exclusive proprietary and administrative rights to the land belongs to the Province in which the land is located through the operation of section 109. Consequently, as a result of the division of powers in sections 91(24) and 109, the ability to create and set aside Indian reserves from the lands surrendered under the terms of a land-cession treaty may only be accomplished through the cooperation and joint effort of the Federal and relevant Provincial government. This situation arises due to the fact that only the Federal government possesses the jurisdiction to set aside reserves, under its section 91(24) powers, while only the Province possesses proprietary and administrative control over surrendered lands which are unencumbered of their Indian title. However, while section 109 passes the proprietary and administrative interest in Indian land surrendered by treaty to the Province in which the land is situated, it may not do so without also passing at least part of the fiduciary obligations which arise from the treaty to the Province.

The practical significance of this situation, as illustrated by the *St. Catherine's Milling* decision, is that the *British North America Act, 1867* has the effect of dividing and redistributing the powers, responsibilities, and benefits to be obtained from the surrender of Indian lands among the Federal and relevant Provincial Crowns. In so doing, the Act may also be seen to

divide and redistribute the Crown's fiduciary obligations to the Native peoples between the Federal and relevant Provincial Crowns.[411]

As will be discussed in further detail in our consideration of the decisions in *Ontario Mining Company. v. Seybold,* if the Provincial Crown, which possesses exclusive proprietary and administrative rights over Indian lands surrendered by treaty, has no legal obligation to cooperate with the Federal Crown in the establishment of Indian reserves from those lands under the terms of the treaty, the treaty obligation to set aside the reserves cannot be fulfilled. By not fulfilling the treaty obligation to set aside reserve lands, the fiduciary obligations owed to the aboriginal signatories under the treaty would be breached. As the Province not only reaps benefit under the treaty, but possesses exclusive rights over the surrendered lands, it must, by necessity or logical implication, also obtain part of the fiduciary duty owed to the aboriginal signatories to the treaty. To hold otherwise would be to deny the aboriginal peoples the fulfillment of the fiduciary obligations owed to them under the treaty.

The Crown cannot escape its fiduciary obligations to the aboriginal peoples through the division and redistribution of powers, responsibilities, and benefits under the *British North America Act, 1867* among the Federal and Provincial Crowns. Using our example of the setting aside of reserve

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[411]See Slattery, note 118, *supra,* at p.274:

> The rearrangement of constitutional powers and rights accomplished at Confederation did not reduce the Crown's overall fiduciary obligations to First Nations. Rather, these obligations tracked the various powers and rights to their destinations in Ottawa and the Provincial capitals.

lands, it is untenable to allow the Crown to escape the fiduciary duty owed to aboriginal peoples to set aside reserves under the terms of a treaty by virtue of the jurisdictional problems surrounding the establishment of Indian reserves from surrendered aboriginal lands created by the separation of powers in sections 91(24) and 109 of the Act. The division and redistribution of powers among the Federal and Provincial Crowns in the *British North America Act, 1867* does not remove or reduce the Crown's fiduciary obligations to aboriginal peoples. In dividing and redistributing powers, responsibilities, and benefits, it divides and redistributes those obligations, to varying degrees and extents, among the Federal and Provincial Crowns.

Fiduciary obligations of the Crown to Native peoples also arise in the absence of the treaty-making process where control over aboriginal lands has been assumed by the Crown by virtue of the Crown's assertion of suzerainty over aboriginal peoples and their lands, such as through the *Royal Proclamation of 1763*.[412] Whatever the legal effects of these responsibilities may have been prior to the enactment of the *Constitution Act, 1982*, which is binding upon both Federal and Provincial jurisdictions, they now possess constitutional affirmation and support. In the aftermath of the

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[412]The general applicability of the Crown's fiduciary obligations exists independently of the affirmation of this principle by the Supreme Court of Canada in *Sparrow*, note 3, *supra*, when it states, at p.408, that:

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams*... 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. [References omitted]

entrenchment of the Crown's fiduciary obligations in section 35(1),[413] and for the same reasons as described above, the Federal Crown and all Provincial Crowns possess general fiduciary responsibilities towards the aboriginal peoples.

Judicial recognition of Provincial obligations with respect to lands surrendered by treaty may be seen at each of the various stages of *St. Catherine's Milling*. At trial, Boyd C. implies that the Province of Ontario is bound by the Crown's obligations to the aboriginal signatories to Treaty #3 by virtue of receiving the benefit of the surrendered lands under section 109:

> It would seem unreasonable that the Dominion Government should be burdened with large annual payments to the tribes without having a sufficiency of land to answer, presently or prospectively, the expenditure.[414]

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[413]As well as the constitutionalization of the terms and provisions of the *Royal Proclamation of 1763* in section 25 of the *Charter of Rights and Freedoms*, which effectively shields their abrogation or elimination by other sections of the *Charter*:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763

[414](1885), 10 O.R. 196 (Ch.), at p.235. It should be noted, though, that Boyd C. refuses to rule upon the extent of Ontario's responsibility to the treaty signatories since it was not made an issue of at trial: "Whatever equities ...

The inference to be drawn from this statement is that while the Dominion government has certain responsibilities to the Treaty #3 signatory bands, the beneficiary of the surrender of the land under the treaty -- the Crown in right of Ontario -- must also share in this responsibility.

Upon appeal, Hagarty C.J.O. explains that, had the boundaries of Ontario and Manitoba been defined at the time that Treaty #3 was signed, it would be natural to suppose that the Provincial and Federal Crowns would have arranged for an equitable distribution of the treaty responsibilities.[415]

When *St. Catherine's Milling* was appealed to the Supreme Court of Canada, the ownership of the lands surrendered by treaty was held to belong to the Province of Ontario. The issue of who was to bear the responsibilities under the treaty was not discussed by the majority. However, Strong J., dissenting, furthers the earlier reasoning of Boyd C. and Hagarty C.J.O in explicitly holding that the Dominion and Ontario governments are jointly

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may exist between the two Governments in regard to the consideration given and to be given to the tribes ... is a matter not agitated on this record." (p.235)

[415](1886), 13 O.A.R. 148, at p.157. See also at p.158, where Hagarty C.J.O., affirming the notion that the Federal and Ontario governments should share the responsibility to the Indians under the terms of the treaty, states that a distribution of the financial responsibilities under the treaty "could, I presume, be carried out in good faith by arrangement between the two Governments." In contrast, Patterson J.A. states that:

> ... [W]e see that certain outlay was incurred and certain burdens assumed by the Government. ... Whether they give rise to any claims or equities between the Dominion and the Province is a matter of policy as to which we have no information, and with which we are not concerned beyond the one question of the effect on the right to the timber.

and severally responsible for carrying out the terms of the treaty:

> ... [A]ll the obligations of the crown towards the Indians incidental to their unsurrendered lands, and the right to acquire such lands and to make compensation therefor by providing subsidies and annuities for the Indians attach to and may be performed by the Provinces as well as by the Dominion.[416]

Strong J. founds this conclusion upon the signing of Treaty #3 and the effects of sections 91(24) and 109 of the *British North America Act, 1867* upon it.[417]

In delivering the judgment in *St. Catherine's Milling* on behalf of the Privy Council, Lord Watson determines that the Crown in right of Ontario possesses the beneficial interest in the lands surrendered under the treaty, subject to certain exceptions.[418] However, he is explicit about the responsibilities of Ontario to the treaty signatories by holding the Province to be responsible for discharging the annuity obligations incurred under the terms of the treaty:

> The treaty leaves the Indians no right

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[416](1887), 13 S.C.R. 577, at p.622.

[417]See discussion in Ch. V(b), iii, 1, *supra*. Of interest is the finding of Gwynne J., whose dissenting judgment determines that the beneficial interest in the surrendered lands belongs to the Dominion government, as does the responsibility for fulfilling the obligations incurred under Treaty #3 "unless some agreement shall be entered into between the Provincial government and them." *Ibid.*, at p.676.

[418]Namely, lands which the Dominion acquired the right to under sections 108 or 117 of the *British North America Act, 1867*: note 408, *supra*, at pp.57-58.

> whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown ... The fact that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario. *Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government.*[419]

These illustrations from the various stages of *St. Catherine's Milling* indicate that there is significant support for the concurrent fiduciary obligations of both the Dominion and Provincial governments which may be gleaned from each court's treatment of the case, culminating in Lord Watson's explicit recognition of Provincial responsibility at the Privy Council level. Lord Watson's finding of Provincial obligations arising from the treaty is premised upon the same logic detailed in the earlier discussion of the effects of the *British North America Act, 1867*'s division and redistribution of powers, responsibilities, and benefits upon the fiduciary obligations owed to the aboriginal peoples.

The existence of the Federal Crown's fiduciary duty to the aboriginal peoples is not in question. That duty has been demonstrated to exist within the powers encompassed in section 91(24) of the *British North America Act, 1867*, the decision of the Supreme Court of Canada in *Guerin*, and, as

[419]*Ibid.*, at p.60. Emphasis added.

confirmed by the *Sparrow* decision, in section 35(1) of the *Constitution Act, 1982*. The recognition of Provincial fiduciary responsibilities towards the aboriginal peoples is not yet as clear. However, the results of the considerations of Provincial responsibilities at the various stages of *St. Catherine's Milling* clearly suggests the existence of Federal as well as Provincial fiduciary obligations to aboriginal peoples, at least within the context of Treaty #3.

Three cases which were similarly concerned with determining the issue of responsibility for the treaty obligations owed to aboriginal peoples were decided by the Privy Council between 1897 and 1910 -- the *Robinson Treaties Annuities Case, Ontario Mining Company. v. Seybold*, and the *Treaty #3 Annuities Case*. Each of these cases refers to Lord Watson's finding of Provincial fiduciary obligations in *St. Catherine's Milling*. Ultimately, however, each of the cases declines to follow the direction given by Lord Watson in *St. Catherine's Milling*. We will now examine the decisions in these cases in more detail.

2. *Robinson Treaties Annuities Case/Ontario Mining Co. v. Seybold/Treaty #3 Annuities Case*

This trilogy of cases follows up on *St. Catherine's Milling*'s discussion of joint Dominion-Provincial responsibility for treaty obligations undertaken by the Crown to Native peoples. It should be noted at the outset that each of these decisions dismisses any *legal* basis for Provincial responsibility for offsetting, contributing to, or assuming entirely the responsibilities incurred

by the Dominion government arising from its negotiation of Indian treaties. However, in arriving at their respective conclusions, the judges in these cases either fail to recognize the *equitable* basis of the Provincial duty, as illustrated by Lord Watson in *St. Catherine's Milling*, or mischaracterize that basis.

The first two of these cases are distinguishable on their facts from *St. Catherine's Milling*. Whereas *St. Catherine's Milling* is concerned with the issue of whether the Dominion or Ontario Crown possesses the beneficial interest in lands surrendered by a post-Confederation treaty, the *Robinson Treaties Annuities Case* deals with a pre-Confederation treaty. The issue in the *Robinson Treaties Annuities Case* is whether the Dominion or Ontario is obliged to pay the increased annuities provided for in the terms of the pre-Confederation Robinson-Huron and Robinson-Superior treaties. *Seybold*, although it, like *St. Catherine's Milling*, deals with issues arising out of the terms of Treaty #3, is distinguishable from *St. Catherine's Milling* in that one of its issues in dispute is the legal obligation of the Dominion, Ontario, or both, to set aside a reserve under the terms of the treaty. The *Treaty #3 Annuities Case*, meanwhile, centres around the issue of responsibility for annuity payments under Treaty #3 which Lord Watson had stated earlier in *St. Catherine's Milling* constituted a Provincial obligation.

Prior to engaging in a detailed discussion of these cases, it is important to note that these cases, as with *St. Catherine's Milling*, were decided long before the initial judicial recognition of the fiduciary relationship between the Crown and aboriginal peoples in Canada in *Guerin*. At the time that these cases were decided, the judicial characterization of the relationship between the Crown and Native peoples was akin to that of guardian and ward.

However, the understanding of the Crown-Native relationship at that time was that the Crown had no legal duty to the aboriginal peoples. Instead of acting through any legal compulsion to do so, the Crown acted on behalf of the aboriginal peoples out of its sense of moral obligation to "better and improve" the aboriginal peoples by "civilizing" them in the ways of the white man. It is important, therefore, when considering the judicial determinations made in each of these cases to be aware of the underlying assumptions of the nature of the Crown-Native relationship upon which these decisions are predicated.

In *Province of Ontario v. Dominion of Canada and Province of Quebec: In re Indian Claims* (The *Robinson Treaties Annuities Case*),[420] the Supreme Court of Canada heard an appeal from an arbitration award dated 13 February 1895. The arbitration had been authorized to settle the long-standing issue of who was responsible for discharging the obligation of the increase in annuity payments under the terms of the Robinson-Huron and Robinson-Superior Treaties of 1850 -- the Dominion of Canada, the successors of the old Province of Canada which negotiated the treaties (*i.e.* Ontario and Quebec), or the Province of Ontario which, after Confederation, reaped the benefits of the lands surrendered in the treaties.

Both the Robinson-Huron and Robinson-Superior treaties include provisions which guarantee the aboriginal signatories a certain sum for a perpetual annuity. Both treaties also contain an identical clause which provides for the payment of increased annuities if the revenues from the lands surrendered under the treaties produce a sufficiently increased amount

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[420][1896] 25 S.C.R. 434.

of revenue to allow for the payment of increased annuities to the signatories without resulting in a loss:

> The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that should all the territory hereby ceded by the parties of the second part, at any future period produce such an amount as will enable the Government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order...

Consistent with the determination made by Lord Watson in *St. Catherine's Milling,* the arbitrators held that the Province of Ontario was responsible for paying the increase in the annuities since the lands surrendered under the treaties accrued to it by virtue of section 109 of the *British North America Act, 1867.* Ontario appealed the arbitrators' award to the Supreme Court of Canada, insisting that it had no legal obligation to pay the annuities under the treaties. It maintained that since the former Province of Canada had unilaterally negotiated the treaties, the Dominion government alone was responsible for discharging any increased obligations arising from them since the obligation for the annuity payments, both the original and any increased amounts, are subsumed under section 111 of the *British North America Act, 1867.* Section 111 provides that upon Confederation, the Dominion of Canada would absorb and become liable for "the Debts and Liabilities of each Province existing at the Union," subject to the limits on

that amount imposed by sections 112, 114, and 115 of the Act.

The Supreme Court, Gwynne and King JJ. dissenting, overturned the arbitrators' award. The majority judgment held that Ontario was responsible only for its share of any increase in the obligations owed under the treaty by the former Province of Canada as it had existed prior to Confederation. Since the post-Confederation Province of Ontario was carved out of the territorial boundary of the pre-Confederation Province of Canada, it was held to be responsible for the payment of the increase in the annuities under the treaties in proportion to the amount of surrendered lands situated within its boundaries as they existed after Confederation.[421]

As will be demonstrated further despite the case's protestations to the contrary, this finding is itself based upon an adherence to Lord Watson's judgment in *St. Catherine's Milling*. The decision in the *Robinson Treaties Annuities Case* differs from Lord Watson's reasoning in *St. Catherine's Milling* only to the extent that section 111 of the *British North America Act, 1867* applies to the former, whereas it does not apply to the situation in *St. Catherine's Milling* since that case concerns a post-Confederation treaty.

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[421]Which does not entail Provincial responsibility in the manner described in the arbitrator's report. Rather, Ontario and Quebec owe the increased annuity payments by virtue of the fact that the pre-Confederation debt existing at Confederation assumed by Canada in section 111 of the *British North America Act, 1867* is qualified by the limit imposed by section 112. Once that limit, which was subsequently augmented, was attained, Canada remained liable for the payment of any such pre-Confederation debt existing at Confederation, but was indemnified for any amounts exceeding the limit by Ontario and Quebec, which were also obligated to pay interest on that amount at the rate of five per cent per annum. Consequently, when there is any discussion herein of the responsibility of Ontario and Quebec for the increased annuity payments, it is to be understood in terms of the indemnification of Canada provided for in section 112.

Strong C.J.C. attempts to distinguish Lord Watson's dictum in *St. Catherine's Milling*, by illustrating the differences between the facts in *St. Catherine's Milling* and those in the *Robinson Treaties Case*:

> ... [I]n the case of *The St. Catharines Milling Co. v. The Queen* ... the Privy Council held that this surrender enured to the benefit of the province of Ontario, and so holding it also decided that Ontario was bound to pay the consideration for which the Indians ceded their rights in the lands. I see no analogy between that case and the present. In the case before us no one doubts that the province of Canada, which acquired the lands, was originally bound to pay the consideration. In the case before the Privy Council the question was, as it were, between two departments of the government of the Crown, and the most obvious principles of justice required that the government which got the lands should pay for them.[422]

As may be clearly observed from this passage, Strong C.J.C. does not dispute the findings of Lord Watson in *St. Catherine's Milling*, but, rather, affirms them within the context in which they arose by holding that "the most obvious principles of justice required that the government which got the lands should pay for them." The purpose of his discussion of Lord Watson's decision in *St. Catherine's Milling* is not to dispute it, but to distinguish it on its facts from the matter before him in the *Robinson Treaties* case.

Strong C.J.C. further emphasizes that the scope of the Supreme Court's jurisdiction to hear Ontario's appeal in the matter before him is limited by statute to "purely legal considerations" and may only consider matters which

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[422]Note 420*supra*, at p.505.

fall within the "proper construction" of the *British North America Act, 1867* and the Robinson treaties. Upon considering the effects of the *British North America Act, 1867* and the Robinson treaties, Strong C.J.C. finds that any increase in the annuity obligations to the Native peoples which initially belonged to the pre-Confederation Province of Canada was not transferred in whole or in part to the Provinces upon Confederation, notwithstanding the effects of section 109. Rather, he determines that the annuities, both the original and any increased amount, are not a charge on the surrendered lands accruing to the Provinces of Ontario and Quebec by the operation of section 109, but are part of the general debts and liabilities of the former Province of Canada and therefore became the liability of the Dominion upon Confederation under section 111:

> That it was a "liability" though consisting of deferred periodical payments cannot be doubted, and that it was a "debt" though not payable *in presenti* is also clear; it therefore comes within the literal meaning of the 111th section, and we are not at liberty to unravel the arrangements between the two divisions of the old province, upon which it may be assumed the provisions of the Union Act as to the apportionment of assets and liabilities was based in order to arrive at some secondary meaning contrary to the ordinary and natural import of the language of the Act.[423]

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[423] *Ibid.*, at p.506. Strong C.J.C. bases his conclusion, to a significant degree, upon the pronouncement of the arbitrators appointed under section 142 of the *British North America Act, 1867* to determine the "Division and Adjustments of the Debts, Credits, Liabilities, Properties, and Assets" of Upper Canada and Lower Canada. The arbitrators' decision, dated 3 September 1870, determined, in paragraph 13 of their report (as reproduced in the *Robinson Treaties Annuities* decision, note 420, *supra*, at p.372):

By determining that the original annuity payments are the responsibility of the Dominion government by way of section 111, being part

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> XIII. That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuties to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate by the other of the said provinces.

Strong C.J.C. uses this passage as a basis for finding that the increased annuities are a part of the debt of the Province of Canada existing at Confederation, as well as refuting the argument that the annuity payments constitute a charge on the lands and thereby constitute an "Interest other than that of the Province" under section 109. It is interesting to note, however, that although Strong C.J.C. emphasizes the importance of interpreting the *British North America Act, 1867* in a manner that is consistent with "the ordinary and natural import of the language of the Act," his interpretation of the arbitrators' findings in paragraph 13 is quite liberal to make it consistent with his own conclusions.

The arbitrators make no mention of the increased annuities under the Robinson treaties as being included as part of the debt of the Province of Canada in their report. While Strong C.J.C. does not dispute this fact, he attempts to belittle its importance by stating, at p.507, that "at the time this award of 1870 was made no question had arisen regarding the payment of the augmented annuities, but this in my opinon can make no difference." Strong C.J.C. attempts to rationalize the consistency of the arbitrators' report with his own judgment by stating that since the award had not been challenged for twenty-five years and may have been the basis of other dispostions, "the arbitrators must therefore be taken to have had in mind all the annuities, the original fixed annuities as well as those contingently provided for": *Ibid.*, at pp.507-508. In deference to Strong C.J.C.'s findings, there is no basis in the arbitrators' report for such a conclusion. See the discussion of King J.'s interpretation of paragraph 13 in relation to this issue at note 426, *infra*.

of the general debts and liabilities of the former Province of Canada, and that the increase in the annuity payments is owed by each of the Provinces of Ontario and Quebec only in their individual status as each constituting a part of the former Province of Canada -- *i.e.* that Ontario and Quebec are each responsible for the increased annuities payments of the former Province of Canada in proportion to the surrendered lands existing under their post-Confederation boundaries -- Strong C.J.C.'s conclusions may be seen to follow precisely the logic employed by Lord Watson in *St. Catherine's Milling*. Strong C.J.C. deviates from the rationale behind his conclusion, however, by determining that the increase in the annuities is also part of the general debts and liabilities of the former Province of Canada existing at Confederation, as represented by Ontario and Quebec, and therefore is also subsumed under section 111.

A closer analysis of Strong C.J.C.'s thought process reveals how his reasoning replicates that of Lord Watson in *St. Catherine's Milling*. Strong C.J.C. initially states that it is beyond doubt that the original annuity money was the responsibility of the old Province of Canada. Yet, since the old Province no longer existed at Confederation, its debts and liabilities became, for all intents and purposes, the debts of Ontario and Quebec, as the successors to the old Province. These debts and liabilities did not accrue to the Provinces of Nova Scotia and New Brunswick since they could not be held responsible for debts relating to benefits which they did not share in. However, all Provincial debts and liabilities existing at Confederation, subject to the limits imposed by sections 112, 114, and 115 of the *British North America Act, 1867*, became the responsibility of the Dominion of Canada, thereby relieving

Ontario and Quebec of the original annuity obligations.

Based on this chain of events, it is evident that, save for the existence of section 111 transferring Provincial debts existing at Confederation to the Dominion, the Provinces of Ontario and Quebec, as successors to the old Province of Canada, would themselves be responsible for paying the original annuity money. As for the increase in the annuity payments, Strong C.J.C.'s determination that the increased annuity payments are also subsumed under the "debts and liabilities of the Provinces existing at the Union" is not consistent with the proper construction of the *British North America Act, 1867* and the Robinson treaties.

By treating the original and increased annuities in the same fashion, Strong C.J.C. fails to appreciate the significant difference between the two. The proper construction of the Robinson treaties should be to understand them as providing for two separate annuities: the first (the original amount) is payable in a guaranteed sum upon the signing of the treaty by the aboriginal signatories; the second (the increase) is entirely dependent upon the revenues generated from the surrendered lands being increased sufficiently to allow for the payment of increased annuities to the aboriginal signatories without resulting in a loss. Therefore, while the first annuity is guaranteed and ascertainable, thereby enabling it to properly be included under section 111 of the *British North America Act, 1867*, the second annuity is entirely contingent upon future events which may never come to fruition and therefore may never exist. The uncertainty of the second annuity renders its classification as a debt or liability existing at Confederation under section 111 completely inappropriate. To construct section 111 in any other manner

imparts to it a far wider scope than that envisioned through a literal interpretation of its wording.

Ignoring the issue of whether the increased annuity ought to be paid for out of the increased revenue generated from the surrendered land -- which its existence is entirely dependent upon -- it is impossible to determine, other than from year to year, whether the increased annuity is due and owing to the aboriginal signatories to the treaty. Based upon the plain construction of section 111 of the *British North America Act, 1867,* it is difficult to sustain an argument that a future, contingent, and unascertainable liability may be characterized as "existing at the Union" and therefore be transferred to the Dominion. At best, Strong C.J.C.'s argument that the increased annuities fall under section 111 may only sustain the proposition that there was an increased annuity due and owing to the aboriginal signatories in 1867 *for that particular year* which ought to be included under the rubric of section 111.

Ultimately, however, the distinction between who is responsible for paying the original and the increased annuity has no effect on the fact that Strong C.J.C.'s reasoning follows that of Lord Watson in *St. Catherine's Milling*. Should Strong C.J.C.'s characterization of the nature of the increased annuity be held to be correct and the increased annuity payments, like the original annuity payments, are the responsibility of the Dominion under section 111, then, again, save for the existence of section 111, the responsibility to pay the original and the increased annuity money is the responsibility of the Provinces of Ontario and Quebec as successors to the old Province of Canada, just as the responsibility to pay the annuity money in *St. Catherine's Milling* is held by Lord Watson to be the responsibility of the Province of

Ontario.

Sedgewick J. affirms the conclusions arrived at by Strong C.J.C., except that he finds the Provinces of Ontario and Quebec liable for the payment of the increase in the annuities since that amount is, in his determination, in excess of the amount of Provincial liability that the Dominion is liable to bear under section 112. Had the amount of the total Provincial debt not exceeded the enumerated limit in section 112, he would have held the Dominion to be liable to pay the increased annuities. Sedgewick J. reveals his recognition of the equities of the matter before the court, however, when he notes that:

> ... [T]here is the principle expressed in the maxim *qui sentit commodum sentire debit et onus.* If a person accept anything which he knows to be subject to a duty or charge it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself.[424]

Through this statement, Sedgewick J. acknowledges that Ontario, by acquiring the benefits of the surrendered Indian lands obtained through the treaties upon Confederation *while being in full knowledge of the Dominion's outstanding obligations under those treaties* which it had assumed from the Province of Canada, must, in principle, assume responsibility for the payment of the annuities. Ontario only loses its liability for the original annuity payments due to the operation of section 111.

The dissenting judgment of Gwynne J. affirms the 1895 arbitrators'

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[424] *Robinson Treaties Annuities Case*, note 420, *supra*, at p.533.

award in squarely placing the responsibility for making the increased annuity payments upon Ontario:

> And as by the 109th section of the British North America Act the province has become entitled to that fund [from which treaty obligations had been paid prior to 1867], Her Majesty's government of that province must take the same subject to the trust obligation in the interest of the Indians assumed by Her Majesty by the stipulations of the treaties. Her Majesty's government of the province of Ontario must in all reason and justice take the property mentioned in the section subject to the same obligation as to the payment of augmentation of the annuities ... as the late province of Canada would have held them if no union had taken place. This was the unanimous judgment of the arbitrators upon this point. That judgment is not at variance with any principle of law, or any statutory provision; on the contrary it is in perfect accordance with the plainest principles of justice and is not open to any sound legal objection.[425]

The difference between Gwynne J.'s analysis and that of the majority is that he views the annuities as a charge upon the lands which flow to the Province through the operation of section 109. In this regard, he disagrees with the findings in paragraph 13 of the 1870 arbitration. King J. concurs with Gwynne J.'s dissent, insisting that "Ontario, getting the lands subject to the trust, would have to discharge the burden which before that was upon the province of Canada, now represented by the provinces of Ontario and Quebec."[426]

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[425]*Ibid.*, at p.525.

[426]*Ibid.*, at p.548. The trust referred to being section 109 and the burden

Upon the Dominion government's appeal of the Supreme Court of Canada's decision to the Privy Council,[427] Lord Watson affirms the Supreme Court's majority decision and dismisses the notion that the annuity obligations are a charge on the lands, as suggested by the dissenting judgments of Gwynne and King JJ.[428] Instead, he holds, in accordance with his earlier determination in *St. Catherine's Milling*, that the Province of

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being the responsibility of paying the original and increased annuity money provided for in the Robinson treaties.

Note also that King J. refutes the stance adopted by Lord Watson regarding the effect of paragraph 13 of the 1870 arbitrators' report and the increased annuity payments under the Robinson treaties at note 423, *supra*, when he states, at pp.549-550, that:

> ... [T]he matter of the augmentation of annuities was not raised before the arbitrators, and if the views herein stated upon the main point are correct, it is apparent that the two things do not rest entirely upon the same foundations. The finding of the arbitrators that the claim as to the fixed annuities that was brought before them did not constitute a charge upon the lands, is therefore not conclusive as to the matters in question here. Par. 13 is to be read in the light of the contention before the arbitrators, and not as an abstract and general denial of all charges, etc., respecting the annuities, but simply as a denial of the lands being subject to the alleged charge to which it was then claimed to be subject.

It is interesting to note that, upon appeal, the Privy Council made no reference to the 1870 arbitrators' report in arriving at its judgment.

[427][1897] A.C. 199 (P.C.).

[428]Indeed, at p.211 of his judgment, Lord Watson explains that "Their Lordships have been unable to discover any reasonable grounds for holding that, by the terms of the treaties, any independent interest of that kind was conferred upon the Indian communities."

Canada until 1867, and its successors from 1867 and thereafter, the Provinces of Ontario and Quebec, were liable for discharging the annuity obligations under the Robinson treaties, but that that responsibility became the responsibility of the Dominion government due to the operation of section 111 of the *British North America Act, 1867*, subject to any adjustments provided for by section 112:

> The effect of these treaties was, that, whilst the title to the lands ceded continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province, which also became liable to fulfil the promises and agreements made on its behalf, by making due payment to the Indians of the stipulated annuities, whether original or increased. In 1867, under the Act of Union, the Province of Canada ceased to exist, having been divided by that statute into two separate and independent provinces, Ontario and Quebec. Until the time when that division became operative, the Indian annuities payable under the treaties of 1850 were debts or liabilities of the old province, either present, future or contingent.[429]

In affirming the conclusions reached by the Supreme Court of Canada, Lord Watson's decision in the *Robinson Treaties Annuities Case* may be seen to make use of the very same rationale which formed the basis of his judgment in *St. Catherine's Milling*.[430] The only difference between his

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[429]*Ibid.*, at p.205.

[430]Which, as has already been illustrated, was also the basis of the judgment of Strong C.J.C. and was concurred in by the majority decision of the Supreme Court of Canada.

decision in the *Robinson Treaties Annuities Case* and that in *St. Catherine's Milling* is that in the former, the Provinces' liability is removed by the operation of section 111, whereas in the latter, to which section 111 does not apply, Ontario retains its liability under Treaty #3.

Although he disagrees with King J.'s assertion that the annuity payments represent a charge on the lands surrendered under the treaties, Lord Watson agrees with King J.'s statement that, in purely financial terms, it is a matter of indifference to the aboriginal signatories who pays the annuities to them as long as the annuities are paid.[431] Along these lines, Lord Watson determines that a conclusion which finds that the annuity payments are a charge on the surrendered lands is not only "of no pecuniary advantage to them,"[432] but it also has the effect of "construing the provisions of s.109 with

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[431]Since there is no constitutional prohibition upon either the Dominion or Provincial governments from paying treaty annuity monies to aboriginal peoples, as opposed to the constitutional prohibitions regarding the establishment of Indian reserves due to the effects of sections 91(24) and 109 of the *British North America Act, 1867*, for example, which will be discussed further in our analysis of *Ontario Mining Co. v. Seybold*, Ch. V(b), iii, 2, *infra*.

[432]Note 427, *supra*, at p. 212. Note also his statement that:

> ... [T]heir Lordships think it must still be matter of absolute indifference to the Indians whether they have to look for payment to the Dominion, to which the administration and control of their affairs is entrusted by s. 91 (24) of the Act of 1867, or to the Province of Ontario. (p.212)

Despite disagreeing with King J.'s notion that the annuity payments are a charge on the surrendered lands, Lord Watson agrees entirely with the statement made by King J. at the Supreme Court of Canada level, note 420, *supra*, at p.546, where he explains that:

> Practically it does not now, and it never did,

an amount of liberality which the ordinary canons of construction do not admit of."[433]

Lord Watson's assertion that it is immaterial which emanation of the Crown pays the annuity money to the aboriginal treaty signatories under the treaty is true, but only to the extent of satisfying the aboriginal signatories' *financial* concern to receive the money promised to them under the treaty.[434] However, Lord Watson's statement does not account for any political considerations by which aboriginal peoples may prefer to deal with one personification of the Crown as opposed to another.[435] Moreover, the issue of whether the aboriginal peoples actually *surrendered* their lands under the treaties in exchange for annuities or other enumerated benefits or merely *shared* their lands with the Crown in exchange for certain considerations is an ongoing matter of dispute.[436]

Shortly after the Privy Council's decision in the *Robinson Treaties*

> make any difference to the Indians whether they were declared to have an interest in the proceeds of the land or not. Their assurance of payment would be equal in either case.

[433]Note 427, *supra*, at p. 212.

[434]Which is only one aspect of the concerns of aboriginal peoples generally regarding their treaty rights.

[435]Depending upon the historical interaction between aboriginal groups and the Crown, or upon the willingness of a particular level of government to negotiate in good faith with aboriginal peoples over their concerns, some aboriginal groups may prefer to deal with the Federal government rather than a Provincial government, or vice versa.

[436]See the references provided in the earlier discussion of this point at note 404, *supra*.

Annuities Case, the issue of Provincial responsibility for treaty obligations arose again in *Ontario Mining Company Ltd. v. Seybold*. One of the issues in *Seybold* concerns the setting aside and establishment of Indian reserves under the provisions of Treaty #3, the same treaty dealt with in *St. Catherine's Milling, supra*.[437] The vital issue in *Seybold*, for our purposes, is whether the obligation to set aside reserves under the treaty rightfully belongs to the Dominion, the Province of Ontario, or both.

At trial,[438] the issue of who is responsible for the setting aside of Indian reserves under the terms of a treaty is not explicitly dealt with by the court. Boyd C. attempts to reconcile *St. Catherine's Milling*'s determination that the beneficial interest in surrendered Indian lands belongs to the Province in which the lands are located once it is unencumbered of the Indian title with the reality in *Seybold* that the Dominion, acting beyond its jurisdiction, set aside a reserve for the benefit of the treaty signatories out of the lands surrendered by the treaty in 1879 and later sold the reserve lands, without the consent of the Province, after obtaining their surrender.

Boyd C. initially determines, in direct conflict with the precedent in *St. Catherine's Milling*, that the Dominion, under its section 91(24) jurisdiction over "Indians, and Lands reserved for the Indians," has a right to set aside

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[437]The matter in dispute in *Seybold* is not restricted to resolving the issue of who is responsible for fulfilling the obligation to set aside reserves under the treaty, but deals with other issues such as the ownership of mineral rights. However, for the purposes herein, our discussion of the case will be restricted to the issue of responsibility for setting aside reserves under the treaty.

[438](1899), 31 O.R. 386 (Ch.).

and exercise legislative and administrative jurisdiction over the reserve, while territorial and proprietary ownership of the land is vested in the Crown for the benefit of, and subject to, the legislative control of Ontario. However, he later determines that it is preferable for the interests of the Indians that the allocation of treaty reserves should be accomplished "with the approval and co-operation of the Crown in its dual character as represented by the general and the provincial authorities,"[439] since the Dominion possesses legislative authority over "Indians, and Lands reserved for the Indians" under section 91(24) of the *British North America Act, 1867* while Ontario possess proprietary rights to the land under section 109.

Upon the appeal of the trial judgment, Street J. recognizes that the Crown had an obligation under the terms of the treaty to establish Indian reserves, yet acknowledges that the precedent in *St. Catherine's Milling* prohibits the Dominion from establishing reserves using lands surrendered by treaty, since those lands belong to the Crown in right of Ontario. To reconcile these incongruous interests, Street J. determines that since only Ontario could set aside the surrendered lands for use as a reserve, it had an obligation to do so:

> The surrender was undoubtedly burdened with the obligation imposed by the Treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender

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[439]*Ibid.*, at p.398. See the discussion in the section entitled "The Nexus Between Governmental Power and Fiduciary Responsibility," Ch. V(b), v, *infra*.

> and refuse to perform the condition attached to it.[440]

Upon *Seybold*'s appeal to the Supreme Court of Canada,[441] and without submitting a written judgment, the majority dismisses the appeal of the Divisional Court's decision on the authority of Boyd C.'s judgment and the precedent in *St. Catherine's Milling*. The only written judgment in the case is the dissenting judgment of Gwynne J. Consistent with the position he adopted in the *Robinson Treaty Annuities Case*, Gwynne J. insists that any obligations arising from the treaty must be assumed by Ontario, even though the power to obtain the surrender of Indian lands resides in the Dominion:

> ... [F]or the benefit so obtained by the province by the treaty of surrender the province alone should in justice bear the burthen of the obligations assumed by Her Majesty and the Dominion to obtain the surrender of those lands as was held in the *St. Catharines Milling & Lumber Co. v. The Queen*.[442]

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[440](1900), 32 O.R. 301 (Div. Ct.), at pp.303-304. While only Ontario could set aside the surrendered lands for use as a reserve, it arguably does not possess the ability to create a reserve, which falls under the Federal jurisdiction of "Indians, and Lands reserved for the Indians," in section 91(24). In order to fulfill the terms of the treaty, Ontario would have to make the lands available for use as a reserve to the Dominion government, which would then set aside the reserve using the lands given for this purpose by Ontario.

[441](1901), 32 S.C.R. 1.

[442]*Ibid.*, at p.13. It should be noted, however, that Gwynne J. determines that the power of the Dominion over "Indians, and Lands reserved for the Indians," under section 91(24) is not qualified by anything in the *British North America Act, 1867*, and that the precedent in *St. Catherine's Milling*

Following its consideration of *Seybold*, the Privy Council determines that it was *ultra vires* the Dominion to appropriate part of the lands surrendered by Treaty #3 to set aside as Indian reserves under the obligations imposed by the treaty without obtaining the consent or cooperation of Ontario. However, in delivering the judgment on behalf of the Privy Council, Lord Davey states that although Ontario has a duty to fulfill the obligations under the treaty, that duty does not exist in a strictly legal sense and exists only to the extent that it should cooperate with the Dominion in the setting aside of the reserves:

> ... [T]he Government of the province, taking advantage of the surrender of 1873, came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two Governments.[443]

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does not govern the case before him: *Ibid.*, at pp.21-22.

[443][1903] A.C. 73 (P.C.), at pp.82-83. While the "honourable engagement" suggested by Lord Davey does not legally bind the Province, it does indicate the Privy Council's recognition of existing Provincial obligations even though it qualifies this recognition by stating it as an assumption rather than a conclusion by prefacing it with "Let it be assumed that ...".

In any event, Lord Davey's later discussion of the Dominion's power to establish Indian reserves, specifically that it does not possess any beneficial interest in the lands surrendered under the treaty and subsequently cannot unilaterally set aside reserves from those surrendered lands without the consent and cooperation of Ontario, infers, by necessity or logical implication,

Lord Davey's characterization of Ontario's obligations as being merely an "honourable engagement" as opposed to a legal responsibility is very misleading. Although he states that Ontario has only an "honourable engagement" to fulfill the term of the treaty, Lord Davey recognizes that, due to the precedent in *St. Catherine's Milling* and the effects of sections 91(24) and 109 of the *British North America Act, 1867*, it is beyond the power of the Dominion government to unilaterally establish and set aside Indian reserves from surrendered lands in order to fulfill the terms of the treaty. By holding that the treaty obligation of setting aside the reserves must be fulfilled while recognizing that this may only be validly accomplished "by the joint action of the two Governments,"[444] it may be inferred that Ontario's obligations are more firmly entrenched than the "honourable engagement" which Lord Davey characterizes them as.

There is no question that, owing to the constitutional division of powers, responsibilities, and benefits under the *British North America Act, 1867*, resolving the matter of setting aside reserves from surrendered lands under the terms of an Indian land surrender treaty requires the joint action of the Dominion and Ontario. Although it may be argued that negotiations between Canada and Ontario could be implemented to resolve this dilemma, and, in fact, were used for this very end, under Lord Davey's determination Ontario is neither compelled nor obligated to reach a settlement with Canada

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the legal nature of the Province's obligations. See note 445, *infra*, and its accompanying text.

[444]*Ibid.*, at p.82.

concerning the obligations under the treaty. In fact, Ontario is not obligated to engage in negotiations with Canada on this issue at all.

If Ontario is entirely unreasonable in its demands upon Canada to cooperate in the setting aside of reserve lands or simply refuses to negotiate with Canada, under Lord Davey's characterization of the nature of Ontario's duty, only the aboriginal signatories to the treaty are punished. Should the aboriginal signatories attempt to initiate legal action to enforce the terms of the treaty, under Lord Davey's characterization they would have a right only against Canada. In any event, even if the aboriginals successfully conclude a legal action which affirms their right to receive reserves under the treaty, the courts cannot enforce that right since they can neither compel Canada to unilaterally fulfill the treaty -- since Canada does not possess the jurisdiction, on its own, to set aside reserves out of surrendered lands -- nor compel Ontario to cooperate with Canada in the setting aside of the reserves since Ontario is not legally bound by any such obligation.

As a result of this situation created by its judgment in *Seybold*, it is legitimately open to question how it is possible for the Privy Council to have found a legal obligation upon the Crown to fulfill the terms of a treaty by setting aside Indian reserves where it does not also find concurrent legal obligations on *both* the Dominion and relevant Provincial authorities, whose joint action is required to set aside an Indian reserve from surrendered lands, to fulfill those terms. In light of these circumstances, it is suggested that the only reasonable way to reconcile the legal requirement upon the Crown to fulfill the terms of the treaty with the constitutional division of powers, responsibilities, and benefits under the *British North America Act, 1867* and

to ensure that the treaty obligations are fulfilled is to require both the Federal and Provincial levels of government to be legally obligated to cooperate in the fulfillment of the treaty by legally binding them to act jointly to set aside Indian reserves from the surrendered lands.

An analogy may be drawn between this scenario and the proper method of interpreting a statute which explicitly binds either the Crown in right of Canada or the Crown in right of a Province, but not both, and, due to the constitutional division of powers, requires both Crowns to be bound in order to effect its intentions. In this situation, where the statute would be frustrated or rendered absurd unless it is read to bind both Crowns, the statute must be read to bind both Crowns by necessity or logical implication.[445]

In the *Seybold* scenario, without holding both the Federal and Provincial governments to legal obligations to fulfill the treaty's terms, we have demonstrated that there neither exists a guarantee that the treaty will be fulfilled, nor the ability of the aboriginal signatories to legally enforce the obligations owing to them. Accordingly, where the efforts of both the Federal and Provincial governments are required to ensure that the terms of a treaty are fulfilled, both governments should be held to legal obligations to fulfill those terms, notwithstanding the precedent in *Seybold*.

The last in this trilogy of cases is *Dominion of Canada v. Province of Ontario* (The *Treaty #3 Annuities Case*). This case is noteworthy for its

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[445]See, for example, *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.), at pp. 31-39; *Alberta Government Telephones v. Canada (C.R.T.C.)* (1989), 61 D.L.R. (4th) 193 (S.C.C.), at p.233; *Province of Bombay v. City of Bombay*, [1947] A.C. 58 (P.C.), at p.61; Peter W. Hogg, *Liability of the Crown*, Second Edition, (Toronto: Carswell, 1989), at p.210.

attempt to wrap up the discussion of Provincial responsibility initiated in *St. Catherine's Milling* and continued through the *Robinson Treaties Annuities Case* and *Ontario Mining v. Seybold.* The issue to be determined in the *Treaty #3 Annuities Case* is which level of government is responsible for the payment of annuity monies to the aboriginal signatories to Treaty #3, the Dominion, the Province of Ontario, or both.

In accordance with Lord Watson's determination in *St. Catherine's Milling*, the Dominion contended that since Ontario reaped the benefit of obtaining the beneficial interest in the lands surrendered under the treaty, it was obliged to pay the annuities. Ontario insisted that the Dominion government was solely responsible for the annuity payments since it unilaterally negotiated the terms of the treaty.

At trial, Burbidge J. affirms Lord Watson's decision in *St. Catherine's Milling* which finds in favour of Provincial responsibility under Treaty #3. In accordance with Lord Watson's holding, Burbidge J. determines that where Provinces reap the benefits of a treaty, they are responsible for incurring the costs of the treaty. Consequently, he finds that Ontario is responsible for the payment of annuity monies under the treaty.[446]

Upon appeal to the Supreme Court of Canada,[447] the majority of the court overturns the Exchequer Court's findings. Allying himself with the decision in *Seybold*, Idington J. determines that Lord Watson's statements in *St. Catherine's Milling* regarding Ontario's liability for paying the annuities

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[446] *Dominion of Canada v. Province of Ontario* (1907), 10 Ex. C.R. 445, at pp.496-497.

[447] *Province of Ontario v. Dominion of Canada* (1909), 42 S.C.R. 1.

owing under the treaty are purely *obiter dicta* and of no legally binding force or effect. Had Lord Watson's statements been legally binding, Idington J. contends that *Seybold* would certainly have explicitly recognized this fact and given effect to them.[448]

Idington J. explains that Ontario could not be held to be responsible for the obligations to the Native peoples arising under Treaty #3 merely because of the effects of section 109 of the *British North America Act, 1867* under which it obtained the beneficial interest in the land surrendered under the treaty. He insists that since the Province did not have the option of accepting or declining receipt of the beneficial interest in the surrendered lands, it could not be held responsible for discharging the annuity payments under the treaty undertaken by the Dominion government:

> It is not the case of an individual who could refrain from acting or accepting. The duty which arose, the only duty the province owed the Dominion, was to do all these things* when given a chance.
>
> We have not, therefore, any ground upon which to say that in seeking equity it must do equity.[449]

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[448]*Ibid.*, at pp.114-115. Idington J.'s reasoning is faulty, since *Seybold* neither explicitly affirms nor rejects the conclusions of Lord Watson in *St. Catherine's Milling* on this point.

*Discharging governmental duties over lands, including selling, settling, leasing, improving, etc.

[449]Note 447, *supra*, at p.111.

In dismissing the notion of Provincial responsibility for the obligations incurred by the Dominion government under the treaty, Duff J. agrees with Idington J.'s rationale. He agrees with Idington J.'s determination that since Ontario did not act to secure the beneficial interest in the lands it obtained under the treaty it cannot rightfully owe a duty to discharge the treaty obligations. Duff J. determines that Ontario would only be liable to pay the annuities owed under the terms of the treaty if it had taken *positive* action to derive the benefits it received under section 109.[450] Consequently, he finds that Lord Watson's statements in *St. Catherine's Milling* are purely *obiter* and of no binding legal effect.[451] Furthermore, Duff J. dismisses the notion of any equitable principle upon which to ground Ontario's responsibility to fulfill the terms of the treaty: "In these circumstances, I cannot conceive on what principle a court of equity could proceed to adjust equitably as between the Dominion and the province the burden of the obligations undertaken by the former."[452]

As in the *Robinson Treaties Annuities Case* and *Ontario Mining v. Seybold*, there is a significant dissent to the majority view in the *Treaty #3 Annuities Case*. Davies J., with Girouard J. concurring, affirms the Exchequer court's determination of Ontario's responsibility for discharging the treaty annuity obligations. He relies upon Lord Watson's pronouncement in *St. Catherine's Milling* in insisting upon Ontario's responsibility for discharging

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[450]*Ibid.*, at p.126.

[451]*Ibid.*, at pp.130-132.

[452]*Ibid.*, at p.125.

the annuity payment obligation of the treaty under which it obtained the benefit of the lands surrendered. Davies J. further corroborates his reliance upon the precedent in *St. Catherine's Milling* by citing Strong C.J.C.'s judgment in the *Robinson Treaties Annuities Case.* As illustrated earlier, Strong C.J.C.'s judgment in the *Robinson Treaties Annuities Case,* while distinguishing between the facts in that case and those existing in *St. Catherine's Milling,* does not overrule Lord Watson's conclusion in *St. Catherine's Milling,* but affirms it within the specific context in which it exists by finding that it accords with "the most obvious principles of justice."

At the Privy Council level, Lord Loreburn L.C. dismisses the Dominion's argument that Ontario must fulfill the payment of Treaty #3 annuity obligations for lack of any recognized legal principle upon which to entrench such a conclusion.[453] As a result of his inability to find an applicable principle of law upon which to base Ontario's responsibility under Treaty #3, Lord Loreburn L.C. states that:

> It may be that, as a matter of fair play between the two Governments, as to which their Lordships are not called upon to express and do not express any opinion, the province ought to be liable for some part of this outlay. But in point of law, which alone is here in question, the judgments of the Supreme Court appears unexceptionable.[454]

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[453][1910] A.C. 637 (P.C.), at p.645: "In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable."

[454]*Ibid.,* at p.646.

Lord Loreburn L.C.'s finding of a Provincial obligation based only upon "fair play" rather than "in point of law" is a clear dismissal of any legal duty of Ontario for the annuity payments owed to the aboriginal peoples under the treaty. In accordance with this sentiment, he supports Idington and Duff JJ.'s characterizations of Lord Watson's statements in *St. Catherine's Milling* as *obiter* and therefore not conclusive of Provincial legal responsibility.[455]

A. The Payment of Annuities and the Establishment of Reserves Under Treaty

Our consideration of the *Treaty Annuity Cases* illustrates the difference in the existence of Provincial obligations to pay annuities arising from pre-Confederation, as opposed to a post-Confederation, treaties. The *Robinson Treaties Annuities Case* has been shown to result in the Dominion's obligation to pay annuities owing under a pre-Confederation treaty due to the operation of section 111 of the *British North America Act, 1867.* In the absence of section 111, the responsibility to pay the annuities would reside with the Provinces of Ontario and Quebec. Meanwhile, the Dominion's obligation to pay annuity money under the post-Confederation Treaty #3, being negotiated subsequent to the division and redistribution of powers, responsibilities, and benefits in the *British North America Act, 1867,* cannot be treated in a similar fashion and, therefore, may not impose similar obligations upon Provincial Crowns to discharge annuity obligations incurred under such treaties.

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[455] *Ibid.*, at p.647.

Our discussion of the trilogy cases also illustrates that there is a significant distinction between the obligations to pay annuities under the terms of a treaty, as in the *Treaty Annuity Cases*, and the obligation to set aside Indian reserves from lands surrendered under treaty as in *Seybold*. In the former, there is no constitutional prohibition preventing either the Dominion or Provincial governments from paying annuity monies under treaty. Consequently, aboriginal peoples who are owed annuities under the terms of treaties do not need to be concerned about the effects of the *British North America Act, 1867*'s division of powers, responsibilities, and benefits upon their ability to obtain the monies owing to them.

The aboriginals' lack of concern over the fulfillment of treaty annuity obligations does not hold true of the situation regarding the establishment of reserves from lands surrendered by treaty, though. As in the *Seybold* scenario, neither the Dominion nor the Provincial governments is constitutionally able to unilaterally set aside Indian reserves from lands surrendered under treaty due to the effect of sections 91(24) and 109 -- the Dominion has no authority over surrendered lands, while no Province may set aside a reserve.[456] Therefore, for the reasons illustrated earlier, where

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[456]This latter assertion is based upon a straightforward interpretation of the exclusive power vested in the Federal government over "Indians, and Lands reserved for the Indians" in section 91(24) of the *British North America Act, 1867*, more specifically the power relating to "Indians," which exists independently of the power over "Lands reserved for the Indians" as determined by the Supreme Court of Canada in *Four B Manufacturing v. United Garment Workers of America* (1979), 102 D.L.R. (3d) 385 (S.C.C.), at pp.398-399. Any attempt by a Province to set aside an Indian reserve out of the lands surrendered by treaty, while it does possess exclusive power over the surrendered lands by way of section 109, would clearly infringe upon the exclusive Federal power over "Indians" -- which entails the sole ability to act

Indian reserves must be set aside from surrendered lands under the terms of a treaty as in *Seybold*, the Province, by necessity or logical implication, should be held legally responsible, to the extent that it is jurisdictionally able, to act in concert with the Federal government to set aside the reserves.

B. Subsidiary Issues Raised by the Trilogy Decisions

In addition to not being able to distinguish between the payment of annuities and the setting aside of reserves in terms of finding Provincial obligations under treaty, the question of privity is another issue which appears to have plagued the judgments in the trilogy cases.[457] It is a

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and legislate in respect of matters which affects Indians *qua* Indians -- and, therefore, would be *ultra vires*. Refer to the later discussion of the effects of section 88 of the *Indian Act* on the applicability of Provincial legislation to aboriginal peoples at notes 493-494, *infra*, and their accompanying text.

[457]As indicated by the comments of Lord Loreburn L.C. in the *Treaty #3 Annuities Case* who states, note 453, *supra*, at p.644, that:

> In making this treaty the Dominion Government acted upon the rights conferred by the Constitution. They were not acting in concert with the Ontario Government, but on their own responsibility, and it is conceded that the motive was not any special benefit to Ontario, but a motive of policy in the interests of the Dominion as a whole.

Note the similarity in sentiment between this statement and that of Duff J., note 447, *supra*, at p.125, who questions how the Province may be responsible for making the annuity payments under the treaty when the Dominion:

> ... [T]o serve his own ends, to meet his own obligations, to protect his own interests, has been

fundamental principle of Contract law that two parties to a contract cannot impose obligations upon a third party who was not privy to the agreement, subject to certain exceptions.[458] Consequently, the judges had difficulty in attaching liability to Ontario by virtue of treaties unilaterally negotiated and entered into by the Dominion, notwithstanding that the benefits derived from the treaties accrued to Ontario. However, it should be remembered in this context that at the time that all of these treaties were signed, the constitutional understanding of the Crown was that it was "one and indivisible" throughout the Commonwealth.

Although the *British North America Act, 1867* modified this understanding of the Crown to allow for the existence of a Crown in right of the Dominion and a Crown in right of each Province, the fact that the Crown remained "single and indivisible" should apply to prevent it from being able to escape its fiduciary obligations existing under a treaty by donning its Provincial Crown "hat" when it was convenient to do so. It should also be noted in this context that the "single and indivisible" Crown was already bound by a pre-existing, general fiduciary obligation to the aboriginal peoples stemming from the various historical, political, social, and legal factors which

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> obliged to procure the surrender of the burden [of Indian title], and who, to procure that surrender, has, without consulting the owners, compounded for it in money on his own terms."

[458]See, for example, *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847 (H.L.); *Vandepitte v. Preferred Accident Insurance Co.*, [1933] 1 D.L.R. 289 (P.C.); *Greenwood Shopping Plaza Ltd. v. Beattie* (1980), 111 D.L.R. (3d) 257 (S.C.C.). See also S.M. Waddams, *The Law of Contracts*, Second Edition, (Toronto: Canada Law Book, 1984), especially at pp.200-204. Note also the discussion of privity in relation to the *Bear Island* decision in McNeil, note 33, *supra*, at pp.50-54.

were illustrated earlier. This pre-existing fiduciary obligation flowed to the Dominion and Provincial Crowns along with the division and redistribution of powers, responsibilities, and benefits under the *British North America Act, 1867.*

It is arguable, in certain situations, that where an aboriginal group was enticed into signing a land surrender treaty by the Crown under the Crown's threat of being unable or unwilling to protect that group's land from white encroachment, the entering into the treaty under such pretenses constitutes a breach of the Crown's pre-existing fiduciary obligation to act in the aboriginals' best interests and breaches the specific obligations contained within the *Royal Proclamation of 1763.* Historical accounts of the negotiations behind many Indian treaties and archival research of correspondence in this regard indicate that this practice did occur and therefore could affect a significant number of Indian treaties in Canada. However, the likelihood of such an argument being adopted by a court of law is, at the present, not very high. Any judicial determination that the Crown engaged in this manner in a particular situation and consequently acted in breach of its fiduciary duty would likely be stunted by a "floodgates" argument -- that by allowing one such claim to succeed, a rash of similar claims would follow.

The situation described above is magnified to a greater extent where an aboriginal group that had been granted a reserve under a land surrender treaty was coerced into a second surrender of much of their reserved lands under the Crown's threat of being unable or unwilling to protect those lands. One such example of this latter situation surrounds the treaty signed by the

Chippewas of Saugeen and Nawash in 1854, eighteen years after surrendering the majority of their lands to the Crown by treaty. In 1836, the Chippewas had been enticed by Sir Francis Bond Head, Lieutenant-Governor of Upper Canada, into surrendering 1.5 million acres of their territory to the Crown in exchange for the promise that lands north of Owen Sound comprising the entirety of the Bruce Peninsula would be reserved to them and protected from white encroachment. However, shortly after signing the treaty, the Chippewas complained to the Crown that their lands were being infiltrated by squatters and that timber was being cut and removed.

In 1854, the Crown sought a further surrender of land from the Chippewas. The Chippewas were informed by the Superintendent of Indian Affairs that unless they surrendered some of the lands that had been reserved to them under the 1836 treaty, the Crown would not protect their lands from white encroachment as had been promised. The Chippewas then surrendered much of their remaining reserve lands to the Crown in Treaty No. 72 on 13 October 1854. The suggestion that the Crown's "inability" to protect the Chippewas' lands was based more upon its unwillingness rather than any inability to do so appears to be corroborated by the fact that immediately after the conclusion of Treaty No. 72, the Superintendent General of Indian Affairs issued a notice warning squatters not to trespass on the newly-surrendered lands and enlisted the aid of the Sheriff in the vicinity to police the area and enforce the Crown's exclusive right to the lands.[459]

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[459]The discussion in this section is summarized from information contained within the Public Archives of Canada. See, for example, the *Report*

This situation, like the one described earlier, potentially renders the Crown liable for breaching its pre-existing and specific, Proclamation-based, duties to the Chippewas by entering into either the 1836 or 1854 treaties. In addition to constituting a *prima facie* breach of the Crown's pre-existing and specific, Proclamation-based duties, however, the Crown is potentially liable as well for breaching the specific obligations that it had incurred in the 1836 treaty by entering into the 1854 treaty. Due to the actions taken by the Crown subsequent to Treaty No. 72 to protect the newly-surrendered lands from squatters, it appears to have been fully within the ability of the Crown to fulfill its 1836 obligations and protect the Chippewas lands from white encroachment. Consequently, the Crown's failure to protect the lands and its inducement of the Chippewas into a further surrender of their lands under false pretenses provides a basis upon which to either render the 1854 treaty void or to base an action in damages or restitution.

The basis of the breach of fiduciary duty argument against the Crown in a situation such as this is that the Crown assumes a fiduciary duty to aboriginal peoples through the promises it gives to the aboriginals in exchange for the surrender of their lands. Where the Crown enters into a subsequent treaty with the same aboriginal group under the false pretense that it is no longer able to fulfill its existing treaty obligations, it is in breach of its general duty to act in its aboriginal beneficiaries' best interests as well as its specific duties as outlined in the terms of the initial treaty. In a situation such as this, an aboriginal group may avoid the "floodgate" problems associated

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on Negotiation Proceedings regarding Surrender of the Saugeen Tract from Superintendent General of Indian Affairs L. Oliphant to Lord Elgin, Governor-General of Canada, PAC RG 10, Vol. 117.

with mounting an argument for breach of duty based upon the Crown's pre-existing, or specific, Proclamation-based, duties by basing the breach upon the specific obligations contained within the initial treaty. By eliminating the floodgates argument that a claim of breach of duty based upon the Crown's pre-existing or Proclamation-based duties unavoidably carries with it, a court's reluctance to find in favour of a breach of the Crown's duties emanating from a specific treaty should be greatly reduced.

C. Summary

Our examination of the trilogy cases suggests that while the legal obligation to pay annuities under the terms of a pre- or post-Confederation treaty ultimately resides with the Federal Crown, the obligation to set aside Indian reserves from surrendered lands must belong jointly to the Federal and Provincial Crowns. Nevertheless, the decisions in the trilogy cases are determinative only of the rights and obligations of the Federal and Provincial Crowns vis-à-vis each other in discharging the obligations owed to aboriginal peoples under the terms of Indian treaties. They do not determine the reciprocal rights and obligations of either the Federal or Provincial Crowns vis-à-vis the aboriginal peoples. At the time that the trilogy cases were decided, there was no judicial acceptance of the fiduciary nature of the relationship between the Crown and aboriginal peoples in Canada. In addition, the aboriginal peoples whose interests were being affected by the judicial determinations in these cases were not represented in any of them; therefore, the issues decided therein are not *res judicata* as against the

aboriginal peoples.

Furthermore, the courts' use of the conventional approach, as discussed in Chapter I, leads them, in their consideration of Provincial responsibility for the Crown's obligations to Native peoples under the treaties, to attempt to root their determination exclusively in section 109.[460] The problems inherent in the use of the conventional approach in the trilogy cases parallels the modern judiciary's use of this approach in its attempt to precisely define or concretize the Crown's fiduciary obligation to Native peoples.[461] However, section 109 is only one element of a full and proper consideration of the Crown's fiduciary obligations to aboriginal peoples.

The results of the courts' conventional approach in the trilogy cases are twofold: (1) the courts based their considerations of section 109's effects on Provincial responsibility for the Crown's obligations entirely upon the precedent in *Attorney-General of Ontario v. Mercer*[462] without due regard for the specific facts giving rise to the issues before them, and; (2) the courts ignored the effect of pre-existing Crown fiduciary obligations to the aboriginal peoples on section 109 and on the division of powers in sections 91(24) and 109. These two factors prevented the courts from properly examining the

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[460]This may be illustrated by the judgment of Lord Watson in the *Robinson Treaties Annuities Case*, note 427, *supra*, at p.213, which is couched in section 109 rhetoric: "... [T]he Indians obtained no right which gave them any interest in the territory which they surrendered, *other than that of the province*; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise ..."

[461]By rooting it in legal documents such as the *Royal Proclamation of 1763* or the *Indian Act*. See the discussion in Ch. I, *supra*.

[462]Note 406, *supra*.

basis of Provincial obligations to the aboriginal peoples.

Had the courts in the trilogy cases adopted a contextual approach to the issues before them, they would have considered the effects of section 109 *within the context of the pre-existing Crown-Native fiduciary relationship* and *within the division and redistribution of powers, responsibilities, and benefits in the British North America Act, 1867 between the Dominion and Provinces,* especially in sections 91(24) and 109 rather than simply implementing section 109 as it had been interpreted in *Mercer*. The *British North America Act, 1867* cannot be read to remove or eliminate the Crown's pre-existing fiduciary duty, but only to redistribute it.[463]

The primary basis of Provincial responsibility for treaty obligations within the contexts contemplated by the *Robinson Treaties Annuities, Seybold,* and the *Treaty #3 Annuities* decisions, as well as by *St. Catherine's Milling,* is the effect of section 109 upon surrendered Indian lands once they are relieved of Indian title.[464] Notwithstanding the determinations in these cases, where the benefit of an Indian surrender of lands to the Crown accrues to a Province through section 109, the Province must be either partially or wholly responsible for discharging, to the extent that it is legally or constitutionally able, the obligations incurred by the Crown in securing the surrender:

> Where the benefiting Province has the exclusive constitutional authority to fulfill the Crown's promises, it cannot take the benefit of the

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[463] See note 411, *supra,* and its surrounding text.

[464] See the discussion in Ch. V(b), iii, 1, *supra.*

> surrender without incurring corresponding fiduciary obligations. Thus, if the Federal Crown has undertaken to set aside reserves out of the lands surrendered, this promise binds the Province to which the lands pass, because it alone has the power to carry out the promise.[465]

The trilogy cases were decided at a period in time when far fewer relationships were recognized as fiduciary on the legal plane, though they may have existed as such on the extra-legal plane. Since that time, many more relationships have been recognized as fiduciary on the legal plane, including the Crown-Native fiduciary relationship. In light of *Guerin*'s judicial entrenchment of the Crown's fiduciary duty, its subsequent expansion in *Sparrow*, and our new theory of fiduciary doctrine,[466] the decisions in this trilogy of cases may be seen to be in error. Consequently, they should not be regarded as authoritative in any discussion of the nature and extent of Provincial fiduciary responsibilities to Native peoples in Canada, nor should they be regarded as precedents for the proposition that Provincial Crowns do not possess treaty obligations towards Native peoples where they obtain direct benefits from those treaties.

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[465]Slattery, note 118, *supra*, at p.275.

Refer also back to the discussion of *Delgamuukw*, where McEachern C.J.B.C., despite his extremely limited view of the Crown's fiduciary duty, affirms that that duty is owed by both Federal and Provincial governments. See note 190, *supra*, and its accompanying text.

[466]Which may be seen, respectively, in Ch. III(a), Ch. III(c), and Ch. IV(c), iii, *supra*.

3. Gardner v. Ontario/Bear Island/Mitchell v. Peguis Indian Band

In opposition to the judicial determinations of the nature of Provincial obligations in the *Robinson Treaties Annuities Case, Ontario Mining v. Seybold*, and the *Treaty #3 Annuities Case*, more recent judicial consideration of Provincial obligations in Indian treaties indicates an unqualified return to the reasoning espoused by Lord Watson in *St. Catherine's Milling*.

In *Gardner v. The Queen in Right of Ontario*,[467] the plaintiffs had commenced an action against both the Federal and Ontario governments for their roles in denying the plaintiffs the inclusion of certain lands in their reserve allotment under Treaty #3. In particular, the plaintiffs insisted upon their right of possession of headlands in those parts of their reserves which were bordered by water bodies. By agreement with the Federal Crown,[468] Ontario had initially undertaken to protect those interests, but effectively reneged upon that agreement through subsequent Provincial legislation.[469]

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[467](1984), 45 O.R. (2d) 760 (Ont. H.C.).

[468]*An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, S.O., 1891, c.3, *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, S.C., 1891, c.5.

[469]*The Beds of Navigable Waters Act*, S.O. 1911, c.6, and *An Act to confirm the title for the Government of Canada to certain lands and Indian Lands*, S.O. 1915, c.12. The latter directly contravenes the agreement between Ontario and Canada established in the 1891 statute. See also the discussion of the effects of these statutes in *Ontario and Minnesota Power Co. v. The King*, [1925] A.C. 196 (P.C.); Angela Emerson, *Research Report on Policy of the Government of Ontario Re: Headland to Headland Question, Treaty #3, 1873-*

For any remedy granted by the court to be legally enforceable against either Canada or Ontario, both the Crown in right of Canada and the Crown in right of Ontario would have to be parties to the plaintiffs' action. To seek redress against both the Federal and Provincial Crowns, the plaintiffs were forced to bring actions in both the Federal and Provincial courts.[470] Ontario insisted that the plaintiffs' actions in two different courts systems were identical and could not both be maintained. To prevent what it viewed as an abuse of process by allowing the plaintiffs to pursue similar declaratory relief against two different levels of government in two different courts, Ontario sought to have the Ontario court strike out the plaintiffs' statement of claim against it. Ontario argued that since only one of the plaintiffs' actions should be allowed to proceed and that as a result of the *Indian Act* there was a *prima facie* privity of contract between the plaintiffs and the Federal Crown, only the plaintiffs' Federal Court action against the Federal Crown should be allowed to proceed.

In finding in favour of the plaintiffs' ability to continue both of their actions concurrently in the Federal and Ontario courts, White J. bases his decision upon the statutory requirements in existence at the time, his finding

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1978, (Office of Indian Resource Policy, Ministry of Natural Resources, 1978); Richard H. Bartlett, *Aboriginal Water Rights in Canada*, (Calgary: Canadian Institute of Resources Law, University of Calgary, 1988), at pp.103-109.

[470]Legislative requirements at the time insisted that the Crown in right of Canada could only be sued in Federal Court, while the Crown in right of Ontario could only be sued in the Ontario courts. Section 17(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7 (as amended) now provides that the Federal Court, Trial Division possesses "concurrent original jurisdiction in all caes where relief is claimed against the Crown," thereby allowing both Federal and Provincial Crowns to be co-defendants in one action in Federal Court.

that the plaintiffs have a justiciable claim against the Province, and that the Province, having promised to uphold the plaintiffs' interests by agreement with the Dominion government, should have more concern for the plaintiffs' loss of rights:

> ... [T]he plaintiffs have been deprived of a valuable right which, in part, they paid for by surrendering their aboriginal rights to the Crown in right of Canada. It is unseemly that the Province of Ontario, which in an agreement with the Dominion of Canada, promised to uphold that right, is not solicitous of that right. Perhaps, the Province of Ontario should have viewed any imperfection in the plaintiffs' pleading with a more appropriate measure of forbearance.[471]

Gardner does not determine Ontario's obligations under the terms of the treaty, since the sole matter in issue was Ontario's application to strike out the plaintiffs' statement of claim. It does recognize, however, that Ontario, by virtue of its actions in accepting and later repudiating the protection of the plaintiffs' rights under the treaty, may possess obligations towards the plaintiffs based upon Ontario's part in the enactment of legislation protecting aboriginal interests.[472]

The *Bear Island* decision is also noteworthy for its inference of Provincial fiduciary responsibility for aboriginal interests. In particular, the

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[471]Note 467, *supra*, at pp.775-776.

[472]See the further discussion on this point in the section entitled "The Nexus Between Governmental Power and Fiduciary Responsibility," Ch. V(b), v, *infra*. Refer back to note 181, *supra*, and the finding of Provincial responsibility for protecting Native rights in *Cree Regional Authority v. Robinson*.

Bear Island decision suggests that Ontario is bound by fiduciary obligations to the Teme-Augama Anishnabai through the *Robinson-Huron Treaty, 1850.* While the Supreme Court vaguely states that "the Crown ... breached its fiduciary obligations to the Indians,"[473] it also states that the matters involving the breach of duty "currently form the subject of negotiations between the parties."[474]

As our earlier discussion of *Bear Island* indicates,[475] the only parties involved in the negotiations referred to by the Supreme Court are the Temagami people and the Province of Ontario. By virtue of this fact -- which the Supreme Court was eminently aware of at the time of its decision -- it would appear that Ontario's fiduciary duty to the Temagami people is accepted by the Supreme Court in *Bear Island.* Although the court does not explicitly state that Ontario is bound by fiducial obligations to the Temagami people, the court's statement that the matters surrounding the breach of the fiduciary duty "currently form the subject of negotiations between the parties," strongly supports the notion of Provincial fiduciary responsibility.

Of more general applicability is the fact that there is nothing unique about Ontario's role in the *Bear Island* scenario which results in the Supreme Court's inference of Ontario's fiduciary obligations to the Temagami people. *Bear Island* is akin to other situations in which lands surrendered by aboriginal peoples under treaties unilaterally negotiated by the Dominion or

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[473]*Bear Island* , note 3, *supra,* at p.81.

[474]*Ibid.*

[475]Ch. I, Ch. III(d), ii, *supra.*

Federal Crown accrue to the Provinces in which they are situated under section 109 of the *British North America Act, 1867.* As our reappraisal of the Dominion and Provincial Crowns' obligations to aboriginal peoples in the trilogy cases suggests, the equitable basis of a Provincial fiduciary duty is unaffected by the pre- or post-Confederation nature of the treaty which gives rise to it. Rather, it is concerned only with whether the Province reaped benefits under the treaty due to the division and redistribution of powers, responsibilities, and benefits under the *British North America Act, 1867.* Furthermore, the *Bear Island* decision does not define or limit Ontario's fiduciary obligation to the Temagami. Accordingly, the Supreme Court's inference of fiduciary responsibilities on the part of Ontario may be seen to support the notion of general Provincial fiduciary responsibilities to the aboriginal peoples living within their jurisdictional boundaries.

In addition to the findings in *Gardner* and *Bear Island,* the dissenting judgment of Dickson C.J.C. in *Mitchell v. Peguis Indian Band*[476] lends further credence to the argument that Provincial governments owe fiduciary obligations to Native peoples, at least within their own jurisdictional boundaries. In *Mitchell,* a creditor-debtor case, the fundamental point in issue is the determination of which levels of government are encompassed within the phrase "Her Majesty" for the purposes of section 90(1)(b) of the *Indian Act.*[477] La Forest J.'s majority decision determines that "Her Majesty"

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[476]Note 61, *supra.* See also the discussion of *Mitchell* from an administrative law perspective in H. Wade MacLauchlan, "Developments in Administrative Law: The 1989-90 Term," (1991) 2 *S.C.L.R.* (2d) 1, at pp.13-18.

[477]R.S.C. 1970, c.I-6.

refers only to the Crown in right of Canada. In contrast, Dickson C.J.C., dissenting, insists that "Her Majesty" refers to both the Federal and Provincial levels of government.

While La Forest J.'s assessment is based upon an adherence to the intentions of Parliament in enacting the *Indian Act*, Dickson C.J.C. concentrates upon the aboriginal understanding of the phrase "Her Majesty," as mandated by the decision in *Nowegijick v. The Queen* and affirmed by a number of Supreme Court of Canada decisions over the next decade.[478] Relying upon *Nowegijick*'s determination that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian,"[479] Dickson C.J.C. determines that:

> ... [T]he Indians' relationship with the Crown or Sovereign has never depended upon the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations.[480]

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[478]See note 61, *supra*.

[479]*Ibid.*, at p.198. Note also the reference to the problems in the interpretation of Indian treaties in the *Report of the Select Committee on Aborigines, 1837*, note 197, *supra*, where, at p.80, it states that:

> ... [A] ready pretext for complaint will be found in the ambiguity of the language in which their agreements must be drawn up, and in the superior sagacity which the European will exercise in framing, in interpreting, and in evading them.

[480]*Mitchell*, note 61, *supra*, at p.209.

The relationship between the aboriginal peoples and the Crown far predates the separation of legislative and executive powers between the Federal and Provincial governments established in the *British North America Act, 1867.* While the majority of this section has focused upon positive legal rationales for the entrenchment of fiduciary obligations upon the Federal and Provincial governments, there is a far more fundamental rationale for these conclusions which is illustrated by Dickson C.J.C.'s dissenting judgment in *Mitchell* -- the aboriginal understanding of the Crown-Native relationship, as reflected, in part, in the aboriginal understanding of "the Crown."

iv. The Aboriginal Understanding of "The Crown"

The aboriginal reference point for the basis of the Crown's fiduciary duty has always been "the Crown." It has not been the Crown in right of Britain, the Crown in right of Canada, or the Crown in right of a particular Province. It has just been "the Crown." This is due to the wording of treaties and other agreements between the Crown and Native peoples, as well as their explanations *by the Crown's own representatives* to the aboriginal peoples. Based upon the accounts of the history and background to many Indian land treaties, no differentiation between the personifications of the Crown were made evident to the aboriginals.[481] From the aboriginal viewpoint, therefore,

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[481]See, for example, the references in note 404, *supra,* as well as the accounts reported by Alexander Morris in *The Treaties of Canada with the Indians of Manitoba and the North-West Territories,* (Toronto: Belfords, Clarke & Co., 1880, Facsimile Edition reprinted by Coles Publishing, Toronto,

where the Crown treated with aboriginal peoples and undertook certain responsibilities towards them, it did so as a unified entity.

Indeed, the underlying bases for the present fiduciary duty of the Crown all predate the notion of the divisibility of the Crown in constitutional usage and practice espoused by Lord Denning M.R. in the *Alberta Indian Association* case. We have already detailed the effects of the political changes in the relationship between Britain and Canada upon the continuing fiduciary obligations of the British Crown.[482] However, the aboriginal understanding of "the Crown" as representing both the Federal and Provincial Crowns is not affected by the change in the understanding of "the Crown" from "one and indivisible" to "separate and divisible." As Dickson C.J.C. acknowledges in *Mitchell* :

> That relationship began with pre-confederation contact between historic occupiers of North American lands (the aboriginal peoples) and the European colonizers (since 1763, "the Crown"), and it is this relationship between aboriginal peoples and the Crown that grounds the distinctive fiduciary obligation on the Crown.[483]

Moreover, the Supreme Court of Canada's own guidelines towards the interpretation of Indian treaties and statutes relating to Indians from *Nowegijick* indicates a preference to aboriginal understandings over competing understandings where there is a discrepancy over the construction

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1971).

[482]Ch. V(b), ii, *supra*.

[483]*Mitchell*, note 61, *supra*, at p.209.

to be given to a particular phrase or concept: "Aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions."[484] These guidelines are based upon the earlier rationale established by the United States Supreme Court in *Jones v. Meehan*, where it was held that treaties ought to be construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."[485]

La Forest J.'s majority judgment in *Mitchell*, on the other hand, explicitly rejects Dickson C.J.C.'s characterization of the aboriginal understanding of "the Crown" as not being reflective of modern circumstances:

> With deference, I question his conclusion that it is realistic, in this day and age, to proceed on the assumption that from the aboriginal perspective, any federal-provincial divisions that the Crown has imposed upon itself are simply internal to itself, such that the Crown may be considered what one might style an "indivisible

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[484]*Ibid.*, at p.201. See also note 31, *supra*; *R. v. Taylor & Williams*, note 31, *supra*; *R. v. George* (1966), 55 D.L.R. (2d) 386 (S.C.C.); *Robinson Treaties Annuities Case*, note 420, *supra*, at p.535.

Furthermore, this method of interpretation is consistent with the *contra proferentem* rule in Contract, which holds that any ambiguity in a contract or agreement is to be interpreted against the party that drafted the agreement. See Waddams, note 458, *supra*, at pp.345-361.

[485]175 U.S. 1 (U.S. 1899), at p.4, based upon the earlier precedent established in *Worcester v. Georgia*, 6 Pet. 515 (U.S. 1832), at p.582, where M'Lean J. states that "The language used in treaties with the Indians should never be construed to their prejudice."

entity".[486]

From this statement, it is evident that La Forest J.'s reasoning places too heavy an emphasis upon modern constructionism. Instead of assuming that the *current* aboriginal understanding of the legal usage of "the Crown" accords with the modern constitutional understanding of the "separate and divisible" Crown, La Forest J. should have based his judgment upon the understanding of "the Crown" possessed by the aboriginal peoples either at the time of the *Royal Proclamation of 1763* or when the treaties were signed. His characterization is unable to account for the true aboriginal understanding of the meaning of "the Crown" since it is not based upon an *bona fide* attempt to understand the aboriginal viewpoint. La Forest J. appears to base his assessment upon his own inferential assumptions rather than upon an attempt to understand the aboriginal perspective on its own terms.[487]

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[486]*Mitchell*, note 61, *supra*, at p.237.

[487]See the references in note 481, *supra*. To gain a basic understanding of general differences between aboriginal and non-aboriginal world views, see Mary Jane Jim and Diane Moir, Address, Cross-Cultural Workshop for Yukon Judges and Justices of the Peace, Yukon College, Whitehorse, May 9, 1989 (unpublished), as cited in Heino Lilles, "Some Problems in the Administration of Justice in Remote and Isolated Communities," (1990), 15 *Queen's L.J.* 327, at pp.333-334; see also Dr. Clare Brant, "Native Ethics and Rules of Behaviour," (1990), 35 *Cdn. J. Psychiatry* 534; Robin Riddington, "Cultures in Conflict: The Problem of Discourse," [1990] *Cdn. Literature* 273.

The tendency of common law courts to understand aboriginal ideas and concepts solely by direct comparison to common law notions was warned against almost seventy years prior to *Mitchell* by Viscount Haldane in *Amodu Tijani v. The Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.), at p.403, where he states, in discussing the nature of aboriginal title, that:

Modern aboriginal understandings of "the Crown," as it is represented in treaties and through the historical intercourse of governmental authorities and aboriginal peoples in Canada, are based upon the understandings passed down from generation to generation which date back to the various bases of the Crown's fiduciary obligation. Furthermore, the aboriginal understanding is quite consistent in its view that it is the Crown *as a unified whole,* not the Crown in right of Britain, the Crown in right of Canada, or the Crown in right of a particular Province, with whom treaties were signed and compacts made which entail outstanding obligations which are owed to them.[488]

Since the fiduciary duties owed to the aboriginal peoples are a continuation of the duties owed to them from various pre- and post-Confederation political, military, social, and legal alliances, as well as other intercourse between them and the Crown or its representatives, these duties still exist and are of paramount importance. The determination of which emanation of the Crown owes the duties is a secondary matter.[489] The most important concern, from the aboriginal perspective, is to ensure that any obligations which are owed to them are properly fulfilled by the party or parties which owe those obligations. It becomes relevant to determine which

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> There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.

[488]See, for example, Price, note 404, *supra;* Fumoleau, note 404, *supra;* Morris, note 481, *supra;* Cardinal, note 62, *supra.*

[489]It is secondary in the sense that it only becomes important to determine who owes the duty if, indeed, the duty is found to exist.

emanations of the Crown owe those duties where political concerns of a particular aboriginal group may affect which emanation of the Crown the group may prefer to deal with or where legal action to obtain a remedy for a breach of duty requires that the aboriginal peoples know who owes the obligations to them so that they may commence their action against the proper party or parties.

This discussion may be best understood by viewing the totality of the fiduciary obligations owed to the aboriginal peoples as a pie. The pie came into existence shortly after Contact, yet at different stages since that time the pie has been divided into different slices, each of which represents one or more obligations. At its origins and shortly thereafter, all of the slices belonged to the "single and indivisible" Crown. As the "single and indivisible" Crown's powers were gradually transferred to the British Crown and Canadian Crown, slices of the pie were also transferred. Ultimately, with the attainment of Canadian independence, all of the slices of the pie belonged either to the Federal Crown or the Provincial Crowns under the division and redistribution of powers, responsibilities, and benefits under the *British North America Act, 1867.*

The only constant throughout this process is the existence of the pie and all of its slices. The necessity for following the evolution of the pie's distribution of slices is the result of the divisibility of the Crown and the redistribution of powers over Canada, first to the British and Canadian Crowns, and ultimately to the Federal and Provincial Crowns. Doctrinally, the aboriginal peoples may rely upon and expect the fulfillment of the fiduciary obligations owed to them without necessarily having to be aware of

which emanation of the Crown is responsible for fulfilling each individual obligation, or who owns what slice of the pie. Based upon this assertion, Dickson C.J.C.'s conclusion in *Mitchell* that any divisions of the Canadian Crown are merely internal to itself and do not affect the intercourse between the Crown and the aboriginal peoples is the correct approach.

In a practical sense, however, and owing to the division and redistribution of the "single and indivisible" Crown's powers, responsibilities, and benefits among the Federal and Provincial Crowns, aboriginal beneficiaries who have suffered a breach of fiduciary duty by "the Crown" and seek a remedy for that breach from the courts would be wise to inform themselves as to whether the duty is owed by the Federal Crown, a Provincial Crown, or both. As has been often repeated throughout this section of the thesis, since Canadian powers are divided between the Federal government and the Provinces, Canadian responsibilities must necessarily also be divided. This topic will be discussed in further detail in the following section.

v. The Nexus Between Governmental Power and Fiduciary Responsibility

Where power is divided or shared between various levels of government, the resultant obligations which flow from that power must also be shared.[490] Mutual power entails mutual responsibility[491] and it is this

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[490]As, for example, with the explicit sharing of legislative power -- and consequently legislative responsibility -- between the Federal and Provincial governments regarding agriculture and immigration under section 95 of the *British North America Act, 1867* (although the doctrine of paramountcy is

mutual responsibility, founded in part upon the sharing of legislative and executive powers by the Federal and Provincial governments, which underlies the fiduciary obligations of the Crown towards the aboriginal peoples.[492]

An example of the sharing of legislative responsibility over aboriginal affairs may be seen in the ability of Provincial governments to pass legislation affecting aboriginal peoples through section 88 of the *Indian Act*.[493] Subject to the terms of Indian treaties or Federal legislation, section 88 allows for Provincial laws of general application to be applied to aboriginal peoples by referential incorporation, even though legislative jurisdiction over "Indians, and Lands reserved for the Indians" is an exclusive Federal power under

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explicitly included so that Provincial legislation which is repugnant to Federal law is rendered null and void to the extent of the repugnancy). Refer also to notes 495 and 496, *infra*, and their accompanying text.

[491]Note the similarity in reasoning regarding the relationship between power and responsibility enunciated by the Supreme Court of Canada in *Sparrow*, where the court states that "federal power must be reconciled with federal duty." See note 147, *supra*.

[492]As has been repeatedly documented, however, the Crown's fiduciary obligation is based upon a variety of historical, political, social, and legal events and occurrences. Due to the absence of actual Provincial participation in the majority of these events, Provincial obligations stem primarily from their shared legislative and authoritative position as governmental bodies which entails an acceptance of both benefits and obligations from the actions of the Federal government after 1867 and from its predecessors, including the British Crown, prior to 1867. As will be seen, Provincial obligations also arise from their direct actions toward aboriginal peoples and their interaction with them.

[493]Note 2, *supra*. Typical examples of instances where aboriginal peoples are directly affected by Provincial legislation include Provincial Game and Wildlife Laws.

section 91(24) of the *British North America Act, 1867.*[494]

Provincial governments cannot intrude upon the legislative sphere belonging to the Federal government under section 91(24) without affecting the nature and scope of their obligations to Native peoples. Where Provincial governments either: (1) pass legislation referentially under section 88 of the *Indian Act*; (2) play an active role in the formulation of land agreements concerning the establishment of Indian reserves,[495] or; (3)

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[494]The application of section 88 is is a complicated matter which, in light of the effects of section 35(1) of the *Constitution Act, 1982*, may be of questionable validity: see Slattery, note 118, *supra*, at pp.284-286. For further consideration of case law dealing with the effect of section 88, refer to *R. v. Sutherland* (1980), 113 D.L.R. (3d) 374 (S.C.C.) ["pith and substance" rule]; *Kruger and Manual v. The Queen*, note 31, *supra*, [whether Provincial laws are of general application and/or impair the status and capacity of aboriginal peoples]; *Four B Manufacturing v. United Garment Workers of America*, note 458, *supra* [*idem*]; *Dick v. The Queen* and *Derrickson v. Derrickson*, note 61, *supra* [Provincial laws may not interfere with Treaty rights]; Macklem, note 272, *supra*, at pp.419-423, 435-445; Slattery, note 2, *supra*, at pp.775-780; Slattery, note 118, *supra*, at pp.282-286.

[495]As Ontario did in the implementation of Treaty #3 and Treaty #9 reserves. See, for example, *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian lands*, note 468, *supra* -- concerning the establishment of Treaty #3 reserves, in which the sixth clause states:

> 6. That any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario.

See also the obligations of Ontario and Quebec in the 1912 Ontario and Quebec Boundary Extension Acts: *Ontario Boundaries Extension Act*, S.C., 1912, c.40, *An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province*, S.O. 1912,

actively participate in the negotiation of Indian treaties and agreements[496]

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c.3; *Quebec Boundaries Extension Act*, S.C., 1912, c.45, *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, S.Q. 1912, c.7, which provide in section 2(a) of the Federal Ontario Act and section 2(c) of the Federal Quebec Act:

> (-) That the province of ... will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders.

These provincially-obtained surrenders were subject, however, to the approval of the Governor in Council (sections 2b and 2d respectively) and the "trusteeship of the Indians in the said territory, and the management of ... lands ... reserved for their use, shall remain in the government of Canada." (sections 2c and 2e respectively)

[496]Such as Quebec's role in negotiating the James Bay Agreement -- *James Bay and Northern Quebec Native Claims Settlement Act*, S.C., 1976-77, c.32 -- and the enactment of Provincial legislation in respect thereof, such as *An Act respecting hunting and fishing rights in the James Bay and New Quebec Territories*, S.Q., 1978, c.92; *The Cree Villages Act*, S.Q., 1978, c.88; *An Act respecting the land regime in the James Bay and New Quebec Territories*, S.Q., 1978, c.93.

Similar situations include Quebec's role in the *Cree-Naskapi (of Quebec) Act*, S.C., 1984, c.18 and Ontario's part in negotiating with the Nishnawbe-Aski Nation (NAN) to recognized NAN self-government. Regarding the latter, see the Memorandum of Understanding dated 24 February 1986 between the Province, the Federal government, and NAN to enter into negotiations for the purpose of recognizing NAN self-government within the context of Canadian Confederation. This was followed by an Addendum to the Memorandum of Understanding signed on 1 December 1989 and an Interim Measures Agreement dated 12 June 1990 regarding any future development adjacent to NAN reserve lands and lands claimed as NAN lands.

they simultaneously acquire some measure of the Federal government's fiduciary responsibility. As Brian Slattery explains: "... [S]o long as the Provinces have powers and rights enabling them to affect adversely Aboriginal interests protected by the relationship, they hold attendant fiduciary obligations."[497]

Furthermore, with the passage of the *Constitution Act, 1982,* Provincial governments have a constitutional responsibility to act in accordance with the furtherance of the aboriginal and treaty rights guaranteed in section 35(1). As the Supreme Court states in *Sparrow,* "The nature of s.35(1) itself suggests that it be construed in a purposive way."[498] Therefore, while a Province may not legislate in respect of Indians *qua* Indians, it must act in accordance with section 35(1). In light of the decision in *Sparrow,* it is arguable that this entails an obligation to actively and purposively promote or further the rights protected within section 35(1). The purposive nature of the Crown's fiduciary duty will be discussed further in the section entitled "Is the Crown's Fiduciary Duty Purposive?" *infra.*

Sparrow 's purposive duty does not suggest that the Crown must seek prior court approval of its legislative or policy initiatives which affect Indians

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[497]Slattery, note 118, *supra,* at p.274. See also Slattery, note 2, *supra,* at p.755:

> The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.

[498]Note 3, *supra,* at p.407.

qua Indians. It does insist, however, that in light of the historic relationship between the Crown and aboriginal peoples and *Sparrow* 's requirement that the Crown must maintain its honour, integrity, and avoid sharp practice in all of its dealings with the aboriginal peoples,[499] the Crown must act to further and promote the rights enshrined in section 35(1). It is insufficient to merely pay lip-service to the rights in section 35(1) if they are to have any meaningful place within the constitutional structure of Canada.

The mere existence of section 35(1) assumes the recognition of aboriginal and treaty rights as important aspects of the Canadian constitutional structure. Consequently, section 35(1) rights need to be more clearly defined and articulated so that they may assume the form and substance which properly belongs to any rights which are constitutionally entrenched.[500] One aspect of the purposive nature of the Crown's fiduciary duty in *Sparrow* requires it to define and further section 35(1) rights -- through direct consultation with the aboriginal peoples -- so that those rights may become sufficiently understood to enable them to protect the special interests of the aboriginal peoples and assume their place in the constitutional structure of the nation.

Under the rubric of section 35(1) and *Sparrow*'s suggestions as to its proper method of interpretation, a Province may exempt aboriginal peoples

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[499]As emphasized through its reliance upon the precedent established in *R. v. Taylor and Williams*, note 31, *supra*.

[500]There is no reason to constitutionally-entrench rights if they are so ill-understood through their lack of definition or articulation that they are rendered incapable of providing any protection whatsoever to the people that they are designed to protect.

from Provincial hunting and fishing regulations due to the differential impact which such regulations have upon them from what may otherwise appear to be facially-neutral legislation.[501] However, the extent to which a Province may act in accordance with the furtherance of section 35(1) rights before it infringes upon the exclusive legislative jurisdiction of the Federal government regarding "Indians, and Lands reserved for the Indians" in section 91(24) is a point of contention which, as of the present, has yet to be resolved.

vi. Summary and Conclusions

In light of the judicial entrenchment of the Crown's fiduciary obligations in *Guerin*, the constitutional responsibility of the Federal and Provincial governments to purposively act to further the aboriginal and treaty rights contained within section 35(1) of the *Constitution Act, 1982*, and the nexus between governmental power and responsibility and between the division or sharing of power and the benefits received therefrom, the basis of the decisions in the *Robinson Treaties Annuities Case*, *Ontario Mining Co. v. Seybold*, and the *Treaty #3 Annuities Case* may now be seen to be in error.

Based upon the variety of evidence presented herein, it is suggested that the Federal and Provincial governments of Canada are equally bound by

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[501]See, for example, the Ontario Ministry of Natural Resources' Interim Enforcement Policy dated 28 May 1991 detailing the Province's relaxed regulation of aboriginal hunting and fishing rights. Slattery, note 118, *supra*, at p.284 corroborates this notion that a Province may pass legislation directed at aboriginal peoples if the effect of the legislation is to grant exemptions to them in recognition of their aboriginal and treaty rights.

fiduciary obligations to Native peoples. While Canadian aboriginal rights jurisprudence has failed thus far to explicitly recognize the fiduciary responsibility of Provincial governments, the inference of Provincial liability in the Supreme Court of Canada's decision in *Bear Island*, for example, suggests that Canadian courts may soon be prepared to explicitly acknowledge the existence of Provincial fiduciary responsibilities towards aboriginal peoples.

Now that the basic issue of which emanations of the Crown owe the fiduciary obligations to the aboriginal peoples of Canada has been answered, there are a number of other outstanding questions untouched by judicial decisions in Canadian aboriginal rights jurisprudence which may now be addressed.

(c) Is the Crown-Native Fiduciary Relationship Terminable?

In light of the recent discussions and negotiations surrounding the aboriginal right to self-government, as witnessed in both the Federal government's proposal to recognize the aboriginal right to self-government in its recent amalgam of constitutional proposals[502] and the initial report of the Royal Commission on Aboriginal Peoples,[503] the terminability of the

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[502] *Shaping Canada's Future Together*, (Ottawa: Minister of Supply and Services Canada, September, 1991).

[503] *The Right of Aboriginal Self-Government and the Constitution: A Commentary by the Royal Commission on Aboriginal Peoples*, (Ottawa: February, 1992).

Crown-Native fiduciary relationship is an important matter.

Fiduciary relations do not operate within the same rigid confines and absolute preciseness as do trusteeship duties. Consequently, the duration of a fiduciary relationship cannot be ascertained by reference to Trust law. In examining the duration of a trust relationship, it may be seen that a trustee's duties cease upon the closing of the trust, either due to passing of a prescribed length of time or the attainment of a particular end or purpose: "A trust comes to a close, and the trustee is entitled on a passing of his final accounts to a discharge, when the terms of the trust have been carried out."[504] The prescribed length of the trust is generally established in the trust instrument. In the instance of express trusts, however, a premature closing may come into effect.[505]

There are some similarities between the length of trust and fiduciary relationships, though. Like the trust relationship, the duration of a fiduciary relation is situation-specific, being entirely dependent upon the particular purpose or goal of the relationship in question. Unlike the trust relationship, the fiduciary relation does not automatically cease upon the attainment of a particular end. In some instances, such as the relationship between first-time partners in a speculative real estate venture, fiduciary duties do cease upon

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[504]Waters, note 106, *supra*, at p.961.

[505]Either by virtue of the rules established in the Court of Chancery, most notably the precedent established in *Saunders v. Vautier*, (1841), 4 Beav. 115 (Ch.), where it was held that beneficiaries of a trust may terminate the trust due to their equitable interest in the trust *res* , or through the statutory powers of courts to vary or revoke trusts. See Waters, note 106, *supra*, at p.962 and, generally, at pp.961-980, 1055-1086.

the attainment of a particular end -- the closing of a deal in which their land interest is sold. Once the land is sold, the fiduciary relationship of the partners *for the purposes of selling that land interest* is over. If, however, these same partners decide to jointly engage in further land speculation, the nature of their relationship changes and the fiduciary duties which they owe to each other no longer ends upon individual sales. Since the nature of their relationship is now an ongoing and continuous one, their duties to each other are similarly ongoing and continuous.

As has been emphasized throughout this thesis, the fiduciary nature of a relationship is dependent upon the particular characteristics of that relationship. Therefore, whereas *the existence of a trust relationship* creates the operational framework for the intercourse of the parties to it, the *intercourse of the parties* creates the operational framework for the existence of a fiduciary relationship.

A number of issues surround the discussion of the terminability of the Crown's fiduciary duty to Native peoples. The first set revolves around the status of the Crown's duty: Is the duty a permanent one and, if it is, may it be contracted out of by either the Crown or the aboriginal peoples?

As illustrated earlier, the *Sparrow* decision holds that the Crown's fiduciary obligations to Native peoples is constitutionally entrenched in section 35(1) of the *Constitution Act, 1982*. Any amendment of the rights enshrined within section 35(1) is subject to the more onerous amending procedure outlined in section 38 rather than that in section 43.[506] Moreover, in the absence of constitutional amendment, the only other way in which the

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[506]See discussion in Ch. III(c), *supra*.

Crown's duty may be removed is by the consent or desire of the aboriginal peoples. Due to the nature and history behind the Crown-Native fiduciary relationship, it would be unseemly to allow the Crown to unilaterally extricate itself from its obligations to the aboriginal peoples without finding itself in breach of its duty. The only exception to this may be seen in the earlier discussion of the devolution of the British Crown's fiduciary obligations to Canada.[507]

While constitutional amendment may eliminate one formalistic basis upon which the Crown's obligations are rooted, the precedent in *Guerin* relates to a period prior to the effectuation of section 35(1). Furthermore, even in the absence of positive legal bases upon which to ground the Crown's fiduciary obligation, the Crown's duty nonetheless exists, just as it existed far prior to its judicial recognition in *Guerin*.[508]

Since the aboriginal peoples are the sole beneficiaries of the Crown's fiduciary obligations, they alone possess the ability to terminate the relationship.[509] This ability exists independently of their ability to contract out of their rights contained within section 35(1).[510] Combining the sole

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[507]Ch. V(b), ii, *supra*.

[508]See discussion in Ch. III(e), *supra*. The Crown's fiduciary duty is subject also to the devolution of the British Crown's obligations to the aboriginal peoples to Canada, discussed at Ch. V(b) ii, *supra*.

[509]Note the similarity between this situation applying to fiduciary relationships and the rule in *Saunders v. Vautier*, note 505, *supra*.

[510]Section 35(1) merely recognizes and protects rights, it does not force their acceptance by the aboriginal peoples. Aboriginal peoples may therefore contract out of section 35(1) rights if they choose to do so.

ability of the aboriginal peoples to terminate at will their fiduciary relationship with the Crown with the concomitant inability of the Crown to escape its fiducial obligations, the Crown-Native relationship may be seen to exist at the pleasure of the aboriginal peoples.

While the Crown's fiduciary duty to the aboriginal peoples exists independently of the Crown's sovereignty, that duty would be meaningless without the concurrent existence of the Crown's sovereignty. For example, if the Crown's duty requires it to set aside land for use as an Indian reserve, it may only do so if it possesses sovereignty -- and, as we have seen, full constitutional authority -- over the land. To further the illustration, suppose that the French Crown owed a duty to a particular aboriginal band to set aside reserve land under an alliance or treaty entered into prior to the conquest of New France in 1761 -- when it ostensibly had a legitimate basis for both entering into the alliance or treaty and fulfilling the duties under it. That duty may arguably still exist today, but it is rendered meaningless since France no longer possesses the sovereign authority over Canada and consequently cannot set aside Canadian land to fulfill any outstanding obligations it may have to aboriginal peoples by way of treaty.

In addition to this discussion concerning the continued existence of the Crown-Native fiduciary relationship, the continuation of the Crown's fiduciary obligations in the presence of the push towards aboriginal self-government raises a second set of issues: Does the transfer of Crown powers or their voluntary relinquishment to the aboriginal peoples reduce the scope of the Crown's fiduciary obligations?

(d) May the Crown's Fiduciary Obligation Be Reduced in Scope?

What this question asks, essentially, is whether any transfer or relinquishment of powers over Indian affairs directly to Native bands or organizations is permissible within the scope of the Crown's fiduciary obligation or whether such a transfer constitutes a breach of that obligation. Moreover, along these same lines, does the transfer of previously governmentally-controlled or regulated powers to the Native peoples absolve the government of a part of its fiduciary obligations?

In the face of aboriginal self-government negotiations, the ramifications of the transfer of governmental powers to the aboriginal peoples must first be made known. It should be noted, though, that aboriginal self-government exists in many forms. It may be as limited as the ability of aboriginal bands to determine the makeup of their own band lists or as expansive as complete governmental powers over things and persons aboriginal. In light of this difference, it would appear as if different effects would result from a limited transfer of governmental powers -- such as those seen in sections 10(1), 60(1), and 69(1) of the current *Indian Act*[511] -- versus a wholesale transfer of powers from the Crown to the aboriginal peoples.

The questions which arise from a consideration of this issue are vital to the determination of the Crown's role and responsibilities in the face of the evolution of aboriginal self-government. Does the limited transfer of Crown powers to the aboriginal peoples reduce the scope of the Crown's fiduciary obligations? What effects does this limited transfer of powers to the

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[511]See the further discussion in Ch. V(d), *infra*.

aboriginals have upon the nature of the Crown's fiduciary duty to oversee the carrying out of these powers?[512] Alternatively, does the complete transfer of powers over things and persons aboriginal result in the termination of the Crown-Native fiduciary relationship? If so, when is it terminated, at the time of *de facto* self-government (*i.e.* when self-government is first achieved and implemented), or when self-government has been practiced and solidly entrenched? What if government is relinquishing or vacating its jurisdiction over a previously-controlled area to allow for the exercise of inherent aboriginal powers? Finally, must the Crown, by virtue of its fiduciary obligations, oversee the institution of aboriginal self-government mechanisms to ensure that the best interests of the aboriginal peoples are being served?

As we have already seen, the Crown's fiduciary obligation mandates that it act in the best interests of the aboriginal peoples. Therefore, any Crown action which furthers or promotes the aboriginals' best interests does not constitute a breach of fiduciary obligation. *Prima facie*, the return of legislative or governing powers to Native peoples or the vacating of a jurisdictional area to allow for the exercise of inherent powers would appear to be in the aboriginals' best interests and not constitute a breach of fiduciary duty.[513]

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[512]In other words, does the Crown's fiduciary duty exist only in respect of powers which its exercises personally and does the transfer of those powers to the aboriginal peoples reduce or eliminate the Crown's fiduciary responsibility.

[513]Assuming that the aboriginal peoples concerned agree with this assertion. For fiduciaries to act in their beneficiaries' best interests, the

Indeed, the current *Indian Act* provides for the transfer of previously controlled activities to aboriginal bands. Section 10(1) allows a band to assume control over its own membership list as long as it adheres to certain criteria.[514] Under section 60(1), the Governor in Council, upon request, may grant to a band the ability to control and manage its own reserve lands.[515] Similarly, section 69(1) provides for the ability of a band to receive authority to control, manage, and expend its own revenue moneys.

The transfer of these powers to the aboriginal peoples to exercise on their own behalf could only constitute a breach of the Crown's fiduciary obligations if the transfer was detrimental to their best interests. However, the transfer of powers by the Crown to Native peoples may not completely relieve the Crown of its fiduciary obligations.

The responsibility of the Crown to supervise activities which were previously controlled by the Crown through its representatives is analogous, but not identical, to the situation involving the transfer of the Crown's fiduciary obligations documented earlier. Where a particular duty pertaining

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fiduciaries' must first determine what those interests are. To determine the best interests of their beneficiaries, fiduciaries must take whatever steps are necessary to inform themselves as to their beneficiaries' best interests, including direct consultation with their beneficiaries. Therefore, the Crown, as fiduciary to the aboriginal peoples of Canada, must ask its beneficiaries what the latter believe to be in their best interests and then, in accordance with the *prescriptive* nature of fiduciary doctrine discussed in the next section of the thesis, act to further those interests.

[514]The band must establish rules for the regulation of the list in accordance with the Act and, once it has indicated its intent to assume control over its membership list, receive the consent of a majority of its electors.

[515]Although section 60(1) is subject to revocation at any time by the Governor in Council through section 60(2).

to the aboriginal peoples has been transferred to them or where Federal jurisdiction has been vacated, a residual obligation remains to supervise the aboriginals' exercise and control of that duty during the transition period until the aboriginal peoples determine that it is no longer required. Unlike the transfer of a duty to another person who is to act in a quasi-fiduciary role, the return of a duty to act on behalf of aboriginal peoples to the aboriginals themselves is a fulfillment of duty rather than a mere transfer of it. Nevertheless, it is insufficient for the Crown to attempt to dispose of its obligations by dumping them unceremoniously upon the aboriginal peoples without providing for their harmonious transition to the aboriginal authority.

By virtue of the length of time that the Crown has assumed jurisdiction and responsibility for Indian affairs while simultaneously preventing the aboriginal peoples from exercising their right to self-government, it would be unconscionable to allow the Crown to be instantaneously free of its fiducial responsibilities without providing for a period of adjustment. Accordingly, the Crown must be duty-bound to facilitate the transfer of control over certain powers and to supervise their assumption by the aboriginal peoples until the aboriginals determine that they no longer require Crown aid.[516]

Finally, it is immaterial whether the scope of the powers to be transferred or vacated is limited to the responsibility over band membership lists or if it is as broad as aboriginal self-government; the nature and extent of

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[516]This aid may take a variety of forms; moreover, it may be advisory, financial, or a combination of both.

the residual Crown obligation only remains until such time as the aboriginal peoples determine that they no longer require it. Should the Crown fail to perform this supervisory role, it will be liable for a breach of its fiduciary duty to the aboriginal peoples to the same extent and in the same fashion as if it had failed to positively exercise the transferred powers prior to their transfer.

An interesting side issue is the ability of the Federal Crown to delegate authority not to the aboriginal peoples, but to some other appointee under the terms of the *Indian Act*. Section 53(1) allows the Minister of Indian Affairs to personally designate an appointee to manage, sell, lease, or otherwise dispose of surrendered Indian lands in accordance with the terms of the *Indian Act* and the surrender document. Under this scenario, the Minister, as the agent of the Federal Crown, is responsible for the appointee's actions. Should the appointee fail to carry out the responsibilities delegated by the Minister, the Federal Crown is in breach of its fiduciary obligations to the band in question.

Prior to the establishment of this provision, the Minister was not allowed to delegate authority over surrendered lands. The ability of the Minister to delegate such authority in the absence of explicit statutory authority was raised in *St. Ann's Island Shooting and Fishing Club v. The King*.[517] In that case, Rand J. objects to the notion that the Minister of Indian Affairs may delegate authority over the disposal of surrendered lands as being contrary to obligations of the state to the aboriginal peoples:

> ... [S].51 requires a direction by the Governor

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[517](1950), 2 D.L.R. 225 (S.C.C.).

> in Council to a valid lease of Indian lands. The language of the statute embodies the accepted view that these aborigines are, in effect, wards of the state, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of Governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.[518]

Rand J.'s judgment is endemic of the tone of early Canadian cases which indicate the existence of what is referred to as a political trust owed to the aboriginal peoples by the Crown.[519] While not legally binding upon the Crown or rooted in fiduciary doctrine, Rand J.'s judgment in *St. Ann's* is consistent with the notion that the Crown cannot absolve itself of its responsibilities to the aboriginal peoples simply by assigning them to a delegate.

(e) Is the Crown's Fiduciary Duty Purposive?

The *Sparrow* decision indicates that the Crown's fiduciary obligation

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[518]*Ibid.*, at p.232.

[519]See also *Miller v. R.* (1950), 1 D.L.R. 513 (S.C.C.), at p.518, in which the court states that references to the Crown:

> ... [A]s trustee for the Indians and to the Indians as wards of His Majesty is not a technical use of such terms but such references are merely descriptive of the general political relationship between His Majesty and the Indians.

should be *purposively applied*, yet what does this mean in practical terms? Due to the purposive nature of the Crown's duty, is the Crown in breach of its fiduciary obligations simply by acting only when it is expressly required to -- such as in the instance of a band wishing to surrender land -- rather than acting in a *positive* fashion to further the best interests of the aboriginal peoples? Answering this question entails determining whether the nature of the Crown's fiduciary duties is active or reactive.

If the purposive nature of the Crown's duty requires positive activity on its part to promote Native best interests, this renders the Crown's duty *prescriptive* -- placing an onus upon the Crown, under the watchful eye of fiduciary law, to positively determine or establish what is in the aboriginals' best interests and act accordingly -- rather than *proscriptive* -- having the courts determine, after the fact, whether a particular action demonstrates fidelity to the aboriginals' interests.[520]

The distinction between the *prescriptive* and *proscriptive* nature of fiduciary relationships is discussed by Paul Finn in "The Fiduciary Principle":

> On one view it is a *prescriptive* notion; its concern is with whether the beneficiary's interests are in fact being served by the fiduciary; and it uses possible effects on those interests as the determinant in settling the fiduciary's responsibilities. ... The alternative view sees the fiduciary principle as a *proscriptive* one; it is concerned with the maintenance of fidelity to the beneficiary; and it is activated when the fiduciary seeks improperly to advance his own or a third

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[520]These terms are adopted from Paul Finn's article "The Fiduciary Principle," although, as will become evident, their meaning within this section is not synonymous with his own characterization of them.

> party's interest in or as a result of the relationship.[521]

The simplest way to differentiate between these divergent visions is to understand the *prescriptive* vision as being pro-active, whereas the *proscriptive* view may be seen to be passive.

Based upon his characterizations, Finn concludes that fiduciary obligations cannot be *prescriptive*, for "If a fiduciary's liability was to be determined by reference to whether or not the beneficiary's interests had in fact been served, an often impossible inquiry, more than curious consequences would follow."[522] These consequences, he states, include the impingement of fiduciary doctrine upon the separate legal spheres occupied by the law of Trusts, Agency, Tort, Contract, etc. or, alternatively, their complete replacement by fiduciary law. This vision of the effects of the *prescriptive* view of fiduciary doctrine is not only incorrect, but extremist.[523]

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[521]Finn (1989), note 6, *supra*, at p.25. See also Reid, note 265, *supra*, at p.28; Maddaugh, note 262, *supra*, at pp.27-28.

[522]Finn (1989), note 6, *supra*, at p.28.

[523]Especially in its suggestion that fiduciary law may completely replace these separate spheres of influence, although this has also been suggested by Shepherd, note 6, *supra*, at p.373:

> [A]ny comprehensive and effective theory of fiduciaries can be postulated as being co-extensive with the law of restitution as a whole. This becomes a *reduction ab absurdum*. The more sophisticated our theory becomes, the larger the area of law it must encompass. A solid theory of fiduciaries may take in the whole law of restitution. If it is then further refined, we may find the law of

An adherence to Finn's vision of fiduciary doctrine as *proscriptive* entails a situation whereby fiduciary doctrine is neither purposive, nor merely passive, but completely inert.[524] Paradoxically, the inevitable effect of an inert vision of fiduciary doctrine is the very same impossible inquiry into the actions of fiduciaries which Finn warns about in relation to the

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> torts disappearing under its conceptual umbrella. Eventually, at its perfect level, the theory may become a conceptualization of the entire legal system.

Fiduciary theory is quite wide-ranging and, indeed, underlies virtually every aspect of law due to its equitable nature. Correspondingly, it could, potentially, infringe upon or entirely replace the spheres of influence carved out by areas such as Contract and Tort. However, while fiduciary doctrine does underlie virtually every sphere of law, it acts to complement, not combat or replace, the latter. As Lord Cowper states in *Dudley v. Dudley*, note 38, *supra*, at p.119: "Equity therefore does not destroy the law, nor create it, but assist it." Particular examples of how fiduciary doctrine complements other spheres of law may be found in the doctrines of Unconscionability in Contract, and with Duty in Tort.

[524]As Finn states:

> A further consequence flows from the rejection of a prescriptive view of the fiduciary principle. It is not, of itself, an independent source of positive obligations which go beyond the exaction of loyalty in relationships.

Finn (1989), note 6, *supra*, at p.28. Finn does except what he describes as fiduciary powers -- such as those possessed by lawyers in relation to their clients -- whereby it is the power held by the former in relation to the latter which results in the relationship being classified as fiduciary rather than a situation whereby powers are given by one party to the other which gives rise to the fiduciary nature of the relationship. For further elaboration, see Finn (1977), note 6, *supra*, at pp.3, 272-273.

prescriptive, purposive view.[525] If fiduciary doctrine is truly inert until such time as a breach of duty is proven, then the courts' ability to inquire into fiduciaries' actions at that time to determine whether or not they are in breach of their duties is quite limited and prohibitively difficult.[526]

Finn's assertion is untrue of a *prescriptive* understanding of fiduciary doctrine, though. Under the *prescriptive* view, the judiciary does not continuously monitor the fulfillment of fiduciary obligations by fiduciaries; instead fiduciary law effectively does so on its own -- through its general principles -- but, in a passive, or dormant, state which underlies the fiduciary relationship. When a breach of fiduciary duty is proven, this subterranean monitoring of fiduciaries' actions is activated and brought to the surface.[527] The congruency of fiduciaries' actions with the general principles and characteristics of fiduciary doctrine is then juxtaposed against their beneficiaries' best interests to determine whether the fiduciaries have

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[525]See note 522, *supra*.

[526]To wit, if fiduciary doctrine is not *prescriptive* (*i.e.* characterized by general principles and characteristics which serve to continuously monitor the actions of a fiduciary), how is it possible to determine whether a fiduciary is in breach of duty? The requirement of loyalty mandated by the *proscriptive* vision of fiduciary doctrine serves only to determine *positive* actions which are adverse to a beneficiary's interests, such as the fiduciary's acceptance of a bribe. Meanwhile, other situations which are equally characterized as conflict of interest, such as a fiduciary not purchasing a property for a beneficiary in order to acquire it personally, are not caught by the *proscriptive* vision of fiduciary doctrine.

[527]See note 254, *supra*, and its accompanying text. See also p.14, *supra*, where it is explained that "While fiduciary doctrine exists to govern fiduciary relationships, it does so in a passive fashion as long as the integrity of the relationship is maintained."

maintained fidelity to their *duties* to their beneficiaries, not just fidelity to their beneficiaries. This is an important distinction.[528] Therefore, while Finn's notion of the impossible inquiry is true for *proscriptivism*, it acts against his theory of fiduciary doctrine rather than in favour of it.

Support for the *prescriptive* , pro-active view of fiduciary doctrine may be found in the House of Lords' judgment in *In re Gulbenkian's Settlement*, where, in the context of determining the certainty of objects of a mere power -- as opposed to an explicit trust power -- it was held that:

> A settlor or testator who entrusts a power to his trustees must be relying on them in their fiduciary capacity so they cannot simply push aside the power and refuse to consider whether it ought in their judgment to be exercised.[529]

Finn's *proscriptive* vision of fiduciary doctrine regards this statement as standing for the proposition that a fiduciary must consider, though not necessarily exercise, its fiduciary powers. As he states: "The trustees' fiduciary obligation requires them to consider whether they should exercise the power.

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[528]This distinction is important to distinguish the effects of the *prescriptive* versus the *proscriptive* understandings of fiduciary doctrine. As note 526, *supra*, illustrates, it is possible for fiduciaries to maintain fidelity to their beneficiaries, thereby satisfying the *proscriptive* vision, while contravening the requirements of their *duties* as fiduciaries. The *prescriptive* view insists that such actions are not in accordance with the nature and requirements of fiduciaries' duties to their beneficiaries and therefore prevents such an occurrence through its monitoring of fiduciaries' actions.

[529][1970] A.C. 508 (H.L.), at p.518. For the purposes of the discussion herein, the facts of the *Gulbenkian* case are not relevant and any discussion of the case beyond that contained herein has been omitted to avoid confusion as to the extent of its relevance in the context of this thesis.

But they have no duty to exercise it."[530]

While this assertion may be sufficient for *proscriptivism*, it cannot be reconciled with the theoretical basis of fiduciary doctrine, which is premised around the notion that fiduciaries are bound to act selflessly and in the best interests of their beneficiaries. Extrapolating from this underlying premise of fiduciary theory, it may be argued that the obligations of fiduciaries to act in the best interests of their beneficiaries encompasses not only situations where fiduciaries are expressly required to act, but also situations where fiduciaries have the discretion to act, but where making the positive choice to act results in the fulfillment of their beneficiaries' best interests.

If fiduciaries are bound only to *consider* whether to exercise their fiduciary powers, as Finn argues, then it is possible for fiduciaries, in certain situations, to be in breach of their duties to their beneficiaries when they have the discretion of whether to act, but choose not to.[531] A fiduciary's consideration of whether or not to exercise certain powers must be subordinated to the general premise that fiduciaries, upon the assumption of their positions, are bound to act in their beneficiaries' best interests. When examined in this way, it may be seen that fiduciaries stand in breach of their obligations to their beneficiaries if they possess the power to promote their

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[530]Finn (1977), note 6, *supra*, at p.272.

[531]Such as fiduciaries who fail to exercise business opportunities for their beneficiaries in order to take advantage of those opportunities for themselves. In this situation, there is also a conflict of interest, but fiduciaries who fail to exercise such opportunities are already in breach of their duties even before they are in conflict of interest, at least under the *prescriptive* view, since they possessed the ability to act in their beneficiaries' best interests yet failed to do so.

beneficiaries' best interests yet fail to exercise that power. Similarly, where fiduciaries possess the power to contravene their beneficiaries' best interests, they are bound not to exercise that power.

When viewed in this way, *prescriptivism* may be seen to share its ideological foundation with the rule against conflict of interest. Fiduciaries are in conflict of interest not only if they take positive action which contravenes their beneficiaries' best interests,[532] but also if they possess the ability to facilitate their beneficiaries' best interests but fail to act. The *prescriptivist* view of fiduciary activity would therefore interpret the House of Lords' discussion of the use of powers in *In re Gulbenkian's Settlement* to stand for the proposition that where a beneficiary entrusts a fiduciary with certain powers with the understanding that the fiduciary will exercise those powers in the former's best interests, the fiduciary is bound to exercise those powers where their exercise is consistent with the fulfillment of the beneficiary's best interests.

Finally, it must be remembered that the ultimate determination of whether or not a relationship is fiduciary on the legal plane rests not with the parties to the relationship or upon the dictates of commentators on the subject but with the judiciary.[533] Accounting for this fact as well as the purposive nature of the Supreme Court of Canada's fiduciary duty in *Sparrow* discussed earlier,[534] the nature of the Crown's fiduciary duty towards

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[532]For example, fiduciaries who accept bribes in exchange for selling their beneficiaries' property to a third party at a price lower than its market value.

[533]See note 332, *supra*, and its accompanying discussion.

[534]Ch. III(c), *supra*.

aboriginal peoples should be seen to be *prescriptive*. *Sparrow* is explicit about the purposive nature of the Crown's duty when it states that:

> The nature of s.35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.[535]

A *prescriptivist* interpretation of the Supreme Court's decision in *Sparrow* would find that not only is the Crown obliged to act in the best interests of Native peoples, but it must actively promote and further those interests. This entails an obligation upon the Crown to act, both when expressly called upon to do so and where the Crown possesses the discretion to act and where acting will further and promote the aboriginal peoples' best interests. Since *Sparrow* determines that the Crown's fiduciary duty towards Native peoples is contained within section 35(1), the Crown's duty, as understood by *prescriptivism*, should also be construed in a purposive or pro-active fashion. Therefore, the purposive method of interpreting the rights in section 35(1) requires the active promotion and furtherance of the rights enshrined in section 35(1).[536]

To concretize these theoretical distinctions, the primary difference between *prescriptivism* and *proscriptivism* may be best illustrated for our

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[535] *Sparrow*, note 3, *supra*, at p.407.

[536] This is, of course, subject to the justificatory test for legislative initiatives formulated by the Supreme Court in *Sparrow*, which is discussed in Ch. III(c), *supra*.

purposes through the recent constitutional negotiations surrounding the inherent right of Native self-government. If Native peoples desire self-government and the Crown is aware of that desire, the *prescriptive* view of fiduciary doctrine holds that the Crown must *act* to pave the way for its exercise. The *proscriptive* vision merely requires the Crown to *consider* whether Native self-government is in the aboriginal peoples' best interests, but does not require the Crown to act. Even if Native self-government is in the aboriginal peoples' best interests, *proscriptivism* does not require the Crown to take steps to further its achievement. *Proscriptivism* only requires that a fiduciary take positive action not to contravene a beneficiary's interests; it does not require a fiduciary to take positive action to further a beneficiary's best interests.[537]

(f) The Crown's Duty and Conflict of Interest

The matter of conflict of interest is a significant issue in any discussion of the Crown's fiduciary obligations to Native peoples in Canada. As we have seen, the Crown is duty-bound to act in the best interests of the aboriginal peoples by virtue of its fiduciary obligations to them. The Crown's duty is such that, in its fiduciary capacity, it must act selflessly in the aboriginals' best interests while simultaneously forsaking its own interests. The Crown may be found liable for a breach of its duty even in the absence of malevolent

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[537]The *proscriptive* vision may therefore be seen to be purely remedial, though it is not entirely effective even in this limited role. Refer back to Finn's characterization of *proscriptivism* at note 521, *supra*.

actions merely by deviating from the fiduciary's standard of conduct prescribed by law.[538]

The obvious query on this topic is "How may the Crown maintain fidelity to its fiduciary obligations to Native people while many of its other interests are served by not acting in the best interests of Native peoples?" While there are other instances where fiduciaries find it difficult to adhere to their duties to their beneficiaries, or where fiduciaries may be tempted to act in conflict of interest, the situation involving the Crown and its fiduciary

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[538]See especially note 357, *supra*. Note also the comments of the United States Court of Claims in *Three Affiliated Tribes of Fort Berthold Reservation v. United States*, 390 F.2d 686 (U.S. Ct. Cl. 1968), at p.691:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indian's property within the meaning of the Fifth Amendment to the Constitution. ... *Congress can own two hats, but it cannot wear them both at the same time.* [Emphasis added]

To deal with this situation, the Court of Claims developed what is known as the "good faith effort" test. This test holds that there is no breach of governmental duty where Congress exercises good faith in its dealings with the aboriginal peoples in question and provides adequate compensation for the taking of aboriginal lands. This test was subsequently endorsed in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (U.S. 1980).

Again, due to the divergence in the paths followed by American versus Canadian aboriginal rights jurisprudence, no further discussion of conflict of interest on the part of Congress will be attempted. For further discussion of the *Fort Berthold* test, see John D. Hurley, "Aboriginal Rights in Modern American Case Law," [1983] 2 C.N.L.R. 9, at p.37.

responsibilities to the aboriginal peoples is unique, or *sui generis*.[539]

The Crown's duty to the aboriginal peoples is not its only duty. On a macroscopic level, the Crown also owes a duty to the Canadian population as a whole to act in their collective best interests, or what is better described as the "national interest."[540] Consequently, the Crown often finds itself in the difficult situation of having to reconcile each of its duties with its day-to-day activities. While the reconciling of various fiduciary duties with daily activities is not unique to the Crown,[541] the types of activities and considerations which the Crown is confronted with are unique. The recent constitutional negotiations surrounding aboriginal self-government are a prime example of the unique situation of the Crown as a fiduciary to the aboriginal peoples. The various personifications and understandings of the Crown and the ability of these understandings to change or be altered over time due to the course of historical and political events is yet another unique characteristic of the Crown's fiduciary duty towards Native peoples.[542]

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[539]The following discussion of the uniqueness of the Crown's role as fiduciary to the aboriginal peoples must not be understood to contradict the situation-specificity of fiduciary doctrine which emphasizes that all fiduciary relationships are *sui generis* and must be treated accordingly. It is intended for illustrative purposes only.

[540]Although this is not the only duty of the Crown, our discussion will be restricted to it.

[541]Indeed, a corporate director possesses fiduciary duties to the corporation, its employees, and to its various classes of shareholders which must be reconciled with daily operational decisions.

[542]Referring to the discussion of the nature and extent of the British Crown's fiduciary obligations to the aboriginal peoples of Canada and the effects of the *British North America Act, 1867* in dividing and redistributing

Due to the number of unique situations which arise as a result of the Crown's role as fiduciary to aboriginal peoples, the potential for conflict of interest is high and the ability to avoid it is oftentimes difficult.

The potential for conflict of interest on the part of the Crown is replicated in a number of areas. One of the most conspicuous of these is the Indian land claims process. In both the Specific and Comprehensive claims processes,[543] the Federal government, through the Department of Justice and the Department of Indian Affairs, is both the appraiser of a claim's merit as well as its arbiter of fact. As the lawyers of the Federal government, the Department of Justice is bound, first and foremost, to represent and protect the Federal government's best interests. How is it then possible that the Department of Justice may impartially decide upon the merits of a particular Indian land claim which seeks to reclaim revenue-generating lands from the Federal government whose best interests it represents and seeks to protect?[544]

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powers, responsibilities, and benefits among the Federal and Provincial Crowns discussed in earlier sections of the thesis.

[543]A Specific Claim refers to any claim to particular areas of land such as those promised under treaty, whereas Comprehensive Claims include claims to land which have not been previously recognized by the Crown, such as those based upon aboriginal title.

[544]See Douglas Sanders, '"The Friendly Care and Directing Hand of the Government"; A Study of Government Trusteeship of Indians in Canada,' Unpublished paper, 1977 (on file with author), especially at p.26: "The truth is that the Department is concerned with protecting itself against the Indians. That is understandable, politically, but cannot be reconciled with any trust obligations of the government."

Any claim to impartiality on behalf of the Department of Justice in Canadian aboriginal rights jurisprudence cannot be substantiated by virtue of the fact that if a Native rights issue is the basis of a court action, the Department of Justice inevitably acts for the Federal government, not the

Another potential conflict of interest arises with regard to Indian moneys held in trust by the Crown. Under section 61(1) of the *Indian Act*, the Governor in Council has total discretion to determine what uses Indian moneys under this section are to be put.[545] Where, for example, the Crown is obliged to provide enumerated services, such as a schoolhouse or health care, to an aboriginal band by virtue of agreement or treaty, the spectre of conflict of interest arises where the Crown pays for these services out of section 61(1) trust moneys instead of public moneys. Although the Crown must use Indian moneys "only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held," it may not use Indian moneys to pay for services which it has pledged to provide by way of agreement or treaty. The rule against conflict of interest insists that the Crown must use its own funds, not those of the Indians, to pay for any obligations incurred in its own name.

Perhaps the ultimate conflict of interest on the part of the Crown was illustrated by the existence of section 6 of *An Act to amend the Indian Act*.[546] Section 6 amended the *Indian Act*, R.S.C., 1906, c.81 through the addition of section 149A, which prohibited aboriginal bands from retaining solicitors to commence legal actions against the Crown:

> 149A. Every person who, without the consent of the Superintendent General

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aboriginal peoples.

[545]Unless, of course, the authority over Indian moneys is managed by a band for itself under section 69(1). See discussion in Ch. V(d), *supra*.

[546]S.C. 1926-27, c.32.

> expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purposes of raising a fund or providing money for the prosecution of any claim which the tribe or band or Indians to which such Indian belongs, or which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.

Section 149A was repealed upon the enactment of the revised *Indian Act*, S.C. 1951, c.29. Until it was repealed, by preventing legal action from being taken against it by aboriginal peoples -- without any determination of whether or not the aboriginals possessed a just claim -- the Crown, by assenting to the legislation passed by Parliament in the Crown's own interest and against that of the aboriginal peoples, clearly acted in conflict of interest. As their fiduciary, the Crown clearly breached its obligations to the aboriginal peoples by assenting to legislation which sought to prevent the aboriginal peoples from seeking legal representation for any claims they might have had against the Crown.[547]

As a result of its fiduciary obligations to the aboriginal peoples, the

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[547]By assenting to section 149A, the Crown approved of Parliament's legislating away of the aboriginal peoples' recourse to legal representation and the judicial system in a matter which is akin to the ability of fiduciaries to rely upon exculpatory clauses exempting them from liability for the breach of their duties. See note 359, *supra*.

Crown must avoid situations where it places itself or is placed in a potential conflict of interest or else risks being found in breach of its duty. In some instances where a Crown conflict of interest already exists, such as in the land claims process, the existing system needs to be restructured to avoid such conflicts. In other areas, such as the regulation of aboriginal and treaty rights, the Crown must act in accordance with its duty to protect, promote, and further aboriginal interests. In many situations this may require the balancing of competing fiduciary considerations. However, the Crown may not favour one fiduciary consideration over another. Where a number of beneficiaries are owed the same fiduciary obligation, as with the obligations of a corporate director to the shareholders of a corporation, a fiduciary must treat them all equally.[548] Simultaneously, where the Crown owes fiduciary duties to a number of beneficiaries stemming from different obligations, the Crown cannot escape liability for the non-fulfillment of its obligations by citing competing interests.

The ability of the Crown to escape liability for a breach of its fiduciary obligations by citing competing interests was the subject of the decision of the Federal Court of Appeal in *Kruger v. R.*[549] The fact situation in *Kruger* is a prime example of the dilemma raised by the rules against conflict of interest. The Federal government had obtained two parcels of land (henceforth Parcel A and Parcel B, as per their designations by the court in *Kruger*) from the Penticton Indian Reserve No. 1 for use as an airport. Parcel A had been the

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[548]Refer back to the discussion in "Fiduciaries Must Not Compromise Their Beneficiaries' Interests," Ch. IV(d), iii, *supra*.

[549]Note 3, *supra*.

subject of extensive lease negotiations between the Department of Transport and the Department of Indian Affairs, acting on the behalf of the Penticton band. Indian Affairs had proposed a ten-year lease arrangement which the Penticton band accepted and then signed a surrender on the basis that the lease be accepted by the Department of Transport. The Department of Transport objected to the financial terms of the rental payments in the lease proposed by Indian Affairs and expropriated Parcel A in 1938 without obtaining its surrender. Compensation for the expropriation of the land was only paid to the Penticton band in 1941.

In 1942, a desire to expand the airport resulted in Parcel B being sought by the Department of National Defence for Air. It was taken possession of in 1942 and work was initiated upon on it prior to its acquisition from the Penticton band. Parcel B began to be fenced in by the Department of Transport in December, 1942, prior to any agreement over the land being reached. After fruitless negotiations, Parcel B was expropriated in 1944. An offer of interim compensation was refused by the Penticton band. A surrender of Parcel B was only obtained in 1946 upon the payment of $15,000 to the Penticton band.[550]

The Penticton band launched an action against the Federal Crown for damages for breach of trust and lost revenue. Alternatively, the band claimed damages for the Crown's wrongful taking of the land. The basis of the appellants' claim was that in not properly acquiring the two parcels of land and failing to provide them with adequate compensation for the land once it

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[550]The surrender was sought and obtained in 1946 due to an opinion of the Deputy Minister of Justice that Indian lands could not be expropriated, but could be surrendered.

was taken, the Crown was pursuing other interests ahead of its duty to act in the band's best interests.

To simplify the matter, the fact situation in *Kruger* juxtaposes the Federal government's concern as steward of the national interest (represented by its Department of Transport) with its fiduciary responsibility to act in the interests of aboriginal peoples (represented by its Department of Indian Affairs). The *Kruger* scenario brought about a situation where the Federal government was forced to wear its Department of Transport "hat" in securing the land for an airport while simultaneously donning its Indian Affairs "hat" to selflessly serve the best interests of the affected band. The question before the court was whether the Federal government may successfully wear both hats at once without finding itself in conflict of interest stemming from its duty to the Penticton band.

Urie J., with Stone J. concurring, acknowledges that when the Crown expropriated the two parcels of land "there would appear to have been created the same kind of fiduciary obligation, vis-à-vis the Indians, as would have been created if their lands had been surrendered."[551] "The precise obligation in this case," Urie J. finds, "was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians."[552] Urie J. bases his determination of whether the Crown was in breach of its fiduciary obligations to the Penticton band upon the honest and prudent exercise of the Crown's discretion as

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[551]*Kruger* , note 3, *supra*, at p.647.

[552]*Ibid*.

fiduciary for the benefit of the band.

In finding that the Crown did not breach its obligations to the band, Urie J. explains that the competing considerations of the Crown's position as steward of the national interest versus its fiduciary duty to act selflessly in the best interests of the appellants renders the Crown's actions justifiable under the circumstances:

> From the perspective of the Crown in its Department of Transport incarnation, there were competing considerations. ... From these considerations and facts, the question which must be posed is, did the fact that the competing considerations were resolved in respect of both Parcels "A" and "B", with the concurrence of the Indians, on terms which were clearly compromises, not entirely satisfactory to either of the branches of the Crown involved, result in a breach of the Crown's fiduciary duty to the Indians entitling them to the remedies sought in this action? I think not ...[553]

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[553]*Ibid.*, at p.654. Note also Urie J.'s comments at pp.648-649:

> There was no breach of the fiduciary obligation of the Crown based on the alleged conflict existing between two of its departments -- Mines and Resources, Indian Affairs Branch, and Transport. ... [T]he transport officials, too, owed a duty in the performance of their functions, not a direct duty to the Indians but a duty owed to the people of Canada as a whole, including the Indians, not to improvidently expend their moneys. Ultimately, a decision had to be taken. ... That fact does not mean that there was a breach of fiduciary duty nor that there was a conflict of interest which had to be resolved in their [the Indians'] favour, disregarding the obligations of the Department of Transport officials.

The competing interests of the Crown under the circumstances, according to Urie J., simply could not allow for a finding in favour of the appellants.[554]

Heald J. breaks down his consideration of the Crown's action into the individual situations involving each of the parcels of land. As for Parcel A, he finds that there were competing considerations between the two Federal departments which resulted in the Federal government being in conflict of interest in respect of its fiduciary obligations to the Penticton people.[555] Heald J. bases his conclusion on fiduciary doctrine's rule against conflict of interest:

> The law is clear that "... one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside" and that "Equity fashioned the rule that no man may allow his duty to conflict with his interest." On this basis, the federal Crown cannot default on its fiduciary obligation to the Indians through a plea of competing considerations by different departments of government.[556]

In respect of parcel "B," Heald J. finds that the same conflict of interest

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[554]*Ibid.*, at pp.654-655: "The Crown was in the position that it was obliged to ensure that the best interests of all for whom its officials had responsibility were protected. The Governor in Council became the final arbiter."

[555]*Ibid.*, at p.607. Heald J. does note that "The evidence seems to unquestionably establish that the officials of the Indian Affairs Branch were diligent in their efforts to represent the best interests of the Indian occupants. On the other hand, the Department of Transport was anxious to acquire the additional lands in the interests of air transport."

[556]*Ibid.*, at pp.607-608.

arises as in respect of parcel "A."[557] The negotiations surrounding the proposed surrender of Parcel B were found to be inconsistent with the Crown's fiduciary obligations to the Penticton band. The Crown failed to provide full disclosure of the pertinent facts, expropriated the land, and rendered no compensation for the taking "in a timely fashion."[558] Recognizing the reverse onus characteristic of fiduciary doctrine,[559] Heald J. determines that, in light of his conclusions, the Crown must rebut the appellants' allegation of a breach of fiduciary duty in order to avoid liability for its breach.

From his consideration of the material facts in *Kruger*, Heald J. concludes that the Crown breached its fiduciary duty to the Penticton band by allowing other interests to conflict with those of the band: "... [T]he Governor in Council is not able to default in its fiduciary relationship to the Indians on the basis of other priorities and other considerations."[560] In spite of his conclusion, Heald J. dismisses the appeal due to his determination of the lapse of the pertinent limitations period.[561]

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[557]*Ibid.*, at p.622: "It is clear, in my view, that the conflict of interest between two departments of the Government of Canada which was so apparent in the dealings with respect to Parcel "A" is equally apparent when the dealings concerning the acquisition of Parcel "B" are scrutinized."

[558]*Ibid.*, at p.623.

[559]As illustrated in Ch. IV(c), iv, 3, *supra*.

[560]*Kruger*, note 3, *supra*, at p.623.

[561]*Ibid.*, at p.627: "For all the above reasons, it is my reluctant opinion that the appellants' cause of action herein are statute-barred."

The decision in *Kruger* may be seen to be wholly inconsistent with the theory of fiduciary doctrine proposed within and stressed throughout this thesis. The next section will confront this inconsistency directly, first through a critical analysis of *Kruger* using our own theory of fiduciary doctrine and later by reappraising its final determination using this same theory.

(g) The Practical Application of Fiduciary Doctrine: A Reappraisal of *Kruger v. R.*

The result of the *Kruger* decision is legitimately open to criticism. The decision is plagued by fundamental errors of law which arise from its misunderstanding or misconception of fiduciary doctrine. That the issues which were fundamental to the *Kruger* decision have yet to be judicially reappraised in a subsequent proceeding indicates the need to demonstrate the errors in *Kruger*'s application of fiduciary doctrine. Moreover, the lack of judicial consideration of *Kruger* demonstrates the need to correct its mistaken assumptions before its skewed notion of fiduciary doctrine is used as an authoritative precedent.

i. A Critical Analysis of *Kruger v. R.*

Although the judgments of Urie and Heald JJ. in *Kruger* both achieve the same end-result, they differ in the manner in which they arrive at their respective conclusions. While Urie J. bases his decision upon the conduct of individual governmental departments in determining that the Crown did

not breach its fiduciary duty, Heald J. disagrees with Urie J.'s findings, basing his judgment instead upon procedural grounds. The only thing which the two judgments share in common is their misunderstanding of fiduciary doctrine; even so, the misunderstandings which plague each judgment are entirely different.

Urie J.'s finding that the Crown was not in breach of its fiduciary duty due to the competing interests of the Crown under the circumstances[562] is based upon the conduct of individual governmental departments and not upon the conduct of the Federal government as a whole. The Crown's fiduciary duty to aboriginal peoples, as we have emphasized, is not a duty pertaining only to a particular governmental department or agency, but to the Crown as a whole, more specifically in the *Kruger* scenario the Federal Crown and its various departments.[563] Urie J.'s decision not only ignores this fact, but blatantly contravenes the principle of fiduciary doctrine which insists that a fiduciary may not favour one fiduciary consideration over another.[564] The Crown is required to balance its competing duties by attempting to seek ways in which it does not promote one interest at the direct expense of another. Of course, this is not always possible. However, the Crown's decision in this

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[562]See notes 553-554, *supra*, and their accompanying text.

[563]See Hurley, note 5, *supra*, at pp.600-601: "The question of conflict of interest must therefore be decided with reference to the conduct, not of any one department, but of the entire federal government."

[564]See the discussion of this issue in "Fiduciaries Must Not Compromise Their Beneficiaries' Interests," Ch. IV(d), iii, *supra*. Refer also to the discussion of how the Crown may have avoided this conflict of interest situation entirely in the section entitled "A Reappraisal of *Kruger v. R.*" Ch. V(g), *infra*.

context may be subject to judicial review, which allows the courts to assess, much as in *Kruger*, whether the Crown, in attempting to balance its duties to various interest groups, acted with *uberrima fides* and maintained fidelity to its duties, even if it did not actually promote or further them as may be required.

In opposition to Urie J., Heald J.'s insists that the existence of competing interests does not vindicate the Crown's breach of duty to the Penticton band. This view is consistent with fiduciary doctrine's insistence that fiduciaries must not allow personal interests to interfere in the performance of their fiduciary obligations. As Heald J. explains: "Undoubtedly the Department of Transport had good and sufficient reason for requiring subject lands at an early date for its purposes but that circumstance did not relieve the federal Crown of its fiduciary duty to the Indians."[565]

Heald J.'s dismissal of the Penticton band's appeal is based entirely upon the temporal considerations imposed by the relevant limitations periods created by statute. He determines that "the causes of action in the instant case could have been discovered if the appellants had exercised reasonable diligence at the same time the causes of action arose."[566] Since the band failed to exercise such reasonable diligence, he concludes that their cause of action is statute-barred.[567] The basis of Heald J.'s conclusion is in error of

[565] *Kruger*, note 3, *supra*, at p.609.

[566] *Ibid.*, at p.624.

[567] *Ibid.*, at p.627: "For all the above reasons, it is my reluctant opinion that the appellants' cause of action herein are statute-barred."

law, for fiduciary doctrine holds that beneficiaries are under no compulsion or obligation to inquire into the actions of their fiduciaries.[568] Moreover, the effect of limitations periods upon beneficiaries in fiduciary relationships is unique to those types of relationships and cannot be applied in the same manner as to other situations such as breach of contract.[569]

In addition, one of the fundamental rules against conflict of interest in fiduciary law, which dates back to *Keech v. Sanford*,[570] insists that fiduciaries may not negotiate for the lease or purchase of property which is a part of the subject-matter of the fiduciaries' obligations to their beneficiaries.[571] This, at least at first blush, seems to place the Crown in breach of its fiduciary responsibilities to aboriginal peoples where it obtains aboriginal lands for its own use[572] -- as in *Kruger* -- or where it has extinguished[573] or effectively

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[568]See note 314, *supra*.

[569]See note 315, *supra*.

[570]Note 200, *supra*.

[571]See Ellis, note 202, *supra*, at p.2-9:

> ... [T]he Court enforces such a prohibition on the express premise that public policy seeks to enjoin a person in a position of utmost trust and confidence from following his naturally occurring self-interest, a temptation that must be overcome by operation of a rule of law.

Refer also to Scott, note 291, *supra*, at p.543.

[572]The position of the Crown as a requisite intermediary in the alienation of aboriginal lands to a third party, as required by the *Indian Act*, is not pertinent here, since the Crown acts only as an intermediary in such a scenario, not as the party seeking to personally lease or purchase the land. See

regulates[574] aboriginal and treaty rights.

The rule against conflict of interest may be applied to situations where aboriginal and treaty rights have been extinguished in the past or where they are currently regulated through legislation assented to by the Crown, since those rights are a part of the subject-matter of the Crown's obligations to Native peoples. On a macroscopic level, by extinguishing or regulating an aboriginal or treaty right in favour of another interest which it deems to be more important to the public, the Crown is compromising its aboriginal beneficiaries' interests in favour of the national interest. As we have seen, a fiduciary may not favour one beneficiary's interests over those of another

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note 70, *supra*.

[573]The past-tense is deliberately used here to denote the inability to extinguish aboriginal and treaty rights which were in existence on 17 April 1982 due to their entrenchment in section 35(1) of the *Constitution Act, 1982*. As Slattery, note 66, *supra*, explains at p.243:

> The expression, "aboriginal rights," ... refers to a range of rights held by native peoples, not by virtue of Crown grant, agreement, or legislation, but by reason of the fact that aboriginal peoples were once independent, self-governing entities, in possession of most of the lands now making up Canada. ... What [section 35] does is recognize that some, if not all, of the rights originally vested in native Canadians have survived the process whereby the Crown gained sovereignty over Canadian territories. Insofar as those rights were not lawfully terminated prior to 17 April 1982, they now enjoy the protection of section 35.

See also at p.262, regarding the protection of treaty rights in section 35(1).

[574]Even in accordance with the principles established in *Sparrow*, note 3, *supra*.

merely by citing competing interests. Therefore, the Crown would appear to be in breach of its duty to the aboriginal peoples where it has either extinguished or regulates aboriginal and treaty rights through actions designed to facilitate or provide for the interests of its other beneficiaries -- the general public. However, due to the *sui generis* nature of the Crown-Native fiduciary relationship,[575] the strict application of this rule may, in accordance with the situation-specificity of fiduciary doctrine, require modification in certain instances.

One such instance occurs where the Crown has a valid and demonstrated need to obtain aboriginal lands for public purposes or to regulate aboriginal and treaty rights. The justificatory test instituted for Federal legislative initiatives established in *Sparrow* is one example of how the conflict of interest rule may be subject to exceptions due to the unique position of the Crown as a fiduciary versus the position of other fiduciaries.[576]

The permissible range of exceptions under any justificatory test must be consistent with the conflict of interest rule's basis for the general prohibition of fiduciaries' actions which contravene their beneficiaries' interests. The *Sparrow* test, for example, insists that the creation of any limitations to section 35(1) rights must arise only in circumstances in which they are *absolutely* necessary. The complex regulatory scheme fashioned by the

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[575]Which describes both the Crown-Native fiduciary relationship and the relationship between the Crown and Native peoples in general.

[576]See the discussion of the *sui generis* nature of the Crown's position as a fiduciary in Ch. V(f), *supra*.

Supreme Court in *Sparrow* is designed to allow only those limitations which are absolutely necessary to successfully navigate through the *Sparrow* test's requirements.[577] Moreover, as the *Sparrow* test recognizes, any such exceptions must remain faithful to the nature of the Crown's fiduciary obligations to the aboriginal peoples.[578]

The misunderstanding of fiduciary doctrine evident in the judgments of Urie and Heald JJ. have been illustrated in this section to demonstrate that the *Kruger* decision is fundamentally flawed. Since no case decided since *Kruger* has dealt at any length with the question of the Crown's conflict of interest, it is vital, as suggested earlier, to reappraise the conclusions which *Kruger* fosters.

ii. A Reappraisal of *Kruger*

Our theory suggests that a fiduciary relationship exists when its three criteria are satisfied. The situation in *Kruger* may be seen to fulfill all three of our requirements:

> (1) The Crown does possess the ability to affect the interest of the Penticton band, as indicated by its expropriation of part of the band's reserve lands.
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> (2) The band's land interests within the confines of its relationship with the Crown may only

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[577] Whether the *Sparrow* test actually accomplishes its stated intention is an entirely different matter which will not be discussed herein.

[578] See notes 165, 166, *supra*.

be served -- in this instance negatively -- through the Crown's actions, since no other party may acquire or expropriate Indian lands.

(3) The band relied upon the honesty, integrity, and fidelity of the Crown to fulfill its obligations to act in the band's best interests.

After this initial finding that the relationship between the Crown and the Penticton band is a fiduciary one, it remains to be seen whether the Crown has acted in accordance with its fiduciary duties owed to the band.

Based upon the further entailments of fiduciary relationships documented in our theory, it may be seen that the Crown did not properly perform its fiduciary obligations. It failed to act with honesty, integrity, and fidelity in fulfilling the best interests of the Penticton band (Duty #1).[579] The Crown did not further the band's interests, but rather acted against those interests through its method of negotiating for the lease of the land, by later expropriating the land, and by not offering adequate compensation for its taking (Duty #2). The Crown also acted in conflict of interest by: (i) benefiting from its position as fiduciary which enabled it to expropriate the land; (ii) failing to provide full disclosure of its activities to the band,[580] and; (iii)

[579]The following characterizations of "Duties" correspond numerically to those pertaining to fiduciaries in Ch. IV(c), iii, *supra*. Similarly, the characterizations of "Responsibilities" correspond numerically to those pertaining to beneficiaries in Ch. IV(c), iii, *supra*.

[580]As evidenced through the commencement of airport construction on the land prior to its acquisition by the Crown, the Crown's initiation of procedures to expropriate the land when the Penticton band failed to agree to the Crown's terms, and the evidence presented in *Kruger* which demonstrates that the Penticton people were "kept in the dark for very large

compromising the Penticton band's interests in favour of those of the Department of Transport (Duty #3).

Due to the Crown's failure to fulfill its fiduciary obligations, the Penticton people were unable to enjoy the benefits rightfully belonging to them by virtue of their participation in the fiduciary relationship. The band was entitled to rely upon the Crown's honesty, integrity, and fidelity to its, best interests and was not bound to inquire into the Crown's activities (Benefit #1). The band was also able to commence legal action against the Crown once it discovered the cause of action without concern for the application of limitations periods (Benefit #2). Furthermore, the reverse onus provision of fiduciary doctrine allowed the band to commence its action by alleging the Crown's breach of duty, placing the onus to discharge the allegation of breach upon the Crown (Benefit #3). Upon a finding of a breach of fiduciary duty by the Crown, the band is entitled to remedial aid (Benefit #4) from the Crown, which is liable for its breach of duty (Duty #5).

The appropriate remedy for the Penticton band is the value of their loss suffered as a result of the Crown's breach of duty plus the disgorgement of any benefits obtained by the Crown from its breach of duty. This would amount to compensatory damages for the monetary value of the land as well as the value of any activities associated with the land.[581] The relevant considerations for determining the amount of compensation due include: (1)

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periods of time," and that their lands were taken from them with no offers of compensation forthcoming in a timely fashion: *Kruger*, note 3, *supra*, at p.623.

[581]To the extent that these may be compensated for either monetarily or otherwise.

the deprivation of the band's use of the expropriated land for hay and meadow, which eliminated the means of livelihood of many members of the band who were cattlemen; (2) that the land taken was, in the words of Indian Agent A.H. Barber, "some of the best land on the reserve,";[582] (3) the Penticton band's loss of income suffered prior to the Crown's acquisition of the land due to airport construction; (4) the effects of the airport (*i.e.* noise, pollution) upon the band's ability to use and enjoy the rest of its reserve lands, and; (5) the disruption of the Penticton band's traditional way of life and its relocation to an area where it could resume that way of life.[583]

In addition to the above, punitive damages for the wilful breach of fiduciary obligations by the Crown, through its Department of Transport,[584]

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[582]As expressed in a letter dated 8 July 1940 to the Indian Commissioner for British Columbia: *Ibid.*, at p.598.

[583]This factor was recognized and accounted for by the Department of Indian Affairs in a letter to the Department of Transport dated 12 November 1943: *Ibid.*, at p.612 and again at p.652:

> They are entitled to compensation, in our judgment, for the complete disruption of this Indian community's way of life and for the cost of re-establishing the group where the complete resumption of that way of life may be effected. Owing to their race some opposition to receiving them into available white communities will be encountered and that opposition will be reflected in the price they will have to pay for lands or properties as valuable and as useful to them as those they have been compelled to vacate and give up.

[584]Which was illustrated by Heald J.'s contrast of "their rather leisurely approach to negotiations for compensation as compared to their great haste in taking possession and depriving the Indians of their means of livelihood":

seem appropriate under the circumstances.[585] In order to justly compensate the Penticton people for the Crown's actions and their various losses suffered as a result, the form of compensation owed to them by the Crown under our reappraisal would include a combination of monetary and punitive damages for the value of the land, loss of income, and the Crown's wrongful actions, as well as expenses for relocation and the purchase of new lands to enable the Penticton people to continue their traditional way of life.

Interestingly, the *Kruger* scenario could have been avoided entirely had the Crown taken reasonable steps to accommodate the band's wishes. What the Crown should have done prior to actually taking the land is to have weighed the effects of its desire to expropriate the Penticton band's land with the anticipated effects that the taking of the land would have upon the Penticton people. A careful consideration of the competing interests and costs involved in a manner similar to the requirements outlined in the *Sparrow* test would determine whether the band's land was absolutely needed. This would involve a consideration of the need to build the airport, to build it in that vicinity, and whether it needed to be built upon the band's land with no other sites being suitable or available in substitution. The Crown's fiduciary duty to the Penticton people obligates it to attempt to minimize any detrimental effects upon them. This requires determining what the detrimental effects to the Penticton people would be and how to either avoid them entirely or minimize their impact. The greater the potential detriment

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Ibid., at p.622.

[585]Especially in light of the Penticton band's reluctance to lease the land to the Crown without adequate compensation, which the Crown was eminently aware of.

to the Penticton band, the greater the onus is upon the Crown to demonstrate the need to take its lands.

If land was needed and no other land could have been substituted, the Crown was obligated to consult with the Penticton people to determine the method by which to adequately and swiftly compensate or otherwise accommodate them for their various losses suffered as a result of the taking of their land. If a voluntary settlement could not be reached, the Crown must have acted in accordance with the importance of its project to build the airport. The cost of compensating the Penticton band is directly tied to the importance of the project and the need to obtain the band's land. Since the Crown's fiduciary duty requires it to protect and promote the well-being of its beneficiaries, it must seek to provide fair and expeditious payment of compensation to the Penticton people.

The amount of compensation that the Crown should have paid the Penticton band to have avoided the conflict of interest situation in *Kruger* must consider the five criteria outlined above and be implemented by the same method proposed, save for the payment of punitive damages for the Crown's wilful breach of its fiduciary obligations. Had the Crown heeded the advice given by the Department of Indian Affairs rather than concentrating exclusively upon the Department of Transport's desire to obtain the band's land at the lowest possible price, the entire dilemma raised by *Kruger* could easily have been avoided. As Heald J. explains in his judgment:

> If there was evidence in the record to indicate that careful consideration and due weight had been given to the pleas and representations by Indian Affairs on behalf of the Indians and, thereafter, an offer of settlement reflecting those representations

> had been made, I would have viewed the matter differently.[586]

(h) Conclusions

There are many elements contained within the Crown-Native fiduciary relationship. Chapter V has discussed some of the more fundamental components of that relationship. Nevertheless, it is not possible within the limited confines of this thesis to adequately discuss the entire range of constituent elements which comprise the fiduciary relationship between the Crown and the aboriginal peoples.

What may be asserted is that the Crown's fiduciary obligations to Native peoples encompass the range of areas in which the Crown has assumed responsibility to act in the interests of the aboriginal peoples of Canada. The Crown's obligations stem from the powers which the Crown has assumed through its intercourse with the aboriginal peoples[587] or are encompassed within the powers of the Crown to affect the interests of those whom it asserts jurisdiction over.[588]

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[586]Note 3, *supra*, at p.623.

[587]See discussion in Ch. III(e), *supra*.

[588]The existence or legitimacy of the Crown's jurisdiction over the aboriginal peoples in Canada is far too complex a topic to be dealt with adequately here. It is sufficient for the purposes of this particular point of discussion to ascertain that the Crown has indicated its belief in its jurisdiction over the aboriginal peoples through the powers encompassed within section 91(24) of the *British North America Act, 1867* possessed by the Federal government, as well as the more limited jurisdictions belonging to

Examples of the Crown's fiduciary obligations to Native peoples include the protection of aboriginal interests in land and land-related interests -- such as hunting, fishing, trapping, language, culture, religion, etc.[589] -- as well as aboriginal self-government.[590] By virtue of the fiduciary

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each of the Provincial governments.

[589]A specific instance of the express protection of the types of interests illustrated here may be seen in the *Royal Proclamation of 1763*. The Crown's fiduciary duty to protect aboriginal land and land-related interests had been held to include a duty to follow the *Environmental Assessment and Review Process Guidelines Order*, S.O.R. 84-467 ("EARP Guidelines") in *Eastmain Band v. Robinson*, [1992] 1 C.N.L.R. 90 (F.C.T.D.), but upon appeal the trial decision was reversed.

It should be noted, however, that the Federal Court of Appeal's decision in *Eastmain*, unreported decision of the Federal Court of Appeal, No. A-1071-91, rendered November 20, 1992, has no bearing upon the applicability of the new *Canadian Environmental Assessment Act* ("CEAA") to the Crown's fiduciary duty to Native peoples, once it is proclaimed in force. The CEAA, which received Royal Assent on June 23, 1992, will replace the EARP Guidelines once it is proclaimed in force. For further discussion, see Nancy Kleer and Len Rotman, "Environmental Protection and First Nations: Changing the Status Quo," Unpublished paper delivered at *Canadian Institute* Conference on "Doing Business with First Nations," March 1 and 2, 1993.

[590]As the recent constitutional negotiations recognized, aboriginal self-government is an *inherent* right. Unfortunately, by proposing to include the inherent right of aboriginal peoples to self-government in a separate subsection of section 35 -- section 35.1(1) -- the negotiations failed to address the controversial question of whether the right to aboriginal self-government is an aboriginal right as defined by section 35(1). Although the constitutional proposal failed to recognize this, the right of aboriginal peoples to self-government, as an *inherent* right -- which necessarily entails that it does not flow from the Crown or via the terms of a treaty -- must mean that it is either an aboriginal right or some other "right" which has yet to be defined. Since the intent of section 35(1) is to protect the rights of the aboriginal peoples of Canada in existence as of 17 April 1982, the right to self-government, as an *inherent* right, must be an aboriginal right as defined by section 35(1).

nature of its relationship with Native peoples, the Crown is duty-bound to fulfill these obligations and avoid conflicts of interest. In accordance with a *prescriptive* understanding of fiduciary doctrine and our own fiduciary theory fashioned in Chapter IV, these obligations need to be fulfilled in a purposive manner.

VI. CONCLUSION

This thesis is built around the premise that the current understanding of fiduciary doctrine's application to Canadian aboriginal rights jurisprudence is deficient. Notwithstanding the initial judicial acceptance of the Crown's fiduciary duty towards aboriginal peoples almost ten years ago in *Guerin*, the judiciary has been lax in augmenting its understanding of the Crown-Native relationship despite numerous opportunities to do so. Similarly, academic commentators have not been inclined to wade into this relatively new application of an old, yet not very well understood area of law.

The goal of this thesis has been to increase the understanding of the nexus between fiduciary doctrine and the relationship between the Crown and aboriginal peoples in Canada by illustrating the effects of fiduciary doctrine upon that relationship. The seemingly roundabout process by which this thesis has attempted to arrive at its goal is, in actuality, anything but roundabout. As Chapter II's discussion of the methodology employed in this thesis illustrates, all of the chapters of the thesis are mutually-enriching. They each serve as building blocks upon which the ultimate goal of clarifying the application of fiduciary doctrine to the Crown-Native relationship may be achieved.

Our journey towards an appreciation of fiduciary doctrine's effects upon the Crown-Native relationship commences in Chapter III with an examination of existing case law on the Crown-Native fiduciary relationship. Chapter III begins with an in-depth analysis of the initial judicial acceptance of the application of fiduciary doctrine to the Crown-Native relationship in

Guerin. The analysis of *Guerin* demonstrates that the decisions of Dickson and Wilson JJ. are more consistent than they initially appear to be and indicates the Supreme Court's acceptance of a fiduciary obligation of the Crown towards aboriginal peoples in Canada which is not restricted to the *Guerin* context of the surrender of land, but is of a general nature.

Subsequent decisions which cite the *Guerin* precedent are then examined for their discussion of the determinations made in *Guerin*. Unfortunately, with the exception of the *Sparrow* decision, these cases have done little to further the understanding of the fiduciary nature of the Crown-Native relationship and its impact upon the parties to that relationship. Rather than elaborating upon the Supreme Court's judicial sanctioning of the fiduciary nature of the Crown-Native relationship in *Guerin*, these decisions have been content to characterize the relationship between the Crown and Native peoples in Canada as fiduciary by simply citing *Guerin* as an authority for that proposition without much in the way of elaboration. *Sparrow*, on the other hand, is shown to expand upon the earlier findings in *Guerin* by indicating that the Crown's fiduciary obligation to aboriginal peoples is constitutionally-entrenched within section 35(1) of the *Constitution Act, 1982*. *Sparrow* further states that the Crown's fiduciary duty must be purposively applied, entailing a pro-active approach to the fulfillment of the Crown's obligations.

At the conclusion of the examination of existing case law in Chapter III, we are left with an impression of the current status of fiduciary doctrine in Canadian aboriginal rights jurisprudence. It is evident from the discussion in Chapter III that no one clear judicial understanding of the nature and extent

of the Crown's fiduciary obligation towards Native peoples in Canada currently exists and that further elaboration of the fiduciary nature of the Crown-Native relationship is required. Applying fiduciary doctrine to specific relationships between the Crown and Native peoples requires much more than merely stating that the relationship is fiduciary and citing *Guerin* in support of that proposition. In order to elaborate upon the fiduciary nature of the Crown-Native relationship and, consequently, to be able to understand it sufficiently to become aware of its effects upon the parties to that relationship, the doctrinal misconception of fiduciary doctrine which currently plagues its treatment by the judiciary must be addressed.

To remedy the doctrinal misconception of fiduciary law within the confines of the Crown-Native relationship, it is necessary to examine the precepts of fiduciary doctrine in their own right. Only once fiduciary law is understood in a general sense may it then be properly applied to the *sui generis* relationship between the Crown and Native peoples in Canada. The need to understand the doctrinal basis of fiduciary law provides the impetus for the clarification of the general characteristics and principles of fiduciary doctrine in Chapter IV.

The discussion of fiduciary doctrine in Chapter IV is predicated upon an analysis of the historical and theoretical basis of fiduciary principles. By critically examining the historical and theoretical background of fiduciary doctrine, some definitions of what constitutes a fiduciary relationship, various theories of fiduciary doctrine, and the opinions of judges and academic commentators on the subject, Chapter IV isolates the general characteristics and principles which underlie fiduciary doctrine. These

general characteristics and principles serve as the foundation upon which our new theory of fiduciary doctrine is built. What breathes life into our theory is the reconciliation of these general characteristics and principles of fiduciary law with the situation-specificity of fiduciary doctrine. As the discussion in Chapter IV indicates, fiduciary theories which are unable to account for the flexibility required by the situation-specific nature of fiduciary doctrine are inadequate to respond to the particular needs and requirements of individual relationships and the circumstances in which they exist.

The formulation of our new theory of fiduciary doctrine in Chapter IV allows the thesis to return to its discussion of the fiduciary nature of the Crown-Native relationship in Chapter V. Due to the situation-specificity of fiduciary doctrine, it is not possible to determine beyond a general level many of the issues which are discussed in Chapter V. The rationale behind the discussion in Chapter V is therefore similar to the basis of our theory of fiduciary doctrine in Chapter IV -- to provide general guidelines and principles from which to base future applications of specific rules to particular relationships.

The premise behind Chapter V is to attempt to answer some of the fundamental questions which have been left untouched by the judiciary's consideration of the application of fiduciary law to aboriginal rights jurisprudence and which are vital to achieving a full and proper understanding of what the existence of the Crown-Native fiduciary relationship actually means to the parties affected by it. Perhaps the most important question answered in Chapter V is the question of who owes fiduciary duties to the aboriginal peoples, the Federal Crown, the Provincial

Crowns, or both.

Following an analysis of the devolution of powers and responsibilities over Canadian affairs from the "single and indivisible" Crown to the British and Canadian Crowns, and, ultimately, to the Canadian Federal and Provincial Crowns through the *British North America Act, 1867*, existing case law, the aboriginal understanding of "the Crown," and a discussion of the nexus between governmental power and fiduciary responsibility, the Crown's general fiduciary duty to aboriginal peoples is demonstrated to be a duty belonging to both the Federal and Provincial Crowns. Chapter V also discusses the *prescriptive* nature of fiduciary doctrine and its effects upon the fulfillment of fiduciaries' duties to their beneficiaries. Finally, Chapter V illustrates the practical effects of applying fiduciary law to the Crown-Native relationship in a manner that is consistent with the situation-specificity of our theory through a reappraisal of the *Kruger* decision.

The reappraisal of *Kruger* in Chapter V illustrates the practical effects of the generalized, theoretical discussion in Chapters IV and V within the context of a specific situation. By dissecting the *Kruger* decision into its various components through a critical examination of the judicial reasoning behind the decision, the court's mischaracterization and misunderstanding of the application of fiduciary doctrine to the relationship between the Federal government, its various departments, and the Penticton band becomes evident. Using our new theory of fiduciary doctrine, the reappraisal of *Kruger* avoids the errors inherent in the Federal Court of Appeal's decision and reveal how the issues in *Kruger* should have been decided had the Court of Appeal possessed a proper understanding and appreciation of the effects of

fiduciary doctrine upon the Crown-Native relationship as it exists within the specific context in *Kruger*.

Fiduciary doctrine is a vital element of the relationship between the Crown and aboriginal peoples in Canada. It enjoys widespread application within the confines of that relationship and has the potential to expand even further as the relationship continues to evolve. The implications and ramifications of fiduciary doctrine upon the Crown-Native relationship permeates virtually every aspect of the intercourse between the Crown and aboriginal peoples. Unfortunately, the limited scope of this thesis precludes a discussion of the entire range of constituent elements of the Crown-Native fiduciary relationship.

In the aftermath of the *Sparrow* decision, it is hoped that future case law will adopt the purposive approach[591] to the determination of fiduciary issues pertaining to the Crown-Native relationship advocated by the Supreme Court of Canada. The adoption of such an approach by the judiciary will enable future case law to augment or clarify many of the conclusions reached herein. In any event, it is hoped that the process by which this thesis has attempted to achieve its goal will provide a basis for others to contribute to the literature on the confluence of fiduciary doctrine and aboriginal rights jurisprudence of which this is now a part.

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[591]Which has been shown to be consistent with the *prescriptive* theory of fiduciary doctrine illustrated herein.

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