Out of Conflict:
A Principled Vision for the Future of the Crown-Aboriginal Fiduciary Relationship

by

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Submitted in partial fulfilment of the requirements
for the degree of Masters of Law

at

Dalhousie University
Halifax, Nova Scotia
August, 1997

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Dedication

To the memory of my grandmother, Elsie E. Campbell.

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Abstract

This thesis provides a legal analysis of the fiduciary relationship between the Crown and the Aboriginal peoples of Canada. The analysis commences with a general discussion of fiduciary principles including the "no-conflict" rule. Specific and general fiduciary obligations, remedies and emerging trends and tendencies in fiduciary law are also examined.

While the judicial application of fiduciary principles to define the Crown-Aboriginal relationship dates to 1984, the Supreme Court has told us that the basis for such a characterization is *historic*. The Crown-Aboriginal relationship takes its unique definition from the fact that the Aboriginal peoples of Canada had certain pre-existing rights which the Crown undertook to protect in advancing its own sovereign interests. The history of the Crown-Aboriginal relationship also demonstrates that the Aboriginal peoples of Canada have been traditionally and uniquely vulnerable to the exercise of the Crown's power - particularly where Aboriginal interests have come into conflict with non-Aboriginal interests.

In this thesis the attempt is made to formulate a workable definition of the Crown-Aboriginal fiduciary relationship and the nature of the duties it imposes having regard to the undertaking which is presumed to exist at the heart of the relationship. To that end, the Crown's "general" duty of loyalty, with its attendant requirement to avoid a conflict of interest, is distinguished from the more "specific" duties which may arise whenever the Crown purports to exercise a discretion in relation to particular Aboriginal interests. A consideration of the effectiveness of the fiduciary construct in this area is also undertaken through an assessment of the manner in which Canadian courts at all levels have approached the requirement to apply fiduciary principles to the Crown-Aboriginal relationship. The case summaries presented highlight a number of theoretical and practical problems which the courts have yet to address fully. The courts' response to the no-conflict rule is of particular concern in view of the many sources of conflict in the modern Crown-Aboriginal relationship.

The future of the Crown-Aboriginal relationship is considered having particular regard to the conflict problem and the process of renewal which the *Report of the Royal Commission on Aboriginal Peoples* now urges be undertaken. Recommendations for reform are presented within the context of five fundamental requirements which need to be addressed if the doctrine is to fully assume its protective role within the confines of the Crown-Aboriginal relationship.

Acknowledgements

I gratefully acknowledge the invaluable guidance, assistance and time provided by Professor Bruce Wildsmith in the review of this thesis, particularly during the summer of 1997. His extensive knowledge of Canadian Aboriginal law and his insightful comments, advice and criticisms were greatly appreciated.

I acknowledge, in addition the invaluable assistance of Professor Philip Girard and Professor Diana Ginn of the Faculty of Law of Dalhousie University, who generously volunteered their time, on short notice, to review the draft of this work. Their time and effort proved invaluable in bringing this project to its final form.

I have also been assisted in many ways by the staff of the Sir James Dunn Law Library, the Killam Library, and the JAG Law Library. Many thanks as well to Sheila Wile for her technical assistance - and for her kind words of motivation. Special thanks to Brigadier General Pierre G. Boutet, Judge Advocate General of the Canadian Forces, Captain (N) William A. Reed, and in particular Colonel Kim Carter without whose understanding this project would have faltered.

My deepest gratitude I reserve for my wife, Tracy, and my son, Daniel. Without their sacrifices and continuous support and encouragement during the extended period of time and effort involved in the writing of this thesis I could never have completed it.

Any errors or omissions in this thesis are wholly mine. The views expressed are my own and do not necessarily reflect the opinion or policy of the Department of National Defence, the Canadian Forces, or the Government of Canada.

Chapter 1 - Introduction

The 1984 Supreme Court of Canada decision in *Guerin et al.* v. *The Queen.*[1] represents the first application of fiduciary principles to define the relationship between the Crown and the Aboriginal peoples of Canada. *Guerin*, and more particularly Dickson J.'s judgment in that case, has been hailed as, "a significant act of a new judicial activism" and "an example of the unique genius of the common law".[2] Since *Guerin*, much has been written - both judicially and extra-judicially - concerning the obligations which are said to flow from a fiduciary characterization of the Crown-Aboriginal relationship. While the process of analysis which *Guerin* began still seems far from complete, with the 1990 Supreme Court of Canada decision in *Regina* v. *Sparrow*,[3] the relationship took on constitutional proportions and, therefore, added significance. In this thesis a legal analysis of the fiduciary relationship between the Crown and Aboriginal peoples will be undertaken.

As a reading of the topical literature suggests, some basic confusion and uncertainty remain as to the nature of the Crown-Aboriginal relationship and the duties which are said to flow from the application of fiduciary principles. Therefore, the first

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[1][1984] 2 S.C.R. 335, 13 D.L.R.(4th) 321 [hereinafter *Guerin* cited to S.C.R.].

[2]W.R. McMurtry and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" [1986] 3 C.N.L.R. 19 at 19-20.

[3][1990] 1 S.C.R. 1075, 70 D.L.R.(4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

objective will be to arrive at a comprehensive understanding of what has ambiguously been described as a *sui generis* fiduciary relationship.

What follows in Chapter two, is a general, and necessarily brief, discussion of the fiduciary doctrine, focusing on: the unique features of what traditionally have been termed fiduciary relationships; the scope and nature of fiduciary duties, both specific and general; and, the criteria used by Canadian courts in recent years to expand the fiduciary doctrine beyond its conventional boundaries. As we will see, commencing in 1974, the fiduciary construct entered a period of transition as the courts attempted to grapple with the perceived need to apply the fiduciary doctrine to relationships which had not previously been subjected to equitable analysis. This has caused some to wonder whether the courts are guilty of stretching the fiduciary principle into shapes never intended. Questions abound as to how the doctrine of fiduciary duty is to accomplish the regulating role which the courts seem prepared to ascribe to it insofar as these newly-defined fiduciary relationships are concerned. The discussion in Chapter two is intended to provide a broad, theoretical understanding of the fiduciary construct and the problems associated with its practical application.

While the judicial application of fiduciary principles to the Crown-Aboriginal relationship dates to 1984, and Dickson J's judgment in *Guerin*, the basis for such a characterization is *historic*, deriving from a long-standing pattern of dealings between the Crown and Aboriginal peoples. In this regard, it is submitted that any attempt to grapple with the modern issues which surround our courts' characterization of the Crown-Aboriginal relationship, including any meaningful assessment of the Crown's ability to

discharge its fiduciary obligations in conflict situations, presupposes some understanding and appreciation of the historic forces and processes which resulted in its creation and lent it content. Therefore, in Chapter three, what for want of a better description will be termed the "roots" and "sources" of the Crown-Aboriginal fiduciary relationship will be canvassed.

All fiduciary relationships are premised on the existence of an interest to be safeguarded. At the root of the Crown-Aboriginal fiduciary relationship is the concept of pre-existing Aboriginal interests including the Aboriginal title interest. In this respect, it must be understood that the Crown-Aboriginal fiduciary relationship takes its unique definition from the fact that the Aboriginal peoples of Canada had certain pre-existing or "historic" rights which the Crown undertook to respect.[4] While it may be tempting to explain away any supposed anomalies in the Crown-Aboriginal fiduciary relationship by simply asserting that the relationship is "*sui generis*", such an approach is meaningless unless the anomalies are traced back to the distinctive features of the Aboriginal societies themselves, the historic powers and responsibilities assumed by the Crown in relation to Aboriginal interests, and the corresponding reliance which Aboriginal groups placed on the Crown.[5]

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[4]Indeed, as Dickson J. would observe in *Guerin*, *supra* note 1 at 376, "[t]he fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title".

[5]As Dickson C.J. concluded in *Sparrow*, *supra* note 3 at 1108, "contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship".

As we will see from the discussion in Chapter two, the fiduciary construct is about power, vulnerability, dependence, reliance and expectation. In this respect, it is important to appreciate that the Crown-Aboriginal relationship did not evolve in a vacuum. Nor can we attempt to apply fiduciary principles to Crown-Aboriginal dealings as if the relationship had just been created in the latter half of the twentieth century. The Crown's sovereignty or power over the Aboriginal peoples of Canada was exerted piecemeal over an extended period of time. Similarly, the process by which each Aboriginal group became reliant upon the Crown was largely a function of history and historic forces. Historically, the portrait of Crown-Aboriginal relations which emerges is far from uniform. In this respect, the Crown often took an *ad hoc* approach to dealing with the Aboriginal peoples of North America, the echoes of which can still be seen reflected in the specific fiduciary duties which are now owed particular Aboriginal groups.[6] Nevertheless, there were some common defining moments in the evolution of that relationship.

For the most part, Aboriginal groups were encouraged to place reliance on the Crown and its guarantees - such as those enshrined in treaty rights and the provisions of the Royal Proclamation of 1763. However, as the history of the Crown-Aboriginal relationship amply demonstrates, the Aboriginal peoples of Canada have been traditionally and uniquely vulnerable to the exercise of the Crown's power - particularly

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[6]In this respect Dickson J. would observe in *Sparrow*, *supra* note 3 at 1108, that it was both the "nature of Indian title and the historic powers and responsibilities assumed by the Crown" which constituted "the source" of the specific fiduciary duties which the Crown owed the plaintiff Indians in *Guerin*.

where Aboriginal interests came into conflict with non-Aboriginal interests, including the interests of the Crown itself. In sum, a strong argument can be made that, historically, the Crown has proven both unable and unwilling to live up to its many and varied obligations to the Aboriginal peoples of Canada. The question remains: will a fiduciary characterization lead to a more equitable result for the future?

With a view to facilitating the discussion of this latter issue in Chapter six of this thesis, the discussion in the fourth chapter will focus on the Supreme Court of Canada's 1984 decision in *Guerin*, its 1990 judgment in *Sparrow*, as well as that Court's analysis in the 1996 *Van der Peet* trilogy.[7] While the analysis in Chapter four will therefore be largely doctrinal, or "case-oriented", it will build on the discussion in the previous chapters. The objective will be to provide a workable definition of the Crown-Aboriginal fiduciary relationship and the nature of the duties it imposes.

The discussion in Chapter four will demonstrate that, apart from any specific duties which may arise on the facts of a particular case, the Crown has a general responsibility to act in a fiduciary capacity with respect to the Aboriginal peoples of Canada.[8] This in turn suggests the imposition of a "general" duty of loyalty, good faith

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[7]*R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289; *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528; and, *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648.

[8]Categorical support for this proposition was finally provided by the Supreme Court of Canada in *Quebec (Attorney General)* v. *Canada (National Energy Board)* (1994), 112 D.L.R. (4th) 129 at 147, as follows: "[i]t is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada". Iacobucci J. cited *Guerin* as authority.

and, most significantly for our purposes, the avoidance of a conflict of interest. In Chapter four, the argument will be advanced that, in order to better understand the Crown-Aboriginal relationship, it is essential to appreciate the oft-times subtle distinction between the general duty which the Crown owes Aboriginal peoples by virtue of its fiduciary status, on the one hand, and the more specific duties which may arise whenever the Crown purports to exercise a particular discretion in relation to specific "Aboriginal interests", on the other.[9]

Having achieved a broad appreciation of the true nature of the Crown-Aboriginal relationship, we will move on to consider, in Chapter five, how Canadian courts at all levels have approached the requirement to apply fiduciary principles to the Crown-Aboriginal relationship. In this regard, in determining what fairness now requires that the Crown do or refrain from doing, Canadian judges have had to find workable solutions to problems which the Supreme Court did not address in the cases discussed in Chapter four. The case commentaries presented in Chapter five have been selected having regard to three such issues - issues which, as we shall see, are largely interrelated.

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[9]As it used in this thesis, the term "Aboriginal interests" includes those interests which can now be said to flow from the fact that aboriginal societies, having distinctive social organizations and cultures, existed in Canada before the arrival of the Europeans. Aboriginal interests would include, for example: the beneficial interest which a band would have in a "reserve"; other assets, such as monies, which the Crown may hold on behalf of a particular band; the existing Aboriginal and treaty rights recognized and affirmed under s.35(1) of the *Constitution Act, 1982*, including the Aboriginal title interest in traditional tribal lands (where unextinguished); and, such other rights of Aboriginal peoples as may be guaranteed by legislation, treaty, Crown undertaking, or agreement. The term is considered broad enough to encompass new "Aboriginal interests" as they are identified by the courts. In other words, the list should not be considered closed.

First, the courts have been forced to define the circumstances under which general and specific fiduciary duties may be said to be owed. Second, they have had to determine who they are prepared to hold responsible for the discharge of the Crown's fiduciary obligations. Third, they have had to consider the nature and extent to which the fiduciary's obligation to avoid a conflict of duty or interest will have application to the Crown. As in the previous chapter, the methodology adopted in Chapter five will largely doctrinal in nature.

In the wake of *Guerin* and *Sparrow*, some writers argued that fiduciary law offered the "most compelling and effective means within existing law to achieve justice in the area of aboriginal rights".[10] The reality appears to have fallen far short of the expectation. As we shall see, the courts have largely failed to define or give meaning to the Crown's general duty of loyalty beyond the vague assertion that the "honour of the Crown" must be upheld. Moreover, while the courts have, for the most part, succeeded in explaining when specific fiduciary duties will be owed by the Crown in individual cases, the "after the fact" nature of the fiduciary standard of assessment and the *ad hoc* approach which has tended to predominate judicial decision-making in this field have done little to enhance certainty in the Crown-Aboriginal fiduciary relationship. This problem is accentuated by the disturbing lack of uniformity demonstrated in the methodology and criteria being used by the courts to determine who they are prepared to hold primarily responsible for discharging the Crown's duties. Similarly, the courts' response on the "conflict" issue has not always been consistent

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[10]M.J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 U.B.C. L. Rev 19 at 20.

or principled. Although the recent emergence of the so-called "relaxed" approach to the no-conflict rule is considered noteworthy, the courts have so far failed to explain how it upholds the rationale of accountability. In this respect, one might well question whether the role of fiduciary, which presupposes a strong measure of loyalty and good faith, is demonstrably unsuited to the Crown with its myriad duties, obligations and preoccupations.

In Chapter six, the future of the Crown-Aboriginal fiduciary relationship will be considered having particular regard to the conflict problem. The discussion in the first part of this chapter is intended to illustrate the need for a process of renewal which is fully cognizant of the depth and implications of that problem and the adverse impact it is having on the ability of the Crown to discharge its fiduciary obligations to the Aboriginal peoples of Canada. To that end, we will consider the systemic sources of conflict within the Crown-Aboriginal relationship and conflict's legacy before examining government and Aboriginal perspectives on the fiduciary characterization, including the concerns and expectations which both parties bring to the relationship.

A number of specific recommendations will then be presented with a view to facilitating the process of renewal which the *Report of the Royal Commission on Aboriginal Peoples* now urges be undertaken.[11] These recommendations are discussed in conjunction with what are considered to be five fundamental requirements which must be addressed

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[11]Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Queen's Printer, October 1996) [hereinafter *Royal Commission Report*].

before the principles of renewal can be meaningfully applied to the Crown-Aboriginal fiduciary relationship. More specifically, it is considered essential that:

> 1) All parties must approach the question of fiduciary duty having regard to a rational, principled consideration of what the fiduciary construct is and what it can and cannot be expected to achieve.
> 2) The courts must work diligently to clear up the confusion surrounding the fundamental question of when a fiduciary relationship may be said to arise outside of the traditional fiduciary classifications and address the implications of that choice in terms of the Crown-Aboriginal relationship and the application of the no-conflict rule.
> 3) If the fiduciary doctrine is to have meaning in the Crown-Aboriginal context, then the no-conflict rule must be enforced where it would be appropriate to do so.
> 4) The courts must respond to the need to give greater meaning to the relationship and the responsibilities of each party by explaining how the Crown-Aboriginal relationship is *sui generis*.
> 5) Government must work to restore confidence in its ability to uphold the Crown-Aboriginal relationship by ensuring that those whose responsibility it is to discharge the Crown's lawful fiduciary obligations are shielded from obvious sources of conflict. To the extent practicable it must also work to eliminate longstanding sources of irritation in the Crown-Aboriginal relationship.

In this respect, the argument will be advanced that, unless and until these fundamental requirements are addressed, the Crown will be prevented from fully assuming the fiduciary role which the Supreme Court obviously intended that it adopt in relation to those Aboriginal interests which it undertook to protect in dealings with third parties.

As previously noted, the problem of conflict is considered to play a significant role in the ongoing saga of Crown-Aboriginal relations. While conflict has arguably always been a prominent feature of that relationship, it may well serve to explain the obvious difficulties which the courts are now encountering as they attempt to apply fiduciary standards and principles to a consideration of the Crown's duties vis-a-vis the Aboriginal peoples of Canada and their interests. The conflict problem manifests itself in the Crown-

Aboriginal fiduciary relationship in a number of ways. However, the implications are probably most noticeable insofar as resource-based Aboriginal rights and the Aboriginal title interest are concerned. With a view to giving the conflict problem depth and meaning, two hypothetical scenarios are presented which are considered illustrative of the sorts of conflict situations which have tended to arise in relation to these specific Aboriginal interests in recent years. The reader may find it useful to reflect on these paradigm situations, and the issues they raise, in considering the discussion in subsequent chapters.[12]

Paradigm 1:

> As a result of years of heavy logging on Crown lands in a coastal region of a province many salmon spawning areas of a particular river system have become degraded to the point where the continued viability of recreational and commercial fishing is in question. A federal scientific study suggest that unless it acts quickly to restrict salmon fishing at the mouth of the river, no fish will be available to support any future use. The federal Department of Fisheries and Oceans (DFO) is considering implementing the study recommendations and has also asked the province to consider imposing limitations on the lumbering activities being carried out in the river valley. While local and international environmental groups are lobbying both the federal and provincial governments in an attempt to halt all future logging and fishing in the vicinity, the lumber company, which is operating under a short-term provincial licence, claims it will be forced to close its only lumber mill if it can no longer conduct wood harvesting operations there. The federal and provincial governments are under political pressure to keep that mill from closing.
>
> Two distinct Aboriginal groups reside in the area. Members of each distinct group have Aboriginal rights to fish for food. In addition, the members of one group claim an Aboriginal right to sell the fish they catch. Each group holds different views on how best to manage the resource. While many

[12]While the paradigm situations draw on issues which have arisen in the past the facts are purely hypothetical. Any similarity between the paradigm situations presented and any existing dispute is unintended.

individuals in the Aboriginal and non-Aboriginal communities located on the river, and along the adjacent ocean coast, depend on both the recreational and commercial fishery for their employment, others are employed in the forest industry and do not routinely exercise their Aboriginal fishing rights. Many individuals in both Aboriginal groups distrust the federal fisheries department and have taken their concerns to the Department of Indian Affairs and Northern Development (DIAND).

How will the Crown-Aboriginal relationship impact on the federal Department of Fisheries and Ocean's plans to regulate the fishery? What, if any fiduciary obligations is DIAND under? In considering whether or not to impose limitations on the logging operations in the river valley, is the provincial government under a fiduciary duty to consider the interests of the Aboriginal peoples in the region? Do those interests take precedence over the other competing interests at stake?

Paradigm 2

A developer wishes to open a golf course, casino and theme park adjacent to a national park. The proposed resort promises to provide stable, year round employment in what is otherwise considered to be a depressed region of the province. The provincial and municipal governments are anxious to see the project proceed and are offering significant tax concessions to the developer to locate in the region, which is within the riding of a prominent federal cabinet minister who was recently elected on an economic renewal platform. The Province has agreed to act as a partner in the project and share expenses and revenues. The deal hinges on the developer's ability to acquire a suitable piece of property. Suitable land is scarce due to the fact that the federal government has been expropriating cottage land in the area with a view to expanding the national park. National and international environmental groups consider the implementation of the federal government's plans for national park expansion to be long overdue.

The developer proposes to locate the development on half of a parcel of reserve land which is adjacent to the lands being considered for the park expansion. Although uninhabited, the reserve lands, which are considered sacred, are used by some members of a local band for subsistence hunting and fishing. The province has approached DIAND with a long-term offer to lease the lands based on its assessment of their "fair market" value. The province will in turn sub-lease the land to the developer for a nominal fee. DIAND has explained the offer to the Band.

Band members are bitterly divided on the proposal. Some elders oppose the development in principle - arguing that it is inconsistent with their traditional lifestyle and beliefs. They point out that many Band members depend on the fish

and game which live on the land for sustenance and believe that the remaining land will be too small to support traditional pursuits in the future. Other members of the Band support the surrender and lease in the belief that Band members will benefit from the job guarantees the developer has promised the Band Chief. They argue that if the deal does not go through, the reserve will be vulnerable to expropriation anyway as the national park is expanded. DIAND officials have sought assurances from Parks Canada that the reserve will not be expropriated as part of any future park development proposal. The response, which merely promises to "take Aboriginal concerns into account in any future park expansion which may be undertaken", only serves to fuel suspicions in the Aboriginal community.

The developer, who is experiencing pressure from his investors to start construction, has threatened to abandon the project if a deal cannot be concluded quickly. DIAND is also facing pressure from a number of federal cabinet ministers who have voiced their support for the project and are worried that any further delay will play into the hands of the environmental groups who are opposed to any development in the region. Nevertheless, some officials in DIAND are concerned that the compensation package does not adequately reflect the value of the land. Nor does the package include any offer to provide the Band with suitable replacement lands elsewhere in the immediate vicinity. DIAND has written to advise the Band of its concerns, the developer's threat and DIAND's recommendation that further negotiations be undertaken on the basis of a more comprehensive property assessment and a survey of suitable replacement lands. The recommendation is rejected and a Band meeting is hurriedly convened to consider the surrender and lease agreement. When the vote is held the Band narrowly agrees to proceed with the surrender on the terms offered by the developer.

Must DIAND permit the lease to proceed based on the results of the surrender vote? Will it be in breach of a fiduciary duty if it allows what later turns out to be an improvident bargain to proceed? Which Aboriginal interest are to be given paramountcy when considering how best to discharge its fiduciary obligations? Is DIAND the only government entity which is seized with fiduciary duties with respect to the Aboriginal title interest. In view of the various interests involved, is the federal Crown in a conflict of interest and, if so, how are its various competing interests to be managed? What if any fiduciary duties will be owed by the provincial Crown as the principal lessee in these circumstances?

Chapter 2 - The Canadian Fiduciary Construct: "A Concept in Search of a Principle"?

A. The Fiduciary Relationship - A Traditional View:

What, for want of a better description, might be termed the fiduciary principle, is one of a number of equitable doctrines which found their source in the "inadequacy of the common law" and the "eternal tension between certainty in the law and the need to do individual and contextual justice".[1] Like all equitable doctrines, the fiduciary principle traces its origins to the Court of Chancery. Unlike the ordinary Courts of Justice, which were preoccupied with the "more certain 'legal aspects' of the law, such as contract and tort", the Court of Chancery had "equitable jurisdiction" in matters related to trust, confidence and good faith".[2] Inasmuch as the Court of Chancery was guided by the "timeless goals of justice, equality and fairness", the various equitable maxims which subsequently evolved appear more in keeping with the natural law, and the chancellors' canon law background, than with the precepts of the common law which were developing in the ordinary Courts of Justice in the same period.[3] By the nineteenth century, the

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[1]B.M. McLachlin J., "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective" in D.M.W. Waters, ed., *Equity, Fiduciaries and Trusts, 1993* (Toronto: Carswell, 1993) 37 at 37-8.

[2]G.V. La Forest J., "Overview of Fiduciary Duties" (The 1993 Isaac Pitblado Lectures) 1 at 13.

[3]McLachlin, *supra* note 1 at 37-8.

underlying premise "that where there is a wrong the law should afford a remedy ... had been ossified into a few, confined doctrines such as trusts, tracing and marshalling".[4]

The equitable concept of fiduciary duty had been articulated as early as 1726 by the English Court of Chancery in the singular case of *Keech* v. *Sanford*.[5] That case dealt with the role of a trustee for a leasehold interest in a commercial property which had been devised to an infant beneficiary under the terms of a will. The Court concluded that the leasehold interest was held by the trustee on a constructive trust for the benefit of the infant *cestui que trust*. As such, the trustee, who had refused to renew the lease on behalf of the beneficiary when it was up for renewal, was precluded from taking up the leasehold interest in the real property for himself, in his personal capacity. Furthermore, he was liable to account for any profits which he had made as a result of his personal involvement in the transaction, notwithstanding that no fraud had been alleged on the facts of that case. From such early rulings, "fiduciary duty was developed ... as a device by which a trustee's discretion over the legal interests of his or her *cestui que trust* could be controlled".[6]

The public policy rationale for a finding of fiduciary duty was traditionally tied to the need to "maintain the integrity and the utility of those relationships in which the

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[4]*Ibid.* at 38-9. While the Courts of Justice and Chancery were merged in Canada almost one hundred years ago, there was no corresponding amalgamation of legal and equitable principles. As a result, the equitable doctrines, and the discretionary remedies associated with them, continued to survive in this country (see La Forest, *supra* note 2 at 13).

[5](1726), Sel.Cas.Ch. 61, 25 E.R. 223 [hereinafter *Keech* cited to E.R.].

[6]La Forest, *supra* note 2 at 2.

... role of one party is perceived to be the service of the interests of the other".[7] In this respect,

> fiduciary 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 preservation of the other's interests. ... it does this by proscribing one party's possible use of the power and of the opportunities his position gives, or has given, him to act inconsistently with that responsibility.[8]

In consequence, the fiduciary, who stands in a position of "trust and confidence" relative to a particular beneficiary, is prohibited from using his or her discretion over the beneficiary's interests in any manner which does not benefit the beneficiary. In more positive terms, the need to uphold the "integrity and utility" of the relationship places upon the fiduciary the obligation "to avoid any conflict of duty or interest".[9] This duty not only precludes a fiduciary from using "his position to his own or to a third party's possible advantage", but would also prohibit transactions with third parties which are inconsistent with the subject matter and purposes of the fiduciary's relationship with the beneficiary.[10]

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[7]P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1 at 27.

[8]*Ibid.* at 2.

[9]La Forest, *supra* note 2 at 2-3.

[10]Finn, *supra* note 7 at 27. Finn goes on to list two exceptions to this general proposition. First, he points out that the conduct would not be considered offensive if it was otherwise "authorized by law". Alternately, a beneficiary could consent to a fiduciary so acting, if, in the circumstances of a particular case, the beneficiary's consent had been "freely and informedly" given.

While a fiduciary relationship can exist in situations where no specific obligation has yet arisen,[11] the opposite cannot be said. In other words, for a fiduciary obligation to arise a fiduciary relationship must first exist. But what constitutes a fiduciary relationship, or put another way, what turns an ordinary relationship into a fiduciary one?

Although there were some "pious statements to the effect that the categories of fiduciary were never closed", it was traditionally assumed that fiduciary principles were restricted to a "finite set of pre-ordained categories or classes of relationships".[12] Therefore, and perhaps not too surprisingly, the standard approach was to look at existing classes of relationships, which had already been labelled "fiduciary", with a view to fitting a particular fact situation into one of the known and accepted categories. In the process, the courts tended to focus almost exclusively on the status of the parties involved rather than the oft-times unique nature and circumstances of the particular relationship which had actually been formed. The types of "traditional" relationships which were contained in the resulting list included those of trustee-beneficiary, principal-agent, executor-beneficiary, banker-customer, solicitor-client, physician-patient and director-company. Such relationships, which could be analogized back to the prototypical fiduciary

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[11]*Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 [hereinafter *Lac Minerals* cited to D.L.R.], where Sopinka J. stated that, "not all obligations existing between the parties to a well recognized fiduciary relationship will be fiduciary in nature".

[12]La Forest, *supra* note 2 at 4.

relationship - the express trust - were rather vaguely described as relations of "trust and confidence". Any person who occupied such a position was considered a *per se* fiduciary.[13]

This so-called traditional approach suffered from a number of obvious limitations. By focusing on whether or not a particular relationship fell within one of the accepted classes of fiduciary relationships, the reasonable expectations of the parties concerning their respective duties went largely unnoticed.[14] Furthermore, the approach was seemingly incapable of recognizing the possibility that the specific parties "had not really created a fiduciary relationship" notwithstanding their technical membership in one of the traditional classes of supposed fiduciary relationships.[15] In short, by concentrating on the question of "who was a fiduciary", the more important question of "what was a fiduciary" remained largely unanswered.[16]

Nevertheless, one could still look to the resulting "list" to arrive at some conclusions concerning the basic common ingredients which it was believed all fiduciary relationships shared. In this regard, it was traditionally considered that all fiduciary relationships were possessed of the following characteristics: an interest to be safeguarded; an "undertaking" by an individual or entity (the "fiduciary") to act for or on behalf of

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[13]*Ibid.* at 3. Flannigan, in R. Flannigan, "Fiduciary Obligation in the Supreme Court" (1990) 54 Sask. L. Rev. 45 at 51, suggests that the terms "trust" and "confidence" "are just metaphors for the idea of a defined or limited purpose".

[14]La Forest, *supra* note 2 at 4.

[15]D.P. Owen, "Fiduciary Obligations and Aboriginal Peoples: Devolution in Action" [1994] 3 C.N.L.R. 1 at 3.

[16]J.R.M. Gautreau J., "Demystifying the Fiduciary Mystique" (1989) 68 Can. Bar Rev. 1 at 2.

another individual(s) or group of individuals with respect to the particular interest concerned; some latitude for the fiduciary to exercise an "independent authority", "discretion" or "power" over that interest; and, some resulting vulnerability on the part of the principal.[17] The one characteristic that "united the classes was their trusting nature, or, in analytical terms, access to assets for a defined or limited purpose".[18]

B. The Modern View - A Canadian Perspective:

In recent years Canadian courts have been asked to apply equitable standards, to define relationships which had not previously been characterized as either fiduciary or non-fiduciary, in situations which were nonetheless considered to warrant the "rationale

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[17]A.H. Oosterhoff, *Cases on the Law of Trusts* (Toronto: Carswell, 1980) at 31-44. Traditionally, the term "interest" was used almost exclusively in relation to property interests, which is how Oosterhoff characterized it in 1980. The explanation for this proprietary focus lies in "the fact that the fiduciary duties find their origin in the classic trust where one person, the fiduciary, holds property on behalf of another, the beneficiary" (*Hodgkinson* v. *Simms*, [1994] 3 S.C.R. 377 at 461 (S.C.C.)[hereinafter *Hodgkinson*]. The proprietary-based trust model continued to influence fiduciary thinking until 1987, and Wilson J.'s innovative approach in *Frame* v. *Smith*, [1987] 2 S.C.R. 99 at 136 (S.C.C.)[hereinafter *Frame*]. In *Frame*, Wilson J. coined the phrase "legal or practical interests" to describe the nature of the interest which was capable of being affected by the fiduciary's unilateral exercise of power or discretion. As Finn, *supra* note 7 at 26 observes, the inherent flexibility of the fiduciary principle now serves "to protect interests, both personal and economic, which a society is perceived to deem valuable. ... as perceptions of social interests and values change so also can the ambiance of t he fiduciary principle itself". This explains how, in *M.(K.)* v. *M.(H.)* (1992), 96 D.L.R. (4th) 289 (S.C.C.), La Forest J. was able to conclude that a father is under to general fiduciary obligation to refrain from inflicting physical harm on the person of his daughter, without necessarily being forced into an assessment of the child's economic interests.

[18]Flannigan, *supra* note 13 at 51.

of accountability".[19] In responding to the challenge, our courts have attempted to "define, over the course of a number of decisions, abstract criteria that would generally identify a fiduciary relationship without reference to a categorical status".[20] In the process, fiduciary principles came to be applied to an ever expanding number of relationships as the traditional focus began to shift away from the taxonomic categorization of "classes" of fiduciary relationships to a more pragmatic assessment of the elements which define fiduciary relationships generally.[21] While this latter development has not met with the wholehearted support of the academic and practitioner communities,[22] there is a certain

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[19]*Ibid.* at 58. In this regard, Flannigan observes that the Court "had to consider prospecting arrangements, franchisor/franchisee relations, the relationship between Indians and the Crown, the position of separated spouses and the situation of negotiating prospective joint ventures".

[20]*Ibid.* at 58.

[21]Arguably, this is part of a broader trend in equity. In J.G. Riddall, *The Law of Trusts*, 4th ed. (London: Butterworths, 1992) at 399-400, the author observes that: "[a] major contribution of equity to English law has lain in the way that certain ideas, originating within the trust, have made their way into, and been found to serve valuably, in areas of law where otherwise common law and statute have held primary sway. ... the trust has in this and in other matters provided a fertile seedbed of ideas which have been transplanted to, and taken firm root in, other fields of law."

[22]For example, see Flannigan, *supra* note 13 at 52, for the proposition that, "the apparent relaxation of the strictness of fiduciary responsibility by some judges" and "the effort of the Supreme Court to define in abstract terms the criteria which characterize a fiduciary relationship" have "pushed the law into an uncertain state". As McDougall observes, in J.L. McDougall, "The Relationship of Confidence" in D.M.W. Waters, ed., *supra* note 1, 157 at 170, "[c]oncern has been expressed in many quarters over the dilution of the fiduciary standard which is a consequence of such new uses and the lack of predictability in the law which is also a result". For his part, Finn seems dismayed by the current situation, pointing out that "[i]t is striking that a principle so long standing and so widely accepted should be the subject of the uncertainty that now prevails" (Finn, *supra* note 7 at 24, refers).

inevitability which seems to underscore the current movement away from a status-based approach. In this respect, it has been suggested that:

> [T]he rise of fiduciary law corresponds to changing societal values. Status and contractual relationships alone can no longer address the need to balance the personal freedom of citizens with their interdependence upon each other and upon government. Thus, new fiduciary relationships continue to be formulated and high standards of care imposed.[23]

In Canada, the modern development of fiduciary principles may be seen to have commenced with the 1974 judgment of Laskin J. in *Canadian Aero Service Ltd.* v. *O'Malley*.[24] In *CanAero*, Laskin standardized the approach to be taken in assessing the fiduciary qualities, or lack thereof, of individual relationships. More specifically, he delineated four key issues which must be addressed whenever it is alleged that a breach of a fiduciary duty has occurred, namely: ascertain the nature of the particular relationship; determine the type of duties it imposes; determine whether a breach of those duties has occurred; and, determine whether liability results from the breach.[25]

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[23]A. Peltz and L. Alcuitas-Imperial, "Fiduciary Obligations as a Source of Remedies Against Public Officials: The Aboriginal Context and Beyond" (The 1993 Isaac Pitblado Lectures) 33 at 34.

[24][1974] S.C.R. 592, (1973) 40 D.L.R. (3d) 371 (S.C.C.)[hereinafter *CanAero* cited to D.L.R.].

[25]Owen, *supra* note 15 at 3, suggests that this is a test "to be applied to alleged breaches", rather than the "four issues arising in the area of fiduciaries" - the phraseology which this author considers appropriate and which was adopted by Bryant, in M.J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 U.B.C. L. Rev. 19 at 24.

In addressing the first issue, Laskin J. concluded that a fiduciary relationship "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest".[26]

Dickson J. would add to Laskin J.'s analysis of fiduciary relationships in his 1984 judgment in *Guerin et al.* v. *The Queen*, where he would conclude that, "[i]t is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty".[27] In this regard, Dickson J. found that an obligation of one party, to act "for the benefit of another", which "carries with it a discretionary power", would result in a finding that the party so empowered is a fiduciary.[28] La Forest J. would later characterize the judgments in *CanAero* and *Guerin* as the beginning of the "movement from the traditional categorical approach to what may be termed a principled approach to fiduciary duties".[29]

The Supreme Court of Canada had further occasion to consider the characteristics of fiduciary relationships in *Frame* v. *Smith*. In that case, Wilson J. suggested, in her dissenting opinion, that:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
> 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.

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[26]*CanAero*, *supra* note 24 at 382.

[27][1984] 2 S.C.R. 335 at 384, 13 D.L.R. (4th) 321 (S.C.C.) [hereinafter *Guerin* cited to S.C.R.].

[28]*Ibid.* at 384.

[29]La Forest, *supra* note 2 at 4-5.

3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[30]

By 1989, and the decision of Sopinka J. in *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, the Supreme Court of Canada had adopted Wilson J.'s description of the characteristics of fiduciary relationships.[31]

On the facts in *Lac Minerals*, a majority of the Supreme Court of Canada concluded that a fiduciary relationship had not been formed.[32] According to Sopinka J., who penned what must be considered the majority judgment on this issue, the absence of any vulnerability on the part of the plaintiff (Corona) was the key factor in reaching this determination.[33] Wilson J. and La Forest J. wrote separate judgments in *Lac Minerals*. For

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[30]*Frame*, *supra* note 17 at 136. Wilson J. characterises her description as a "rough and ready guide".

[31]*Lac Minerals*, *supra* note 11 at 27 and 62. Gautreau, *supra* note 16 at 5, takes issue with this assessment, insofar as it pertains to the issue of "vulnerability", pointing out that: "it is not a characteristic of the relationship, but rather, it is a characteristic of the result of the relationship". The Supreme Court has continued to employ the term "legal or practical interests" in its judgments without elaborating further on its meaning (see for example *Hodgkinson*, *supra* note 17 at 430 and 466). However, based on the expanded number of situations in which fiduciary relationships have now been identified, it seems clear that the term "legal or practical interests" must include any interest, be it personal or economic, which is capable of being recognized at law or in equity. For a further discussion of the issue, see note 17, *supra*.

[32]The case involved a dispute between two mining companies over the alleged misuse by the senior company (Lac Minerals Ltd.), of information, concerning the supposed quality of a gold deposit, which had been disclosed to it by the junior company (International Corona Resources Ltd.) during the course of negotiations related to a proposed joint venture. Both parties were sophisticated businesses dealing at arms length.

[33]McDougall, *supra* note 22 at 165, argues that "Sopinka J.'s analysis confuses vulnerability with inequality of bargaining power. The fact that the parties are equal in bargaining power, sophisticated and otherwise capable of protecting themselves should not have been the reason for rejecting liability based on a fiduciary obligation arising out of the

her part, Wilson J. found that in giving Lac Minerals Ltd. access to confidential information, Corona had placed itself in a position of vulnerability which in turn gave rise to a fiduciary duty on the part of Lac Minerals Ltd. "not to use that information for its own exclusive benefit".[34] In short, Wilson J. concluded that the requisite element of vulnerability was indeed present insofar as the misuse of confidential information was concerned.

La Forest J. took a marked departure from the other members of the court in *Lac Minerals* by arguing that the question of whether or not a fiduciary relationship had been created should not be addressed solely with reference to the presence or absence of vulnerability, rather:

> the 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 the other would act or refrain from acting in a way contrary to the interests of that other.[35]

As La Forest would later explain in his extra-judicial writings, "the presence or absence of vulnerability, while an important criteria, is not a necessary one if it can otherwise be

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transfer of confidential information."

[34]*Lac Minerals*, *supra* note 11 at 16. Lamer and La Forest JJ. also concluded that, there was a fiduciary obligation upon the defendant not to misuse the confidential information. It may be noted that Lamer J. did not directly address the issue of vulnerability in his judgment.

[35]*Ibid.* at 40. La Forest J. expressed the opinion that: "the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship". On the basis of Corona's reasonable expectation that Lac Minerals Ltd. would have acted in Corona's best interests, La Forest J. would have concluded that a fiduciary relationship had been created on the facts in that case.

shown that one party had a reasonable basis for expecting that the other party would act in its best interests".[36] It has been suggested that La Forest J.'s dissenting judgment in *Lac Minerals* "marked an important new departure" for the Supreme Court insofar as it embodies "a more flexible and expansive test for the existence of fiduciary duty".[37]

The Supreme Court of Canada would have occasion to revisit the issue of vulnerability in the 1994 case of *Hodgkinson* v. *Simms.*[38] That case concerned the nature of the relationship between an accountant and his stock broker client. The stock broker had relied on the accountant for the latter's tax planning and tax sheltering expertise. For his part, the accountant encouraged his client to invest in a real estate development. However, the accountant failed to disclose that he was also acting for the real estate developer. The majority of the Supreme Court, represented by the judgments of La Forest and Iacobucci JJ., took the view that the relationship was a fiduciary one.[39] The minority judgment, which was jointly written by Sopinka and McLachlin JJ. and concurred in by Major J., reached the opposite conclusion. What is interesting, for our

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[36]La Forest, *supra* note 2 at 7.

[37]McLachlin, *supra* note 1 at 41 and Owen, *supra* note 15 at 6. She goes on to suggest that La Forest J.'s judgment in *Lac Minerals* is a "reflection of the court's felt need to bring the law into harmony with community mores" by using equitable doctrines to "supplement the legal letter of contractual obligations". It may be noted that, in this context, McLachlin J. does not distinguish between the existence of a fiduciary relationship, on the one hand, and the presence of fiduciary duties or obligations, on the other.

[38]*Hodgkinson*, *supra* note 17.

[39]Majority opinions were written by La Forest J. (on behalf of himself, L'Heureux-Dubé and Gonthier JJ.) and Iacobucci J.

purposes here, is the extent to which the majority and minority judgments diverged over the issue of vulnerability.

In the view of the minority judges in *Hodgkinson*, the relationship in question was not one of the traditional *per se* fiduciary relationships; nor could it be said that aspects of it had assumed a fiduciary character.[40] In this regard, Sopinka and McLachlin JJ. concluded that it is "the mutual conferring and acceptance of power to the knowledge of both parties that creates the special and onerous trust obligation".[41] On the facts in *Hodgkinson*, they found that the evidence did not establish that "total power over the affairs in question" had been given by the investor-client or assumed by his accountant.[42] As such, they considered that the key element of vulnerability was missing. In reaching this factual determination, they relied on the majority judgments in *Lac Minerals* for the proposition that it was the "indispensable nature of the feature of vulnerability" which was the "hallmark to which a court looks in determining whether a fiduciary relationship exists".[43]

In *Hodgkinson*, La Forest J. took the opportunity to build on the "expectation" analysis he had developed in *Lac Minerals*. To that end, he reiterated his view that "the concept of vulnerability is not the hallmark of fiduciary relationship though it is an

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[40]*Hodgkinson*, *supra* note 17 at 465.

[41]*Ibid.* at 467.

[42]*Ibid.* at 471.

[43]*Ibid.* at 466-7.

important *indicium* of its existence".[44] La Forest J. evidently considered vulnerability to be inherent to the established or *per se* class of fiduciary relationships, such as that of trustee-beneficiary or agent-principal. However, he went on to argue that the three-step analysis which Wilson J. had first proposed in *Frame*, although helpful in determining whether new classes of relationships were *per se* fiduciary, encountered difficulties "in situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship".[45] In his view, vulnerability as well as discretion, influence and trust, were merely "non-exhaustive examples of evidentiary factors to be considered" when examining this latter type of relationship. What was really required was some "evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party".[46] As such, he argued that:

> The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards.[47]

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[44]*Ibid.* at 405.

[45]*Ibid.* at 409.

[46]*Ibid.* at 409-10.

[47]*Ibid.* at 412. In this regard, La Forest J. appears to have been influenced by the writings of P.D. Finn, *supra* note 7 at 46-7, who suggests that, "[w]hat 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. Ascendency, 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. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship."

Therefore, according to La Forest J., the key question to ask is "whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue".[48]

On the facts in *Hodgkinson*, La Forest J. found that the stock broker-client had placed reliance on the professional advice of his accountant and that the latter was well aware of the former's reliance on his discretion. In his view, this resulted in a "power-dependency" dynamic.[49] To La Forest J., it mattered little that the accountant might have been able to take action to protect himself from potential harm.[50] He was paying for the accountant's expertise and it was reasonable to expect that the accountant would act in his best interests.

The *Hodgkinson* case reveals a disturbing lack of uniformity in the various judgments delivered.[51] As a result, it is difficult to determine whether La Forest J.'s

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[48]*Hodgkinson*, *supra* note 17 at 409.

[49]La Forest J. points out, *Ibid.* at 430, that "power and discretion in this context mean only the ability to cause harm. Vulnerability is nothing more than the corollary of the ability to cause harm. For this reason it is undesirable to overemphasize vulnerability in assessing the existence of a fiduciary relationship." At p. 411 he refers to the case of *Norberg* v. *Wynrib*, [1992] 2 S.C.R. 226, where he employed the term "power-dependant relationship" to characterize a situation of sexual abuse perpetuated by a physician on a young drug-dependant female patient. Interestingly enough, while McLachlin J. dealt with that particular case on the basis of fiduciary duty, La Forest J. choose not to.

[50]La Forest J. argued, *Ibid.* at 431, that, "the refusal to protect this reliance on the grounds that the appellant somehow had the means to protect his own interests is to take an impoverished view of the law in this area".

[51]Presumably, Flannigan would view this decision as symptomatic of a trend he noted as early as 1990. In this respect, he had observed that: "[t]he Supreme Court is plainly experiencing difficulty in coming to terms with fiduciary obligation. No consensus on a suitable approach is apparent in the cases. If anything, the court has become more

"reasonable expectation" analysis will ultimately prevail and whether reliance rather than vulnerability should be considered conclusive when attempting to determine whether or not a particular relationship has a fiduciary aspect.[52] In short, there is still some lingering uncertainty with respect to the fundamental issue of what constitutes a fiduciary relationship. This explains why the Supreme Court has never been able to agree on a concise definition. Nevertheless, based on the extent to which equitable principles have evolved in Canada in recent years, we can at least advance the following definitions as a partial statement of existing fiduciary principles in this country:

> A fiduciary relationship will occur where a person undertakes, either expressly or by implication, to act in relation to a matter in the interests of another, in a manner that is defined or understood by them, and is entrusted with a power to affect such interests. The other person relies on or is otherwise dependant on this undertaking, and, as a result, is in a position of vulnerability to the exercise of such power; and the first person knows, or should know, of such reliance and vulnerability. The nature and circumstances giving rise to the undertaking are such that loyalty and good faith are intrinsic elements of the consequent duty.[53]

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unpredictable with each decision" (Flannigan, *supra* note 13 at 70, refers).

[52]Unfortunately, while Iacobucci J. agreed with La Forest J.'s conclusion that the relationship in *Hodgkinson* was a fiduciary one, he did not comment on the key issues which divided the court (see *Hodgkinson*, *supra* note 17 at 480).

[53]Gautreau, *supra* note 16 at 7. It should be noted that, to date, no one definition has been adopted by the Supreme Court. The omission may well signal a more fundamental theoretical problem. In this respect, after canvassing the various theories, Rotman, in L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: Univ. of Toronto Press, 1996) at 174, concludes that no one theory "in and of itself, provides a satisfactory basis for understanding fiduciary doctrine". As Finn points out, *supra* note 7 at 26, "[w]e have no shortage of rival approaches, but none has carried the day." Finn attributes the "lack of a workable and unexceptionable definition of a fiduciary" to uncertainty concerning "the proper purpose of the fiduciary principle". Whatever the reason, it is important to recognize that, when difficulties have been encountered in determining whether a particular relationship could be considered fiduciary in nature, the Supreme Court has repeatedly elected to retrace the progression of cases, both traditional

C. Specific and General Fiduciary Obligations:

In the classic trustee-beneficiary relationship, which is typified by the express trust, "the trustee is under a duty to act in a completely selfless manner for the sole benefit of the trust and its beneficiaries ... to whom he owes 'the utmost duty of loyalty'".[54] It may be argued that the imposition of such a duty is in direct response to the unique structure and requirements dictated by the fiduciary construct. After all,

> [f]iduciaries serve as a substitute for their beneficiaries and hold power conferred upon them by beneficiaries ... to discharge their substitutionary function. In order to reap the perceived benefits of substituted judgment, power must be conferred. But with the power comes the possibility of self-dealing or neglect. Law's resolution of this dilemma is the fiduciary obligation ... .[55]

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and modern, which have applied the fiduciary principle, rather than attempt to fashion a definition to incorporate the essential points which those cases illustrate. As a minimum, the judgments invariably end up citing Dickson J.'s comments in *Guerin* (referred to *supra* in relation to notes 26 and 27) and Wilson J.'s "rough and ready guide" in *Frame* (see note 30, *supra*). The *Lac Minerals* and *Hodgkinson* cases are illustrative of this tendency. Indeed, as Peltz and Alcuitas-Imperial observe, *supra* note 23 at 33, some commentators have even "questioned the efficacy" of attempting to arrive at a definition at all. The Gautreau definition, which post-dates the decision in *Frame*, is proffered here in an attempt to provide the reader with a concise, useful summary of the salient issues upon which there is considered to be general agreement. In this regard, one should not be unmindful of the fact that the Court has found little to agree on in this area since it subscribed to Wilson J.'s approach in *Frame*. While it must be understood that the Court has not specifically endorsed this nor any other attempt at a partial definition, it may be relevant to note that La Forest J. makes reference to Gautreau's article in *Lac Minerals*, *supra* note 11 at 26. Similarly, in her extra-judicial writings, McLachlin J. cites Gautreau in support of the proposition that "to establish a fiduciary duty and determine its scope, one looks to the precise nature of the undertaking" (see McLachlin, *supra* note 1 at 44).

[54]La Forest J. in *Hodgkinson*, *supra* note 17 at 461, citing *Keech*, *supra* note 5 at 223.

[55]C. Massey, "American Fiduciary Duty in an Age of Narcissism" (1990) 54 Sask. L. Rev. 101 at 101-2.

While more specific duties may also result from the peculiar undertaking in each case,[56] and while our understanding of the other so-called elements of the fiduciary relationship has evolved to some extent, the nature of the general duty of loyalty, which underscores the fiduciary relationship, has remained fairly constant. It is normally characterized in the following, or similar, terms:

> The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary .[57]

The general duty of loyalty also requires "that the fiduciary be fair, honest, and, most important, act always in the best interest of the beneficiary".[58]

The so-called general duty of trust and loyalty may not be the only duty owed. Indeed, once having established the existence of the fiduciary relationship, the focus shifts to an assessment of the nature of any specific duties which may be owed based on the

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[56]In this regard, "the scope of the ensuing fiduciary duties can be determined by looking at the nature of the undertaking" (Bryant, *supra* note 25 at 22, refers).

[57]La Forest J. in *Lac Minerals*, *supra* note 11 at 28. Oosterhoff, *supra* note 17 at 31, puts it in the following terms: "[a] fiduciary relationship is one in which there is a duty on the fiduciary to act solely for the benefit of another or others with respect to any property that is the subject matter of the relationship. This duty has often been described as the duty of loyalty". In his extra-judicial writings La Forest J. argues that a "generalized duty" is emerging to govern the situation where "one party happens to be in a position of overriding power or influence". He suggests that "the substance of this duty is very simple: a strict prohibition against any and all objectionable forms of advantage taking" (La Forest, *supra* note 2 at 9, refers).

[58]Massey, *supra* note 55 at 102.

unique facts which define the particular relationship under consideration.[59] It is the undertaking which will be determinative in this regard. One must therefore ask:

> ...what has the fiduciary undertaken to do? How has he undertaken to do it? Does the law expect anything else from him? ... The duty to be obeyed can vary in a number of ways: (1) the interests to be served; (2) the duties to be performed; (3) the standards to be attained; and (4) the restrictions to be obeyed. ... A fiduciary relationship does not necessarily connote a total all-embracing duty and loyalty to the principal *for all purposes*. (emphasis added)[60]

Based on the foregoing, would it be correct to conclude that a fiduciary duty is so exclusive that it transcends all other interests, including those of the fiduciary? While such a conclusion will no doubt follow in certain circumstances, the better view is that "a fiduciary may not profit from an act which occurs within the scope of the duty that he undertakes, unless it is with the informed consent of his principal".[61] Furthermore, while a conflict of interest is the antithesis of a duty of loyalty, there will be no conflict of interest unless the conduct in question conflicts with "the duties to be performed" or offends the "interests to be served". In other words, the question is one of fact. In cases

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[59]As La Forest J. observed in *M.(K.)* v. *M.(H.)*, *supra* note 17 at 326, "the substance of the fiduciary obligation in any given case is not derived from some immutable list of duties attached to a category of relationships. In other words, the duty is not determined by analogy with the 'established' heads of fiduciary duty. Rather, the nature of the obligation will vary depending on the factual context of the relationship in which it arises."

[60]Gautreau, *supra* note 16 at 18-19. Nor is the case that every aspect of a fiduciary relationship must necessarily give rise to a fiduciary obligation - a principle discussed *supra* note 11.

[61]*Ibid.* at 20.

where there is questionable conduct "the onus is on the fiduciary to rebut".[62] In this regard, the motives of the fiduciary - however well meaning - will not provide a defence.[63]

D. Remedies:

Traditionally, restitution was equity's answer to the question of the appropriate response for a breach of fiduciary duty. The fiduciary was bound to disgorge any profits made as a result of the breach.[64] The rule was meant to discourage fiduciaries from becoming involved in activities where there was a possibility of improper activity.[65] Various "specific and detailed" rules evolved to govern the actual form which the restitution would take. For example,

> the remedy of rescission is available not only against the trustee but also against transferees from the trustee who are not able to avail themselves of the defence of *bona fide* purchasers for value without notice... .[66]

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[62]Owen, *supra* note 15 at 2.

[63]*Ibid.* at 2.

[64]T.G. Youdan, "The Application of Proprietary Remedies" in T.G. Youdan, ed., *supra* note 7, 93 at 94-5. As Youdan goes on to point out, the requirement to disgorge is based on "[t]wo well-known general principles... . The first, 'the conflict principle,' is that a fiduciary must not place himself in a position of conflict between his self-interest and his duty; the second, 'the use of position principle,' is that he must disgorge profits made from his fiduciary position."

[65]Youdan notes that this had been referred to as equity's "'prophylactic' approach" (*Ibid.* at 94).

[66]*Ibid.* at 97.

While the parties could themselves agree to rescind an impugned transaction where the third party was a *bona fide* purchaser for value without notice, in the absence of such agreement a court could order that the property interest, which should have been safeguarded, be resold with any surplus going to the beneficiary and any loss to be accounted for by the fiduciary. Of course, the fiduciary will always be liable to account for any profits which he or she had realized as a result of the breach of duty.

In recent years, the flexibility which has characterized the application of fiduciary principles has been reflected in the expanded list of remedies to which courts can now look to redress a breach of fiduciary duty. This new flexibility can be observed in the 1991 decision of the Supreme Court of Canada in *Canson Enterprises Ltd.* v. *Boughton & Co.*[67] In *Canson* a majority of that court took the view that a plaintiff was free to choose between legal and equitable remedies where an action for a breach of fiduciary duty was also maintainable at law in accordance with contract, tort or negligence law principles. Writing for the majority in that case, La Forest J. explained the rationale for this conclusion in the following terms:

> The truth is that barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.[68]

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[67] [1991] 3 S.C.R. 534, (1991) 85 D.L.R. (4th) 129, (S.C.C.)[hereinafter *Canson* cited to D.L.R.].

[68] *Ibid.* at 148. The court did not take a unanimous approach to the issue of remedies. Indeed, in her minority judgment, McLachlin J. argued against the mixing of common law and equitable remedies. Academic writers have also questioned the defensibility of the move towards integration (see, for example, J.D. Davies, "Equitable Compensation:

By looking to a wider range of remedies beyond the traditional equitable remedy of restitution, courts now appear willing to effect "a just appraisal of the compensation which should be paid, taking into account the gravity of the wrong which was done".[69] In this respect, La Forest J. would observe that the maxims of equity are "malleable principles" that can be flexibly adapted to serve the ends of justice "to achieve a different and fairer result".[70]

E. Trends and Tendencies - the Future of the Fiduciary Principle:

In recent years, we have increasingly seen how recourse is being made to "equitable doctrines where, on the frontiers of developments, the Canadian courts are in search of solutions to new problems".[71] However, as the *Hodgkinson* case seems to suggest, the Supreme Court has not yet fully come to terms with the fiduciary construct in its non-

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Causation Foreseeability and Remoteness" in D.M.W. Waters, ed., *supra* note 1, 297 at 299, 323).

[69]C. Huband, J. "Remedies and Restitution for Breach of Fiduciary Duties" (The 1993 Isaac Pitblado Lectures) 21 at 31. As Mr Justice Huband goes on to explain, the *Canson* case signals the courts attempt to escape the "rigorous application of the equitable remedy of restitution by taking into account the nature of the fiduciary breach and the conduct of the claimant". In his view, issues of remoteness, causation, mitigation, and the plaintiff's own carelessness, must now be considered relevant.

[70]*Canson*, *supra* note 67 at 151-2. The *Canson* case is also noteworthy inasmuch as the Supreme Court concluded that a breach of fiduciary duty could arise in circumstances where a fiduciary was not acting from his or her own self-interest or that of a third party. In this regard, as Huband J., *Ibid*. at 31, observes, a particular breach "may be tantamount to deceit and theft, while on the other hand it may be no more than an innocent and honest bit of bad advice, or a failure to give a timely warning".

[71]D.M.W. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in T.G. Youdan, ed., *supra* note 7, 411 at 412.

traditional setting. This has prompted some writers to label "[t]he fiduciary relationship a concept in search of a principle".[72]

Assuming that the heretofore thorny issue of characterization or identification is overcome, other hurdles will remain. As La Forest J. has himself noted:

> [t]he real challenge in moving away from the traditional categories of liability lies in determining the criteria to demarcate the scope of this duty for the purposes of deciding whether there has been a breach.[73]

This, in turn, presupposes that our courts are prepared to engage in a reassessment of the policy rationale which supports the fiduciary construct "and define what fiduciary obligation is to become".[74] We may already be entering this new and important judicial phase. In this regard, McLachlin J., for one, has suggested that:

> the initial burst of creativity may be yielding to a period of consolidation with the courts increasingly preoccupied with establishing appropriate doctrinal limits for new equitable remedies and ensuring that they mesh with other rules governing civil redress, to the end of assuring a comprehensive, coherent set of legal remedies for civil wrongs.[75]

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[72]Finn, *supra* note 7 at 54-5.

[73]La Forest, *supra* note 2 at 2-3.

[74]As Flannigan, *supra* note 13 at 45, observes: "we are dealing here with a default scheme of regulation. That is ... a determination of the kind of regulation we, as a community, wish to apply when interacting parties have not completely defined their respective positions." The current state of uncertainty in the law suggests that a consensus has not yet been reached concerning how the doctrine of fiduciary duty will accomplish the regulating role which it appears the courts are now prepared to accord it.

[75]McLachlin, *supra* note 1 at 55.

Perhaps this is what La Forest J. has in mind when he approvingly refers to the "gradual trend ... towards an integrated law of civil obligations".[76] While some may take a more pessimistic view of the future of the "fiduciary designation", as a flexible doctrine it hardly seems in any danger of returning to the relative position of obscurity it had occupied in equity for well over two centuries. Simply put, "it is too convenient, meaningful and descriptive of those special cases of human relationships where trust and honour are of very special value and importance".[77]

While Dickson J.'s judgment in *Guerin* may, in part, have ushered in a "principled" approach to the assessment of relationships which can be said to give rise to fiduciary duties, it also represents the first application of fiduciary principles to define the relationship between the Crown and the Aboriginal peoples of Canada. Having established the theoretical basis for an understanding of the principles which underscore the modern view of fiduciary relationships, the balance of this thesis will focus specifically on the Crown-Aboriginal fiduciary relationship. The analysis will commence with a discussion of what Dickson referred to, in *Guerin* and *Sparrow*, as the "roots" and "sources" of an "historic relationship" - a relationship which owes its existence, as a

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[76]La Forest, *supra* note 2 at 12. The trend is evident in the recent decision of the Supreme Court in *Soulos* v. *Korkontzilas*, [1997] S.C.J. No. 52 (S.C.C.)(QL), where writing for the majority McLachlin J. expands the list of circumstances in which the equitable constructive trust would be available to include "wrongful acts like fraud and breach of duty of loyalty" as well as the more traditional "unjust enrichment and corresponding deprivation" situations (see para 43).

[77]Gautreau, *supra* note 16 at 29.

fiduciary construct, to a long-standing pattern of dealings between the Crown and the Aboriginal peoples of Canada.[78]

[78]*Guerin*, *supra* note 27 at 376; *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1108.

Chapter 3 - "Roots" and "Sources": Towards a Meaningful Understanding of the Crown-Aboriginal Fiduciary Relationship.

A. Introduction:

In the Supreme Court of Canada's 1984 decision in *Guerin et al.* v. *The Queen*,[1] Dickson J. stated that "[t]he fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title".[2] Nevertheless, he went on to conclude that the Aboriginal title interest did not, in and of itself, give rise to a finding that the relationship was a fiduciary one. By 1990, and the decision in *Regina* v. *Sparrow*,[3] the then-Chief Justice Dickson would add clarity to his earlier judgment by observing that it was both the "nature of Indian title and the historic powers and responsibilities assumed by the Crown" which constituted "the source" of the specific fiduciary duties which the Crown owed the plaintiff Indians in *Guerin*.[4] However, Dickson C.J. would go on to conclude that:

> The relationship between the government and aboriginals is trust like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights

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[1][1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to S.C.R.].

[2]*Ibid.* at 376.

[3][1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

[4]*Ibid.* at 1108.

must be defined in light of this *historic relationship*. [emphasis added][5]

This conclusion would open the door to a finding that, apart from any specific duties which may arise on the facts of a particular case, the Crown always has a general responsibility to act in a fiduciary capacity with respect to the Aboriginal peoples of Canada.[6] This in turn suggests the imposition of a "general" duty of loyalty, good faith and avoidance of a conflict of interest.[7]

Based on the foregoing, one can conclude, as a governing principle, that the Crown-Aboriginal relationship, while rooted in the concept of Aboriginal title, nevertheless owes its existence, as a fiduciary construct, to the long-standing, *historic*, pattern of dealings between the Crown and Aboriginal peoples. In this regard, any attempt to grapple with the modern issues which surround the court's characterization of the Crown-Aboriginal relationship - including any meaningful assessment of the Crown's ability to discharge its fiduciary obligations in the sorts of conflict situations illustrated by the two paradigm situations presented in the introductory chapter - presupposes some understanding and appreciation of the *historic* forces and processes which resulted in its creation and lent it content.

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[5] *Ibid.* at 1108.

[6] Categorical support for this proposition was finally given by the Supreme Court of Canada in *Quebec (Attorney General)* v. *Canada (National Energy Board)* (1994), 112 D.L.R. (4th) 129 at 147, as follows: "[i]t is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada". Iacobucci J. cited *Guerin* as authority.

[7] The principles discussed in *Guerin*, and subsequent cases, will be considered in greater detail in Chapter four of this thesis.

All fiduciary relationships are premised on the existence of an interest to be safeguarded. In this respect, it must be understood that the Crown-Aboriginal fiduciary relationship takes its unique definition from the fact that the Aboriginal peoples of Canada had certain pre-existing or "*historic*" interests which the Crown undertook to respect. While it may be tempting to explain away any supposed anomalies in the Crown-Aboriginal fiduciary relationship by simply asserting that the relationship is "*sui generis*", such an approach is meaningless unless the anomalies are sourced back to the unique attributes of the Aboriginal interests concerned, the powers and responsibilities assumed by the Crown in relation to those interests, and the corresponding reliance which Aboriginal groups placed on the Crown.

Professor Slattery, who is perhaps the leading legal theorist on the historic origins of Aboriginal rights in Canadian common law, advances the argument that,

> The Crown's historic dealings with Indian peoples were based on legal principles suggested by the actual circumstances of life in North America, the attitudes and practices of Indian societies, broad rules of equity and convenience, and imperial policy.[8]

Slattery suggests that the basic tenets of these legal principles "can be discerned as early as the seventeenth century" but did not fully "crystallize", as a coherent doctrine of "colonial" or "imperial constitutional law", until late in the eighteenth century. He goes on to argue that the rules which emerged out of these principles form part of a larger body

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[8]B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 [hereinafter Slattery, "U.A.R."] at 736-7.

of law which he terms "the doctrine of aboriginal rights".[9] Slattery concludes that, "from its origins in British imperial law, the doctrine of aboriginal rights has passed into Canadian common law, and, subject to statutory modifications, operates uniformly across Canada".[10]

While Canadian courts have traditionally shown a reluctance to precisely define the nature and content of the rights of Aboriginal peoples,[11] there is now clear judicial support for a view of Aboriginal rights as possessing certain inherent features which predate European contact.[12] Other characteristics are said to have arisen at common law

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[9]*Ibid.* at 737.

[10]*Ibid.* at 739.

[11]For example, in *Calder et al.* v. *Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) 145 (S.C.C.) [hereinafter *Calder*], at 173, Hall J. would conclude that "[t]he exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation". *Calder* turned on the issue of whether or not the plaintiff's Aboriginal title rights could be said to have been extinguished. It seems odd that the court could decide this issue without first finding it necessary to determine what it was that may or may not have been extinguished.

[12]See *Calder*, *Ibid.* at 152 and 156, where Judson J. stated, with reference to the Privy Council's decision in *St. Catherine's Milling & Lumber Co.* v. *R.*, (1888) 10 A.C. 13 (P.C.)[hereinafter *St. Catherine's Milling*], that he did not consider "the Proclamation to be the sole source of Indian title"; and further, that: "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries". Similarly, in *R.* v. *Van der Peet* [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at 304 [hereinafter *Van der Peet* cited to D.L.R.], Lamer C.J. further determined that:

> the explanation of the basis of aboriginal title in *Calder*, *supra*, can be applied equally to aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying 'the land as their forefathers had done for centuries'.

or out of the historic relationship between the Crown and Aboriginal peoples.[13] In short, there now appears to be judicial backing for a conceptualization of Aboriginal rights which is capable of recognizing a multiplicity of influences.

In this chapter, the "sources" and "roots" of the "historic" relationship between the Crown and Canada's Aboriginal peoples will be traced, with a view to laying a solid foundation for the more detailed discussion of the Crown-Aboriginal fiduciary relationship which will follow in later chapters. In this regard, it might be tempting to wish away the complexities of this subject area by focusing solely on the jurisprudence. In my view this would be a mistake. As we have seen from the discussion in Chapter two, the fiduciary construct is about power, vulnerability, dependence and reliance. In this respect, it is important to appreciate that the Crown-Aboriginal relationship did not evolve in a vacuum. Nor can we attempt to apply fiduciary principles to Crown-Aboriginal dealings as if the relationship had just been created in the latter half of the twentieth century. Instead, and to the extent that law and history are reconcilable, an attempt will be made to treat the legal developments in this field within their broader

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[13]In the words of Mahoney J. in *Hamlet of Baker Lake et al.* v. *Minister of Indian Affairs and Northern Development et al.* (1979), 107 D.L.R. (3d) 513 at 541, there is "solid authority for the general proposition that the law of Canada recognizes the existence of an aboriginal title independent of the *Royal Proclamation* or any other prerogative Act or legislation. It arises at common law." In *Guerin*, *supra* note 1 at 382 Dickson J. would conclude that: "[t]he nature of the Indians' interest is 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".

historical context.[14] To that end, a mixed methodological approach will be adopted. Having said that, it must be appreciated that there are spacial limitations which must be observed. As Professor Slattery suggests, there are many avenues to explore. While Slattery's characterization of the foundations of the Crown's historic pattern of dealing with Aboriginal groups will be drawn upon, the analysis in this chapter will chiefly focus on the historic origins and content of that portion of the so-called "doctrine of aboriginal rights" which pertains to the Aboriginal title interest and the Crown-Aboriginal relationship.[15] Furthermore, the discussion will only trace the evolution of the principles which underscore the relationship to the point of crystallization, i.e., to 1763.[16] Having said that, it must be acknowledged that the "roots" and "sources" of the relationship are

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[14]See J. R. Fortune, "Construing *Delgamuukw*: Legal Arguments, Historical Argumentation and the Philosophy of History" (Winter 1993) 51 U.T. Fac. L. Rev. 80 at 96, where the author observes that, in the past, "the courts may have been misguided in viewing history as law's obedient servant". He goes on to conclude that history has a role to play in the continuing dialogue on Aboriginal rights by illuminating a new path for the law rather than simply serving as "a tool of existing doctrine".

[15]See Slattery, "U.A.R." *supra* note 8 at 737, where the author states that the "doctrine of aboriginal rights" derives from a broad "body of unwritten [colonial] law" which, among other matters, provides us with "rules governing the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions". He goes on to state that, the part of the doctrine which deals specifically with native lands is termed "the doctrine of aboriginal title". "Other parts deal with such matters as Indian treaties, customary law, powers of self-government, and the fiduciary role of the Crown."

[16]This is not to say that important developments did not occur after 1763, just that the fundamental principles were in place by that date. Later developments will be considered in subsequent chapters to the extent that they serve to shed light on the principal issue to be addressed in this thesis, namely: the extent to which the Crown is able to discharge its fiduciary duties in conflict situations.

also to be found in the broader though still largely ill-defined principles embraced by the concepts of Aboriginal and treaty rights - concepts that will be considered in more detail in connection with the discussion of the jurisprudence which follows in Chapters four and five. Finally, it should be appreciated that while certain original conclusions will be formulated here, in large measure the analysis in this chapter will borrow from the growing body of literature which already exists on this topic.

B. A Detailed Examination of the Origins and Content of Aboriginal Title and the Crown-Aboriginal Relationship:

In modern terms, Aboriginal title is generally described as a *sui generis* type of property interest which embodies a number of characteristic features. In this respect, Aboriginal title is typically referred to as a possessory right to occupy and use land. However, unlike other common law property forms, it is viewed as a collective right which is premised on the original and continuous possession of land by an organized group of Aboriginal people over a substantial period of time.[17] Significantly, lands subject to Aboriginal title may only be alienated to the Crown, which is already deemed to hold the underlying title. Alienation is normally accomplished by a surrender that has been

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[17]Slattery, "U.A.R." *supra* note 8 at 756-761; also Donohue, who writes that, "[b]y definition, aboriginal land title is a non-treaty possessory form of property right inuring to native peoples by virtue of continuous occupation since time immemorial". Maureen A. Donohue, "Aboriginal Land Rights in Canada: A Historical Perspective on the Fiduciary Relationship" (1990) 15 American Indian L. Rev. 368 at 370.

duly executed according to a prescribed set of requirements.[18] However, given the Crown's "overriding interest", the Crown has traditionally also possessed the ability to extinguish Aboriginal title.

This brief treatment of the broad "rules" or "principles" of Aboriginal title raises a number of interesting yet fundamental questions. Why is Aboriginal title described as a "communal" right which is possessory or usufructuary in nature? How did the underlying title to Aboriginal lands come to vest in the Crown? How did the Aboriginal groups who resided on these lands become subjects of the Crown? What happened to their customary laws, and political institutions? Why is the Aboriginal title interest inalienable except to the Crown? Most importantly for our purposes, how did the Crown-Aboriginal fiduciary relationship initially come to be rooted in the concept of Aboriginal title; or, put another way, what historic powers and responsibilities were assumed by the Crown in relation to Aboriginal title? A logical place to begin our inquiry is with a review of the historic attitudes and practices of Aboriginal societies.

i. The Historic Attitudes and Practices of Aboriginal Societies.

In the period before contact between Europeans and Aboriginal peoples, North America was populated by a large number of Aboriginal groups, "organized in societies and occupying the land as their forefathers had done for centuries".[19] Although some groups shared the land with other groups, most claimed "exclusive rights" to use the lands

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[18]Donohue, *Ibid.* at 371.

[19]*Calder*, *supra* note 12 at 156.

they possessed. Inasmuch as geographic boundaries between Aboriginal groups were typically drawn along political lines,[20] "[t]erritorial claims flowing from the independent status of the political unit ... tended to merge with claims to land asserted by the same group in its land-holding capacity".[21]

Geographic boundaries between Aboriginal societies "tended to fluctuate" significantly.[22] Migrations of Aboriginal peoples occurred:

> in response to such factors as war, epidemic, famine, dwindling game reserves, altered soil conditions, trade, and population pressures. Lands that were vacant at one period might later be occupied, and boundaries between groups shifted over time. The identities of the groups themselves changed, as weaker ones withered or were absorbed by others, and new ones emerged.[23]

Therefore, it would be incorrect to assume that Aboriginal institutions were static in nature or that land use patterns did not evolve to suit changed circumstances.

Geography, climate and the presence or absence of natural resources provide one obvious explanation for the diverse patterns of Aboriginal land use which existed in Canada.[24] However, as each Aboriginal society "possessed their own territories, laws and

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[20]B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (Saskatoon: Native Law Centre, reprint of 1979 doctoral thesis, Oxford) [hereinafter Slattery, *L.R.I.C.P.*] at 2.

[21]*Ibid.* at 2.

[22]B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 Am.J.Comp.L. 361 [hereinafter Slattery, "H.C."] at 374.

[23]Slattery, "U.A.R." *supra* note 8 at 741.

[24]For example, some groups in temperate regions practiced agriculture. For others, an abundant supply of animals, birds or marine resources provided a solid economic base. In this regard, it would obviously have been extremely difficult for a group such as the Beothuk to have pursued an agrarian lifestyle given the climate and arability problems

governmental institutions",[25] significant cultural variations could also be observed between Aboriginal groups. Given the inherent distinctiveness of each group, it would be a mistake to conclude that the use one group made of the land it occupied would necessarily have been identical to the specific patterns of usage practiced by all other groups.[26]

Land use patterns *within* a particular Aboriginal group also tended to reflect its cultural uniqueness. Indeed, there were often discernable differences concerning the uses which individual members could make of the lands and resources their Aboriginal group possessed. In this regard, land usage "was determined by rules particular to the group itself, as dictated by customary law and group organs of self-government".[27] These rules were often "designed within the context of a special group: one's own extended family".[28]

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which are characteristic of much of Newfoundland.

[25]Slattery, "H.C." *supra* note 22 at 361.

[26]"What must be recognized is that Indian groups are as different from each other as are White groups. ... Yet writers and speakers, Indian and White, often tend to group them together. Thus an Iroquoian Indian will write an article concerning the philosophy and culture of his people and White people in Northern Saskatchewan will attempt to find similar beliefs and ways of living among the Cree. ... Little wonder that Indian people find great amusement in much of the general literature concerning the culture of Indians." D. Bruce Sealey, "Indians of Canada: An Historical Sketch." (Materials, Native Cultural Awareness Course, Ottawa, 1988) at 1.

[27]Slattery, "H.C." *supra* note 22 at 373.

[28]R. Ross, *Dancing With A Ghost: Exploring Indian Reality* (Markham, Ont.: Octopus Publishing Group, 1992) at 155.

As such, they probably had more to do with governing relations between family members than with any comparable western European concept of property ownership.[29]

Aboriginal title was typically of a communal rather than individual nature. Even in circumstances where a particular individual "was said to be owner", his or her title "was often nominal or held in trust for a group, whose members enjoyed rights of use".[30] Therefore, while a private property regime might have appeared to exist in such cases, a close inspection typically reveals the presence of the communal property notions which are characteristic of traditional Aboriginal land use patterns.

Notwithstanding the fact that there was a great diversity among the various distinct Aboriginal societies concerning the usages made of the land during different periods of their histories, it is still possible to speak of an Aboriginal world view concerning the native person's relationship to the land, a view which is reflected in the following statement:

> We aboriginal people believe that no individual owns the land, that the land was given to us collectively by the Creator to use, not to own, and that we have a sacred obligation to protect the land and use its resources wisely.[31]

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[29]"We native people did not have the concept of private property in our lexicon, and the principle of private ownership was pretty much in conflict with our value system." O. Lyons, "Spirituality, Equality, and Natural Law" in L. Little Bear, M. Boldt and J.A. Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: Univ. of Toronto Press, 1984) 5 at 9.

[30]Slattery, *L.R.I.C.P. supra* note 20 at 2.

[31]F. Plain, "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America" in M. Boldt and J.A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: Univ. of Toronto Press, 1985) 31 at 34.

A number of related concepts are embodied in the traditional Aboriginal perspective on land. They include notions of community or collective-based rights, an inter-connectedness with the community and the natural world, and a highly developed sense of responsibility to maintain and nurture life.

The notion that Aboriginal land title constitutes a collective or community-based right to use the land which an Aboriginal group possesses is reflective of a beliefs system which places a premium on the equality of all life, and the inter-connectedness between individuals, their community, and the natural environment within which the community is centred and upon whose resources individual and collective survival depends. From a traditional Aboriginal perspective, the Aboriginal person is seen as belonging to the land.[32] Not surprisingly, "[l]and is one of the most important (if not the most important) sources of self-identification for native people".[33] Indeed, many Aboriginal persons still subscribe to the view that: "our land is really our life. Without our land we cannot - we could no longer exist as a people."[34]

The philosophic meaning of "inter-connectedness", may be explained in the following terms: "[t]he philosophy states that we are not alone, nor can we go it alone. We are here not to assert dominion or to rise above the rest, but to make a contribution

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[32]"My children are like the caribou - they belong to this land", E. Kaye of Old Crowe as cited in C. Notzke, *Aboriginal Peoples and Natural Resources in Canada* (North York, Ont.: Captus University Publications, 1994) at 173.

[33]*Ibid.* at 173.

[34]*Ibid.* at 173.

with the rest."[35] This view seems consistent with the notion that the land cannot be owned, rather it is simply "borrowed" for a time.[36]

Related to the notion of inter-connectedness is the traditional belief that Aboriginal peoples consider themselves responsible for maintaining and nurturing life on earth; a belief based on a "recognition and respect for the equality of all elements of life" which the creator has made.[37] The Aboriginal concept of responsibility contains elements of what we might, in the language of the late-twentieth century, term ecocentric and inter-generational principles.[38] Responsibility implies observance of natural laws - laws which reward those who conserve their resources in times of plenty, so that life will be assured during the cyclical periods of scarcity which must inevitably ensue. The following statement reflects an articulation of the responsibility concept, and the principles which underscore it:

> [T]he natural law is the final and absolute authority governing *'Etinohah'* - the earth we call our mother. This law is absolute, with retribution in direct ratio to violations. This law has no mercy; it will, exact what is necessary to maintain the balance of life. ... All life is subject, absolutely, to this authority. ... We are nourished by our mother - the earth - from whom all life springs. We must understand our dependence on her and protect her with our love, respect and

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[35]Ross, *supra* note 28 at 182.

[36]A view expressed in P. Ittinuar, "The Inuit Perspective on Aboriginal Rights" in M. Boldt and J.A. Long, eds., *supra* note 31, 47 at 47, in the following terms: "[t]his land does not belong to anyone, it's just borrowed for a time. Neither the government nor the Inuit have authority over it".

[37]Lyons, *supra* note 29 at 6.

[38]See T. Alcoze, "Our Common Future: Native Land Use and Sustainable Development" in E.L. Hughes *et al.*, eds., *Environmental Law and Policy* (Toronto: Emond Montgomery, 1993)567 at 568-70.

> ceremonies. The faces of our future generations are looking up to us from the earth; and we must step with great care not to disturb our grandchildren.

It should be stressed, however, that the Aboriginal concept of responsibility does not dictate an intrusive attempt to regulate the environment. On the contrary, from a traditional Aboriginal perspective, the measure of self-worth is not to be determined by one's ability to subdue the natural forces which surround you, rather "[t]he successful man is the one who understands his role in that chain of sustenance and who dedicates his efforts towards maintaining harmony and balance within all creation".[39]

From an individual perspective, notions of responsibility figure most obviously in the decision-making process, for, unlike other life forms, humans were given the intellect to make choices which have the potential to impact upon the rest of creation.[40] In this context, responsibility requires that an emphasis be placed on long-range planning and a consideration of "the impact of his or her decisions mindful of the past seven generations and the future seven generations".[41]

It remains to consider how the arrival of the Europeans would impact upon Aboriginal title. We will begin by examining the various, and oft-times conflicting, European territorial claims in the so-called "New World"; then move on to consider how

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[39]Ross, *supra* note 28 at 182.

[40]Lyons, *supra* note 29 at 6.

[41]M.E. Turpel, "Reviewing the Honour of the Crown" (1991) 3 Human Rights Forum 2 at 5.

those principles of British imperial law which pertain to Aboriginal title and the Crown-Aboriginal relationship, actually evolved.

ii. European Territorial Ambition in the "Age of Discovery":

Until fairly recently, it had been widely surmised that European claims to sovereignty over North America derived from what has been termed the "act of discovery". The notion that "[d]iscovery conferred title" was premised on the "assumption that a single code of international law regulated the struggle for empire".[42] The discovery thesis may primarily be attributed to the early nineteenth century writings of Chief Justice Marshall, of the United States Supreme Court, and more specifically to his landmark judgment in *Johnson and Graham's Lessee* v. *M'Intosh*. In that case, Marshall wrote that:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. ... But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law ... . The principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.[43]

According to Marshall, possession meant symbolic acts such as planting standards and making verbal utterances. In light of his *dicta* in M'Intosh, one might well conclude that the disputes which subsequently arose between the European powers in relation to North

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[42] G. Lester, *Aboriginal Land Rights: Some Notes on the Historiography of English Claims in North America*. (Ottawa: Canadian Arctic Resources Committee, 1988) at 12.

[43] (1823), 8 Wheaton 543, 21 U.S. 240 [hereinafter *M'Intosh* cited to Wheaton] at 572-4.

America centred on the "geographical extent of the rights that discovery bestowed" and "not over the principle that discovery and symbolic possession conferred title".[44]

Marshall had occasion to revise his thinking somewhat in his subsequent decisions in *Worcester* v. *State of Georgia* and *Cherokee Nation* v. *State of Georgia*.[45] In penning his judgments in these cases, Marshall would conclude that the doctrine of discovery merely "regulated the right given by discovery among the European discoverers".[46] As such, Marshall would appear to be suggesting that the act of discovery did not convey the underlying title *per se*; it merely delivered a preemptive right (as against all other European nations) to acquire it.[47] While sovereign title (sovereignty) could still be acquired by possession, Marshall now seems to have concluded that possession meant effecting a "voluntary cession" of land from the Aboriginal groups which occupied it. In other words, symbolic acts were an inadequate means of perfecting ones sovereignty claim.[48]

Marshall's analysis would have "enduring significance". In this respect, the Marshall explanation has figured prominently in the jurisprudence of Canada, Australia and New Zealand.[49] In Canada, its legacy lives on in a number of key Supreme Court of

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[44]Lester, *supra* note 42 at 13.

[45]*Worcester* v. *State of Georgia* (1832), 6 Peters 515, 31 U.S. 530 [hereinafter *Worcester* cited to Peters]; and, *Cherokee Nation* v. *State of Georgia* (1831), 5 Peters 1, 30 U.S. 1.

[46]*Worcester*, *Ibid.* at 544.

[47]Lester, *supra* note 42 at 16.

[48]*Ibid.* at 17.

[49]Professor Geoffrey Lester, *Ibid.* at 11, explains its "astonishing influence" in the following terms: "[t]hese matters had been shrouded in obscurity and mystery until Chief

Canada decisions concerning Aboriginal rights.[50] Nevertheless, it is important to note that the version of the Marshall analysis which seems to have prevailed is that which is reflected in his early decisions, most notably his analysis in *M'Intosh*.

There are a number of flaws in Marshall's analysis in *M'Intosh*. Most importantly, there were few if any established principles which existed to guide relations among European states during the formative period when European territorial claims were being advanced.[51] When the so-called "age of discovery" began in the early fourteenth century,[52] the concept of the nation state had not yet emerged.[53] Therefore it is difficult to see how an "international" or "law of nations" framework could have been invoked by Marshall to provide a rationalization for the acquisition of sovereignty over North America.[54]

Justice Marshall, and after him, Joseph Story, undertook a detailed explanation of them. At last, the English-speaking world could understand how it all began."

[50]Most noticeably in *St. Catherine's Milling and Lumber Co.* v. *R.*, (1887) 13 S.C.R. 577 (S.C.C.); *Calder*, *supra* note 11; *Guerin*, *supra* note 1; *Sparrow*, *supra* note 3; and, *Van der Peet*, *supra* note 12. In *Baker Lake*, *supra* note 13 at 545, Mahoney J. observed, with some measure of concern, that "[t]he value of early American decisions to a determination of the common law of Canada as it pertains to aboriginal rights is so well established in Canadian Courts at all levels, as not now to require rationalization".

[51]Lester, *supra* note 42 at 2.

[52]The starting point used by Green in L.C. Green, "Claims to Territory in Colonial America" in L.C. Green & O.P. Dickason, eds., *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989) at 4.

[53]Lester, *supra* note 42 at 56.

[54]The point being that any theory which purports to explain how sovereignty was acquired, or define the residue of rights which were said to have remained with Aboriginal groups, "must be tested in accordance with the law as it existed at the time that title was alleged to have accrued" (Green, *supra* note 52 at 126 refers). However, as Blackstone noted, in relation to rights of dominion, there is a certain reluctance "about the British

In point of fact, extraterritorial claims were advanced by the Christian sovereigns of Europe either in their personal capacity or as the "crown" holder.[55] While international law would, in time, evolve out of "the practice of the European Christian states",[56] there would be little formal agreement concerning how an empire might be acquired until the nineteenth century.[57] Inasmuch as there was strong disagreement over the definitions of such basic concepts as "discovery", "occupation" and "possession"; "self-interest demanded that each rival sovereign ... formulate his own argument for empire, to maximize his claims and to prove that rival claims were unfounded in law".[58] In short, having concluded that there was no one universal European doctrine to govern the acquisition of sovereignty, the focus of our inquiry must necessarily shift to examine the basis of the British Crown's claim to dominion over the land mass which would ultimately become Canada.

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mind" to delve into matters which could negatively impact upon established property rights. "Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best, we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built." See Blackstone, *Commentaries on the Law of England* 2d ed. book 2, as cited in J.Y. Henderson, "The Doctrine of Aboriginal Rights in Western Legal Tradition" in M. Boldt and J.A. Long, eds., *supra* note 31, 185 at 208. This tendency may explain the rigid adherence to Marshall's "discovery doctrine".

[55]It was the Crown not the nation state which claimed dominion over foreign land. In the case of England, the monarch could hold title "in his personal capacity as the lord of a new territory or in his capacity as the holder of a 'crown', either national or imperial. ... The Crown is not the nation-state." Lester, *supra* note 42 at 56.

[56]Green, *supra* note 52 at 4.

[57]Lester, *supra* note 42 at 2-3.

[58]*Ibid.* at 58.

iii. The Basis of the British Crown's Claim to Sovereignty.

There can be little doubt that sovereignty over Canada, or more accurately, sovereignty over the lands controlled by the self-ruling Aboriginal peoples who resided here at the time of contact, was eventually acquired by the British Crown. Similarly, the Aboriginal peoples who resided here eventually became Crown subjects.[59] What is poorly understood is the process by which this transformation took place or how that process would impact upon our understanding of the concept of Aboriginal title.[60] Hence the attraction of the rather simplistic notion that discovery could convey title, the attitude which is at the heart of the analysis in *M'Intosh*. In reality the historical evidence suggests that the acquisition of sovereignty occurred in stages over an extended period of time.[61]

English efforts with respect to North America did not begin until 5 March 1497, the date on which Henry VII issued Letters Patent to John Cabot to discover and explore new lands "in whatsoever part of the world placed, which before this time were unknown to all Christians", and, to "conquer, occupy and possess" such lands thereby "acquiring for us the dominion, title and jurisdiction".[62] The reference to other Christian discoveries is

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[59]B. Slattery, "First Nations and the Constitution: A Question of Trust." (1992) 71 Can. Bar Rev. 261 [hereinafter Slattery, "F.N.C."] at 262.

[60]Slattery, "H.C." *supra* note 22 at 363, who argues that, "[w]hat we lack is a proper understanding of when and how the native peoples of Canada were won to the allegiance of the Crown".

[61]"The various territories now comprising Canada were acquired by the British Crown at different stages and in different ways, for the most part during the seventeenth and eighteenth centuries." Slattery, *L.R.I.C.P. supra* note 20 at 11.

[62]Biggar, H.P, ed., *The Precursors of Jacques Cartier 1497-1534*. Publications of the Canadian Archives, no. 5. (Ottawa: Government Printing Bureau, 1911), as cited *Ibid.* at

an obvious allusion to the then ongoing efforts of the Spanish and Portuguese to explore and colonize the Americas. In this regard, Iberian territorial pretensions were based on the "monopolistic" notion that they, and they alone, had the "exclusive right to exploit their new discoveries".[63] Cabot set sail in 1497 and reached the East coast of North America but did little more than make a landfall.[64]

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[63]Lester, *supra* note 42 at 59-72, points out, with reference to J.T. Juricek, Jr., *English Claims in North America to 1660* (Ph.D. dissertation, University of Chicago, 1970), that, while Spanish and, to some extent, Portuguese claims were at first premised on papal grants (Papal Bulls), other Christian monarch's refused to acknowledge the validity of such grants. When later popes attempted to distance themselves from the supposed papal grants, the Spanish monarch's "began, by the 1540's, to shift the basis of their arguments for the defence of their titles to discovery and possession". According to Juricek, the Spanish considered that the fact of discovery, which they defined as "establishing the existence of new territory as a result of a deliberate search", either gave them a "plenary title", or a preemptive right to obtain it through symbolic acts of possession which "consisted of a ritual pantomime or a public ceremony on the land conducted before numerous witnesses and at least one magistrate or notary". The simplicity of the symbolic acts, which in traditional Roman law terms might well be viewed as "acts of conquest", and which the classicist early sixteenth century writer Vitorio therefore concluded could best be defended under the "laws of war", allowed the Spanish to quickly expand the scope of their territorial claims without the need for a massive, costly and time consuming colonization effort. Juricek would characterize this as the "pre-emptive code of territorial acquisition" inasmuch as it "shifted attention" away from the "confused and confusing question of title to the question of who had the best right to acquire it". The pre-emptive code allowed the Spanish and Portuguese to argue that the claims of late-comers could be ignored. In this regard, they appreciated that the achievements of Columbus and other early explorers "could not be denied".

[64]The precise location of his landfall, in what, in all likelihood was Atlantic Canada or Northern New England, is unknown. Unofficial contemporary sources suggest that Cabot made some symbolic attempt to possess the land before being lost at sea in 1498. See Slattery, *L.R.I.C.P. supra* note 20 at 97-8.

In analysing the English Charters issued between 1496 and 1609, Professor Slattery concludes that these early Charters "neither assume nor confer existing rights to any lands"; rather they operate as a sort of commission, or licence, to acquire territories for the Crown, in return for rights to be granted *in futuro* to the discoverer who had been awarded the particular Charter and could succeed in carrying out the preconditions contained therein.[65] This conclusion, and the fact that over the next one hundred years the English did not assert anything more than a preemptive right to acquire title, based on Cabot's voyage of 1497,[66] is entirely consistent with the tenets of the so-called "dominative code of territorial acquisition" to which the English, French, Dutch and Swedish all subscribed in that period.[67] Furthermore, it seems clear that the English were

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[65] *Ibid.* at 109.

[66] Lester, *supra* note 42 at 75.

[67] *Ibid.* at 73-4. As Lester points out, with reference to Juricek, *supra* note 63, adherents to the so-called "dominative code" insisted that: "valid legal title to land in the New World could be acquired only through 'real', 'actual', or 'effective' occupation or possession. Whatever else these formulas were meant to convey, one point was absolutely clear: effective occupation and possession of inhabited lands could be acquired only by 'conquest' of the Aboriginal inhabitants. For an uninhabited area, occupation and possession meant its colonization." The precise meaning of the terms "real", "actual" and "effective" occupation or possession was never defined or agreed upon by those European nations who subscribed to the dominative code. Arguably this would have been counterproductive insofar as the status of their own claims were concerned. Instead, they defined the terms negatively, with a view to denying the legitimacy of "symbolic or declaratory possession" and turning the procedure of acquiring title into a drawn out, time-consuming process, which they hoped would place them on an equal footing with the Spanish and Portuguese. In this regard, Juricek theorized that the efforts of these "late-comers" were directed towards placing themselves in the best position from which to refute the "early and extravagant" claims of the Spanish speaking nations, while leaving them relatively free to attempt to perfect their own claims as best they could.

not seeking what we, in modern times, would consider sovereignty. Indeed, when these early Charters were granted, "English claims in North America were essentially claims to rights of private property, together with attendant jurisdictional rights associated with lordship".[68] This has been attributed to the confusion which existed at that time between the concepts of *imperium* and *dominium*.[69] An account of a debate of the council of the Virginia Company, which occurred prior to 1609, is illustrative of the private rather than public law basis of these early claims. In that account, the explanation of the objectives of the colonization effort in Virginia is couched in the following terms: "[w]ee seeke Dominion" which is "absolutely good agaynst ye Naturall people".[70] Taking the argument

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[68]*Ibid.* at 54, where Lester goes on to conclude that: "[t]he legal nature of English claims in North America changed little throughout the entire Tudor and most of the Stuart period, from 1497 to 1660".

[69]Lester explains the "confusion" in the following terms: "with the disintegration of the Roman Empire, there was a general collapse of public law. The functions of public law and public jurisdiction fell into the hands of kings and princes who were, in turn, subject to the Church's claim to universal overlordship. The secular states were increasingly able to resist the pretensions of the papacy, and the clear distinctions in Roman law between *imperium*, or the right to rule, and *dominium*, or private property, became blurred; political jurisdiction (*imperium*) came to be associated with landed property – in a word, with lordship. Thus, at the time Europeans became familiar with the New World, 'in respect to the territory of the state, the medieval view which confounded dominion with *imperium* and treated sovereignty as a sort of property right was still prevalent.'" *Ibid.* at 27-8, referring to J. Goebal, Jr., *The Struggle for the Falkland Islands* (New Haven: Yale University Press, 1927) at 64-5.

[70]S.M. Kingsbury, ed., *The Records of the Virginia Company of London*, vol III (Washington: Library of Congress, 1906-1935) at 3, as quoted in *Ibid.* at 53-4. The account is remarkable for its clarity at a time when such explanations were typically discouraged. As Lester, at p 11, states: "[m]ost European sovereigns, but in particular the English and French sovereigns, were extremely reluctant to discuss just what they claimed in the New World and how they justified these claims in law".

a step further, it may well also be appropriate to conclude that title to the English colonies in North America should be classified as a right of dominion which vested in the early Stuart monarchs in their personal capacities.[71]

Further Royal Charters were issued in 1609, 1620 and 1621 with respect to Virginia, New England and Nova Scotia. By this time, a shift in continental alliances in Europe meant that France, rather than Spain, was England's chief rival. While France continued to assert it's claims to North American territory based on the dominative code,[72] the English Charters of the period suggest that England was in the process of adopting a new position more in keeping with James I's vision of emerging imperial greatness.[73] In this regard, it may be argued that the 1609 Charter, which gave the appearance of a conveyance of proprietary title to a vast area of the North American continent, signalled the English Monarch's intention to preempt France's own territorial ambitions by resorting to some of the same tactics which the Spanish had earlier attempted to rely upon.[74] To that end, "Cabot was presented as the founder of English

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[71]*Ibid.* at 57, in reference to Juricek, *supra* note 63.

[72]"France from an early stage denied that other European states held either title or exclusive rights to any territories in America other than those actually settled or controlled. Pretensions to sovereignty or exclusive rights of access based upon the Papal Bulls were rejected, as were claims founded upon mere discovery or token occupation." Slattery, *L.R.I.C.P. supra* note 20 at 91. A detailed discussion of the basic precepts of the dominative code is embodied in note 67, *supra*.

[73]Lester, *supra* note 42 at 75-6, in reference to Juricek, *supra* note 63.

[74]In reality, the grant was limited by a clause which specified that only such territory was granted as "we by oure lettres patent maie or can graunte". By the standards of James I's royal predecessors, "the American territory which James 'might' and 'could' grant to his subjects was surely only a tiny fraction of the enormous tract of land delineated". *Ibid.*

rights in North America" commencing with the 1609 Charter.[75] An argument may be made that the apparent shift was even more dramatic with respect to the 1620 and 1621 Charters; they have been described as "full and final grants of the territories named therein".[76] Professor Slattery takes a contrary view of these Charters. He contends that incidental references in the preambles and elsewhere in the Royal Charters of the seventeenth century, suggest that a more realistic attitude in fact prevailed; namely that: "a cession or conquest from the indigenous occupants was requisite to bring the Charter provisions into full effect, for the title conferred there was conditional upon actual acquisition".[77] Insofar as the extravagant territorial claims over North America are concerned, Slattery suggests that the English King was simply "broadcasting" his warning to other European monarch's that he was claiming the "exclusive right to conduct or control activities there, to trade with the inhabitants, to hold relations with their rulers, to found colonies and to acquire lands".[78] This latter view does seem to find some support in the conduct of Britain's colonial administrators who continued to behave as they had

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at 78, citing Juricek, *supra* note 63 at 477-8.

[75]*Ibid.* at 76.

[76]*Ibid.* at 80. Most importantly, these Charters did not contain the "may and can grant" limitation clause which had been inserted in the 1609 Charter.

[77]Slattery, *L.R.I.C.P. supra* note 20 at 110.

[78]*Ibid.* at 109.

before 1609: they conducted imperial business as if "only 'discovery and possession' could convey title to new territories".[79]

In any event, the significance of the seeming conflict, between the wording of the seventeenth century Charters and the attitude and practice of Britain's colonial administrators, evaporates when one appreciates that the colonial powers at times promoted what might be described as "extraordinary claims" in order to "improve their position relative to one another".[80] While such posturing might have had some persuasive value in Europe, the reality of the situation in the colonies dictated a more pragmatic approach. In this regard, it seems appropriate to briefly consider the policy requirements dictated by Britain's long-term imperial strategy as it applied to North America.

iv. The Emergence of British Imperial Policy.

British imperial policy was designed to further British interests abroad. As such, imperial policy was formulated in response to the challenges posed by the attempt to promote British national interests during the seventeenth, eighteenth, and to a somewhat lesser extent, the nineteenth century. The seventeenth century, in particular, was a formative period during which intense commercial and military conflicts were waged between the emergent nation states of Europe. These conflicts were often played out against the backdrop of colonial expansionism in many diverse regions of the globe.

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[79]Juricek, *supra* note 63 at 507, as quoted in Lester, *supra* note 42 at 80.

[80]Slattery, "H.C." *supra* note 22 at 362.

In its broadest sense, British imperial policy throughout the period was consistently directed towards the maximization of British power and wealth. However, as a reactive exercise, imperial policy formulation occurred in stages in response to the challenges posed by Britain's long term imperial strategy for achieving its national policy objectives. In this regard, it was the need to contain the expansionist ambitions of other European rivals, the requirement to perfect the British Crown's overseas territorial sovereignty claims, and, the desire to establish new centres of commercial and agricultural pursuit to further extend Britain's sphere of influence abroad, which drove British imperial policy in its formative period.[81]

Nevertheless, the "real masters of North America" were the Aboriginal peoples whose "significant military capabilities" commanded both fear and respect among the settlers whose scattered communities on the Atlantic seaboard were extremely vulnerable to attack.[82] In this regard, the English were no better off than the French, the Swedes or the Dutch. However, while the physical survival of the colonists dictated a policy which maximized the potential for peaceful coexistence with the native population, commercial success in the highly competitive fur trade demanded much more. The viability of the colonies as profit-making ventures was premised on their ability to secure an abundant,

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[81]Prior to 1660 these claims might more accurately described as claims to *dominium* rather than sovereignty. Lester, *supra* note 42 at 53, refers.

[82]Slattery, "H.C." *supra* note 22 at 361,363.

dependable supply of pelts. European access to furs, in turn, depended on the active cooperation of the Aboriginal population.[83] It was for this reason that:

> [t]he imperial powers were ... obliged to maintain extensive sets of diplomatic relations with native American peoples, to enter into alliances, sign treaties, and exchange gifts. Incoming Europeans often did their best to secure some authority over the indigenous groups they dealt with. However frequently they were in no position to do this, and it was some time before the situation changed.[84]

In short, to be competitive as a colonizer and a key player in the lucrative fur trade, Britain had to pursue an imperial policy of dealing with the native population which was at least as fair and principled as that being followed by her closest European rivals. For example, if all her North European rivals, who subscribed to the dominative code of territorial acquisition, were prepared to negotiate for the cession of lands currently occupied by Aboriginal groups in order to perfect their own territorial claims, then Britain would have to follow a similar strategy, even if she officially denied doing so back in Europe. The seeming contradiction can best be explained as one of the "interesting complications" which would arise from "the coexistence and interaction" of the European and North American spheres of influence.[85]

With a view to engendering uniformity and stability in its commercial and colonization efforts abroad, Britain would eventually come to develop a body of rules and

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[83] *Ibid.* at 362. As Slattery goes on to point out, "the Indian nations were not viewed simply as obstacles to European penetration. During the seventeenth and eighteenth centuries in particular, they were valued as trading partners and also as military allies in struggles with rival Christian powers".

[84] *Ibid.* at 363.

[85] *Ibid.* at 363.

principles which would govern the application of municipal law in its new colonies and settlements throughout the world. In this regard, it is important to appreciate the impact which imperial policy would have on the development of the legal principles which would help shape and define our modern common law notions of Aboriginal title, as well as its influence on the structure and substance of the historic relationship which would come to develop between the Aboriginal peoples of Canada and the Crown. At the same time, it is crucial to recall that the evolution of British imperial policy, and its attendant rules and principles, was at best, a reactive exercise. Indeed, at the outset, and for some time thereafter, imperial common law was ill prepared to "confront the issues deriving from colonization".[86] Therefore, in the early years of settlement, the task of formulating Aboriginal policy was largely left to the colonists. They were chiefly influenced by the "actual circumstances of life in North America", "convenience" and their own notions of "equity".[87] Significantly, the policy initiatives which the colonists adopted would prove to have an enduring quality.

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[86]The task of formulating a uniform set of legal rules and principles which would, in time, come to be known as imperial common law, was very much a work in progress when contact was first made between the Europeans and the Aboriginal peoples of North America. As J.Y. Henderson, *supra* note 54 at 191, points out, in that period common law lawyers were "struggling to develop a national law and preoccupied with the issue of where sovereignty resided within England". As a result, they "had little interest in the law of nations and no theory or doctrines of law".

[87]see Slattery, "U.A.R." note 8 at 736-7.

v. Conquest, Settlement and the Myths and Misconceptions of Early Colonial-Aboriginal Relationships.

When European fisherman and explorers began arriving in North America their first contacts were with those Aboriginal groups which inhabited coastal areas.[88] For their part, these early European adventurers do not seem to have appreciated that North America was inhabited by a vast number of politically and culturally distinct Aboriginal groups. From such contacts, which were often superficial and acrimonious, the belief grew that the Aboriginal peoples "lacked any identity that required recognition or rights which were entitled to respect".[89]

To some extent, such notions might be explained by the fact that, in the early seventeenth century, European diseases had "drastically reduced" Aboriginal populations in the region which now comprises the north-eastern part of the United States, the lower Great lakes, and parts of southern Quebec. In the areas hardest hit, the sudden population

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[88]For the most part, the process of establishing English colonies began on the eastern seaboard of what is now the United States. Therefore, it is these settlements - and in particular the colonies of New England and Virginia - which furnish us with our earliest impressions of the historic roots of the relationship, which would, in time, develop between the Crown and the Aboriginal inhabitants of North America.

[89]Green, *supra* note 52 at 17. Ironically, the nomadic Beothuk were one of the first Aboriginal societies which were encountered by the English. One might speculate how it is possible that stereotypical notions concerning Aboriginal peoples, as so-called "wandering hunters with no more attachment to the land than wild animals", might easily have formed from such early contacts. Indeed, "[i]t was from the Beothuk custom of painting their bodies with a red ochre that the terms "Red" Indian and "Red skin" were derived". See Sealey, *supra* note 26 at 2.

drop fragmented social and political institutions.[90] The destabilizing effects of these so-called "virgin soil epidemics", would, in time, be felt by most, if not all, North American Aboriginal groups.

When the first English settlers arrived in Massachusetts in 1620 the land appeared largely uninhabited as a result of a devastating plague which had decimated Aboriginal populations in that area in 1616 and 1617.[91] In this regard, it has been suggested, by at least one historian, that New England, whose previously large Aboriginal population had practiced "sophisticated forms of agriculture", had effectively been rendered a "widowed

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[90]The far-reaching consequences of such epidemics is only now being fully appreciated. In this regard, a recent study of the epidemics in Huronia and Quebec of the 1630s and 1640s, supports the conclusion that the effects of "[t]he epidemics and the associated famine and depopulation were unprecedented in the losses sustained"; moreover, they were perceived as "unprecedented" in their consequences. In Huronia, it is estimated that a cumulative depopulation of 69.4 per cent would have resulted from three separate epidemics which struck the area in 1634, 1636 and 1639. "This ongoing disaster influenced beliefs, cultural confidence and world view." S. Johnston, "Epidemics: The Forgotten Factor in Seventeenth Century Native Warfare In the St. Lawrence Region." in B.A. Cox, ed., *Native People, Native Lands: Canadian Indians, Inuit and Metis*. (Ottawa: Carleton University Press, 1987) at 15, 21 and 28.

[91]T. Morgan, *Wilderness at Dawn: The Settling of the North American Continent*. (New York: Simon & Schuster, 1993) at 139. Morgan guesses that this plague originated with the European fishing parties. One witness to the aftermath, Edward Winslow, reported that "[t]he savages had died like rotten sheep", struck down so quickly that they could not "bury one another; their skulls and bones we found in many places lying still above the ground, where there houses and dwellings had been". E. Arbor, *The Story of the Pilgrim Fathers* (London, 1897), as cited by Morgan at 140.

land".[92] In short, British perceptions were, to some extent, formed by an image of Aboriginal society which, in some areas, had virtually ceased to exist.[93]

British perceptions were also shaped by self-interest. If a land was "'uninhabited dessert', Englishmen going abroad to occupy it took their law with them 'as their birthright'".[94] As all land had to be held by some 'higher authority' the question of the sovereignty over vacant land could easily be resolved in favour of the colonists' jurisdictional sovereign - the King of England.[95] In 1610 this logic would be applied to the

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[92]Francis Jennings, *The Invasion of America* (Chapel Hill: Univ. of N. Carolina Press, 1975) at chs 2-5, as cited in Lester, *supra* note 42 at 47.

[93]For the Pilgrims who would take up residence there, and for the Puritans who would shortly follow them, the visitation of pestilence upon the Aboriginal peoples appeared to be evidence of divine approval. As one Puritan would observe: "[i]f God were not pleased with our inheriting these parts ... why did he drive out the natives before us? And why doth he still make room for us, by diminishing them as we increase?" Reproduced in A.T. Vaughan and E.W. Clark, eds., *Puritans Among the Indians* (Cambridge: Cambridge Univ. Press, 1981), as quoted in Morgan, *supra* note 91 at 172.

[94]J.Y. Henderson, *supra* note 54 at 191, quoting a legal opinion by Lord Coke dated 1607. By the early eighteenth century, the principle was firmly entrenched in imperial common law. For example, in an anonymous Privy Council opinion of 9 August 1722, 2 P.Wms. 75, the "settled" law on the subject was expressed in the following terms: "[i]f there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the law of England". Opinion quoted in M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw* v. *British Columbia*." (1992) 17 Queen's L.J. 350 at 359.

[95]J.Y. Henderson, *supra* note 54 at 191, attributes this conclusion to the insights of Coke and the "fragmented medieval thoughts of common law". The principle is typically referred to as the "simple settlement rule". As Slattery, *L.R.I.C.P. supra* note 20 at 21, points out, the distinction between the occupation of uninhabited lands on the one hand and conquest (or cession) on the other, would not be made until 1693 and the decision in *Blankard* v. *Galdy* (1693), 91 E.R. 356 (K.B.)[hereinafter *Blankard*]. In that case, Holt C.J. held that, while English law would apply immediately where English settlers occupied uninhabited lands, English law would only replace the laws of a conquered people where

island of Newfoundland.[96] Nevertheless, the English settlers in New England quickly came to appreciate that the land was not entirely vacant, a fact of which their counterparts in Virginia were already keenly aware.

The Virginia colonists had arrived in Chesapeake Bay, in 1607, in the midst "of one of the most heavily populated Indian communities on the Eastern Seaboard".[97] Despite evidence that the Aboriginal groups of this area practiced agriculture, and had formed a sophisticated political alliance comprising some thirty-two tribal groups,[98] the reports which were circulated in England seem calculated to downplay such cultural achievements. An extract from an idyllic account of life in Virginia, which was published in 1609, contains a typical example of the sort of image which was cultivated back home in England:

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the conqueror or his successors declared so. Of course, by the time this legal opinion had been widely accepted, as a principle of British imperial common law, English domestic law was already well established in those North American colonies which had been acquired by conquest or cession earlier in the seventeenth century.

[96]After affirming that the island "remayneth soe destytute and soe desolate of inhabitance that scarce any one savage p'son hath in manye yeares byn seene", King James I couched the justification for his sovereign claim over Newfoundland in the following terms: "by the lawe of nature and nations wee maye of our Royall authoritie possease our selves and make graunt thereof without doeing wrong to any other Prince or State considering they cannot instyle p'tend any Sovaignetye or right therevnto in respecte that the same remayneth soe vacant and not actually possessed and inhabited by any Christian or any other whomsoever". See Patent Roll 8 James I, Part VIII, No. 6. as quoted in Slattery, *L.R.I.C.P. supra* note 20 at 20.

[97]Morgan, *supra* note 91 at 111.

[98]*Ibid.* at 111.

> it is likely true that these savages have no particular property or parcell of that country, but only a generall residence there as wild beasts have in the forest.[99]

Such reports were obviously designed to encourage immigration on the basis that the land in Virginia was being under-utilized.[100] In this regard, the "myth of the savage", or "wild Indian", would serve as the rationalization which would justify the forceable seizure of Aboriginal territory and the expulsion of the Aboriginal groups who lived there.[101]

Indeed by 1622 all out warfare had erupted between the Aboriginal peoples of Virginia and the colonists. With the Crown's encouragement and blessing, the colonists embarked on a policy of total destruction which had the effect of clearing the James River watershed of its Aboriginal inhabitants.[102] From such incidents the idea would develop

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[99] *A Good Speed to Virginia*, excerpt reproduced in C. Horton, *The Relations Between the Indians and the Whites in Colonial Virginia* (M.A. Thesis, University of Chicago, 1921) at 20, as quoted by Green, *supra* note 52 at 18.

[100] The French were also guilty of negative stereotyping with respect to the Aboriginal peoples of Quebec. In this regard, the letters and reports of the Jesuit fathers "tend to give a one-sided view of events since they were used to impress and inform people in Europe and to encourage a flow of both men and money to the mission fields. ... In order to accomplish this, the writings showed the glory of the priesthood at work saving souls, treated the Hurons as meek, humble people needing the help of the church and depicted the Iroquois as Satan incarnate. ... Great stress was put on the torture practices of the Iroquois without attempting to view them in a cultural and historical context." Sealey, *supra* note 26 at 3-4.

[101] "The 'savages' were not utilizing the land properly, therefore, it was not sinful to remove them from the land by any means possible." *Ibid* at 18.

[102] A communique from London, dated 1 August 1622, served as an open invitation to wage unrestricted warfare by "surprising the Indians in their habitations, intercepting them in their hunting, burning their towns, demolishing their temples, plucking their wares, carrying away their corn, and depriving them of succor or relief". The letter is reproduced in S.M. Kingsbury, *ed.*, *supra* note 70, as quoted in Morgan, *supra* note 91 at 131-2. As Morgan notes, the Aboriginal peoples of the region were either killed or forced further inland.

that British sovereignty over the lands previously occupied by the indigenous peoples of Virginia, and other parts of North America, had been acquired by conquest.[103] Such a characterization would not be without its legal consequences.

In this regard, by the early eighteenth century, a commonly held legal view among British common law jurists, would be that:

> Where the King of England conquers a country ... he may impose upon the [conquered people] what laws he pleases. But until such laws are given by such conquering prince, the laws and customs of the conquered country shall hold place... .[104]

Nevertheless, in the early seventeenth century, the law still maintained the feudal distinction between the conquest of a Christian and an infidel kingdom. The dominant view was that the laws of conquered infidels, which were "not only against Christianity but against the law of God and of nature", were immediately terminated following a conquest.[105] Chief Justice Holt, of the Court of King's Bench, took a slightly more

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[103]Holt J.'s judgment in *Smith* v. *Brown* (circa 1702-5) 2 Salk. 666; 91 E.R. 566 (K.B.) is generally cited in support of the proposition that the sovereignty of Virginia was acquired through conquest. For the more general proposition, see Slattery, *L.R.I.C.P. supra* note 20 at 39 where the author asserts that Holt tended to "view the American plantations as conquests". Slattery (p.37) also points to the broad grant of legislative powers in the North American Charters as reflecting "the conviction that the Crown initially held in its American dominions powers as extensive as those (according to *Calvin's Case*) possessed in conquests".

[104]This is a 1722 recapitulation of what is now generally referred to as the "simple conquest rule". See anonymous P.C. opinion, *supra* note 94 at 75, quoted in Walters, *supra* note 94 at 360.

[105]*Calvin's Case* (1608), 77 E.R. 377 at 397-8.

relaxed view of the so-called "simple conquest rule" in his 1683 decision in *Blankard* v. *Galdy*, wherein he stated that:

> in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity.[106]

In the North American context, such legal views must have struck a responsive chord among the colonists, who with the backing of their Royal Charters, had, in practice, always governed themselves as if Aboriginal custom and practice were irrelevant.[107] In Virginia, in particular, the image of the Aboriginal North American, as a "savage infidel", served to rationalize and justify the introduction of English law, together with the English land tenure system, into colonial life. In this regard, the comments of colonist and lawyer William Fitzhugh, are illuminating. In 1683 Fitzhugh would explain that:

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[106]*Blankard*, *supra* note 95 at 357. By 1722, the Privy Council had adopted the views advanced in *Blankard*, with the notable exception that where the laws of the conquered infidel state were rejected or silent, it was "the laws of the conquering country" which were to apply. See anonymous P.C. opinion, *supra* note 94 at 76, as quoted in Slattery, *L.R.I.C.P.* *supra* note 20 at 18.

[107]The House of Burgesses in Virginia, which was the "first legislative assembly convened on the North American continent", was called to assembly on 30 July 1619, just prior to the military campaign of 1622. The Pilgrims invented their own "'civil body politic' able to enact laws" while still onboard the *Mayflower* in November of 1620. Inasmuch as they were outside the geographic bounds set out in their Virginia Charter, the form of government which resulted was "without royal parchment or seal". Morgan, *supra* note 91 at 127,139.

> We have no Original Laws amongst us derived from the Natives here, for we found them at our first coming ... so barbarous & rude that they had no other direction & Government amongst them but the Law of Nature.[108]

Given what we now understand about Aboriginal society, there are at least two other possibilities which might explain the decision to adopt the English legal system, in Virginia, and elsewhere in British North America. On the one hand, the colonists may simply have concluded that Aboriginal groups lacked laws or internal political structures because they existed in a form which was unintelligible to them. Alternately, they may have incorrectly assumed that British law would follow them wherever they settled.[109]

In any event, in Virginia the potential legal implications of the simple conquest rule were rendered moot, when, during the war of 1622, the colonists drove out the Aboriginal groups who lived along the James River. The Aboriginal presence having been effectively terminated, English law could expand to fill the void just as it would have had the territory, which the settlers now occupied, originally been "discovered" in an uninhabited state.[110]

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[108]Slattery, *L.R.I.C.P. supra* note 20 at 24.

[109]*Ibid.* at 25-7 where Slattery refers to this as "an adaption of the ancient concept of personality of laws, whereby the laws of a national group adhere to its members wherever they happen to be located, so as to govern their internal affairs". He argues that the principle was only intended to apply to colonies "planted in uninhabited lands". Slattery points out that the notion was not put to rest in any definitive sense until 1774 and Lord Mansfield's decision in *Campbell* v. *Hall* (1774), 1 Cowp. 204, Lofft. 655, 98 E.R. 848 (K.B.), where at 208-9 (1 Cowp) he stated that: "[a]n Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives".

[110]*Ibid.* at 27. Slattery points out that this is exactly how Lord Mansfield viewed what happened in Jamaica when, following the British conquest of 1655 and the departure of the previous inhabitants, the English established their own plantations on the island.

vi. Settler-Aboriginal Relations and the Puritan Purchase Principle.

The forceable conquest of Aboriginal groups in North America appears to have been the exception rather than the rule. For their part, the Puritans of New England were ill-equipped and ill-disposed to wage unrestricted warfare against the Aboriginal groups they encountered as they began to explore further inland. They quickly came to appreciate, what the Crown would not fully comprehend until the mid-eighteenth century, that "Indian relations" posed the "central dilemma of the frontier".[111] To that end, the Puritans would embark on a policy of purchasing the land they required by dealing directly with the individual Aboriginal groups who were in possession of it. In legal terms the Puritan purchase agreements, or cessions, as they came to be known, were "generally assimilated to the legal position occupied by conquests".[112] In other words, they had the effect of incorporating English law into the lands ceded. However, while the underlying title to the lands purchased under this policy would, in time, be seen as having

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[111]Morgan, *supra* note 91 at 171.

[112]Slattery, *L.R.I.C.P. supra* note 20 at 35. Until this time there was little mention of cession in the legal literature, except that which may have followed a military conquest (p.20). As J.Y. Henderson, *supra* note 54 at 192, points out, quoting Blackstone's *Commentaries on the Laws of England (1765)*, (Oxford, 1776) at 1029-32, the meaning of the term "conquest", under English domestic common law, embodied the notion of a voluntary purchase or cession of territory: "What we call purchase, perquisitio, the feudalists called conquest, conquesus, or conquisitio ... though now, from our disuse of the feudal sense of the word, together with the reflections of [William the Norman's] forcible method of acquisition, we are apt to annex the idea of victory to this name of conquest or conquisition: a title which, however just with regard to the Crown, the conqueror never pretended with regard to the realm of England; nor in fact ever had."

inured to the Crown, the policy was proposed by "the colonists themselves" and formulated "independently of the Crown".[113]

Theories abound to explain the motivations for these private purchases. Clearly, some Puritans fervently believed that the Aboriginal groups held a proprietary interest in their lands which had to be properly dealt with as a precondition to English settlement. Puritan essayist Cotton Mather expressed the concern for equity which underscored the policy, in the following terms:

> the good people of New England have carried it with so much tenderness towards the tawny creatures among whom we live, that they would not own so much as one foot of land in the country without a fair purchase.[114]

Such notions may be traced to the views of an influential seventeenth century Puritan cleric, Roger Williams, who was instrumental in promoting the notion of a "fair and honest" purchase of Aboriginal lands,[115] on the basis that "the Indians were its true owners".[116] Indeed, as Puritan settlement spread from the colony of Massachusetts to

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[113]Lester, *supra* note 42 at 39, citing historian W.C. MacLeod, *The American Indian Frontier* (New York: Knopf, 1928) at 196-208.

[114]Reproduced in Vaughan and Clark, eds. *supra* note 93, as quoted in Morgan, *supra* note 91 at 171. By modern standards, Mather's comments might also be seen as paternalistic if not racist. In this regard, the use of the term "tawny creatures", as an ethnic epithet, reflects a contemporary view of Aboriginal peoples as "savages", albeit "noble" ones. Of further note, Mather does not address the troublesome issue of the "fairness" of some of these early purchases insofar as the adequacy of the consideration paid is concerned.

[115]Lester, *supra* note 42 at 44, points out, with reference to historian Max Savelle, *The Origins of American Diplomacy* (New York: Macmillan, 1967) 194-205, that "[t]hrough the 17th and into the 18th centuries, probably because of Roger Williams's influence, the notion grew that the Indians were sovereign and owners of their lands".

[116]*Ibid.* at 39, citing MacLeod *supra* note 113 at 196-208.

Connecticut, New Haven and beyond, a general consensus seems to have emerged throughout New England that Aboriginal peoples had rights which the colonists were obliged to respect.[117]

Some of the credit for the widespread and enduring nature of the Puritan's Aboriginal policy may also be attributed to the fact that the Aboriginal groups themselves had definite views concerning their territorial interests which had to be taken into consideration.[118] While these views obviously differed from those which the Europeans held, they clearly impressed elites in the Puritan theocracy. As Puritan Edward Winslow noted: every "sachem" knows "how far the bounds and limits of his own country extend; and that (which) is his own proper inheritance".[119]

No doubt Puritan policy was also shaped, to a certain extent, by pragmatism. The Puritan's immediate neighbours, the Dutch of the Connecticut River Valley, pursued a policy of purchasing Aboriginal land. In this formative "period of rivalry among small-scale colonial settlements" the English had to remain competitive.[120] Furthermore, the Puritans' had to balance their expansionist ambitions against the overriding need to insure their future security and stability.[121] In this regard, a failure of their Aboriginal policy

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[117]*Ibid.* at 44, citing Savelle *supra* note 115 at 202-5.

[118]Morgan, *supra* note 91 at 171.

[119]Reproduced in Vaughan and Clark, eds. *supra* note 93, as quoted *Ibid.* at 171.

[120]Lester, *supra* note 42 at 39, citing MacLeod *supra* note 113 at 196-208.

[121]Slattery points out that "Native Americans were jealous of their independence and quick to avenge the intrusions on their lands and offenses against their persons. Unless the aboriginal peoples could be conquered, a hazardous enterprise at best, their

could have disastrous consequences for the isolated and vulnerable English settlements scattered along the frontier.[122] In the climate of "permanent crisis" which persisted along the frontier, it was important to be able to rely on the support of key tribal units.[123] A policy of fair dealing was one means of ensuring that Aboriginal groups remained receptive to pleas for assistance, particularly in time of crisis.

Those back in England evidently preferred to believe that the Puritan policy of "fair dealing" emerged "out of Prudence and Christian Charity" rather than from any "want of sufficient title from the King".[124] As we have seen, the Crown's "official position" may well have been strongly influenced by the diplomatic considerations which prevailed in the European sphere of influence. Nevertheless, Professor Slattery suggests

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cooperation and consent were necessary for sufficient land to be obtained for white settlement and held in safety." Slattery, "H.C." *supra* note 22 at 361-2.

[122]A contributing cause of the celebrated Pequot attack on the town of Weathersfield, in 1637, was the townspeople's failure to live up to an early land cession agreement which was to have allowed a Pequot Chief to continue to reside on his traditional lands after they had been sold. Morgan, *supra* note 91 at 182.

[123]War between the English, on the one hand, and the Pequot and Narragansett tribes, on the other, erupted in 1636 in Massachusetts and Connecticut and would rage for two years along the Puritan frontier. The ultimate success of the English may be attributed, among other things, to the assistance they received from their Indian allies, most notably those of the Mohegan tribal group. The conflict resulted in a military defeat for the Pequot who were either killed, made slaves or driven into exile. Puritan settlers subsequently occupied the Pequot's lands. This sad chapter in the history of English-Aboriginal relations serves as a rare example of the military conquest of an Aboriginal group in New England. See *Ibid.* at 179-185.

[124]A reference to a 1675 English legal opinion written by John Holt and others, contained in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, vol XIII, (Albany: Weed, Parsons & Co., 1856-61) at 486-7; as quoted in Slattery, *L.R.I.C.P.* *supra* note 20 at 115.

that there was an undercurrent of recognition for the view "that the rule holding the Crown to be the sole source of title to land is not always applicable in America".[125]

The Puritan purchase policy also reflects the climate of "mutual bewilderment" which characterized early relationships between the colonists and Aboriginal groups; relationships which proceeded from the oft-times joint "assumption that both societies shared common notions of the 'proper' way to relate to and treat the universe, other people, and one's own mental and spiritual health".[126] The assumption was of course a false one. The legal or equitable assumptions underlining such purchases would probably have made little sense to the Aboriginal peoples of North America who considered themselves the "stewards" of the land. To them, the conduct of the English was an anathema:

> The arrival and settlement of Europeans, therefore, who felled and burned the trees, polluted the waters, and fenced vast areas was akin to the raping of Mother Earth. These two diametrically opposed beliefs concerning the natural environment - preservation versus progress and settlement - with the resultant and ongoing clashes over land issues and land claims, have remained the dominant feature of Indian-white relations ... from the moment of contact until present times.[127]

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[125]*Ibid.* at 117. Slattery refers to a 1731 legal opinion, prepared by Yorke and Talbot, and reproduced in G. Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence*, vol I, (London: Reed and Hunter, 1814) at 109-10, which, in upholding the land rights of a group of individuals who had effected a private purchase of Indian lands, concluded, in effect, that: "the same regularity could not be expected in land matters in the New World as in England".

[126]Ross, "Foreword" in Ross, *supra* note 28 vii at xxv, suggests that the mutual assumption is only now being proven wrong.

[127]R.S. Allen, *His Majesty's Indian Allies: British Indian Policy in The Defence of Canada, 1774-1815*. (Toronto: Dundurn Press, 1992) at 13.

In short, "[w]hat the colonists regarded as simple settlement the Indians saw as an invasion".[128] Indeed, many cession agreements would embody terms which required that Aboriginal peoples remove themselves to "Indian territory", beyond the limits of English settlements.[129] Such terms were generally unnecessary inasmuch as their voluntary removal would generally follow in due course anyway.[130] However, for those Aboriginal groups who might have wished to remain on their land, "every such transaction was effectively a dispossession".[131] As historian Francis Jennings would point out:

> Property and liberty were synonyms in the seventeenth and eighteenth century. When the Indian was dispossessed of his land, he lost all hope of finding any niche in the society called civilized, except that of servant or slave.[132]

vii. The Crown Intervenes.

Between 1634 and 1663, most of the New England colonies would pass legislation to place limitations on a private person's ability to effect a direct purchase of Aboriginal

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[128]Lester, *supra* note 42 at 49, citing Jennings, *supra* note 92 at 145.

[129]However, in some cases, "[t]he Indians sold the land but delayed their departure with clauses giving them the right to fish, hunt and gather nuts, which led to further complications". Morgan, *supra* note 91 at 171.

[130]Slattery, *L.R.I.C.P. supra* note 20 at 41-2 points to Blackstone's *Commentaries on the Laws of England* of 1803, St. George Tucker, ed., vol. I, at 382-4, as a "mature assessment of the position of the American plantations". In this American Edition, Tucker took the position that, while land for the colonies was acquired both through conquest and cession, the "settlers were citizens of the acquiring state, the indigenous population having uniformly withdrawn themselves from the conquered or ceded territory". On this basis, Tucker concluded that the settlers were free to fill the void with English common law.

[131]Lester, *supra* note 42 at 49, citing Jennings, *supra* note 92 at 145.

[132]Jennings, *supra* note 92 at 145, quoted *Ibid.* at 49.

lands. This was accomplished by means of specific provisions which required that all such purchases first be approved by colonial officials.[133] Interestingly enough, the rationale for such restrictions does not appear to have been related to the notion that all title must flow from the Crown.[134] The limiting provisions were simply good policy.

In this regard, the legislative provisions served to mitigate the potential for instability in the colonial government's relations with neighbouring Aboriginal groups by centralizing control over land purchases.[135] However, this was not the only mischief which the colonial legislators sought to control. Against the backdrop of the vague geographic boundaries contained in most Charters, and the territorial claims of rival states, the unregulated establishment of new English settlements could inflame relations with the colonists of the other European principalities which had established a presence in the region.[136] It could also exacerbate the tension which already existed between the

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[133]Slattery, *L.R.I.C.P. supra* note 20 at 112-17, 125.

[134]Indeed, as J.Y. Henderson, *supra* note 54 at 194, points out, "the New England Puritans considered that it was far more important to hold the land under a tribal deed by 'fair contract or just conquest' than under English law".

[135]Slattery, *L.R.I.C.P. supra* note 20 at 113, quotes, as an example, legislation enacted by Massachusetts in 1701, the preamble of which, in referring to similar Acts passed by the colony in the seventeenth century, offered the rationale that the controls had been necessary to ensure that the Indians "might not be injured or defeated of their just rights and possessions, or be imposed on and abused in selling and disposing of their lands". *Acts and Resolves, Public and Private, of the Province of Massachusetts Bay* [1692-1780], vol I, (Boston: 1869-1922) at 471-2,

[136]An example of this type of conflict, occurred in November 1654 when settlers from Connecticut Colony, who had previously negotiated a cession of lands from a local Aboriginal group, attempted to settle on lands the Dutch claimed by reason of an earlier agreement of cession. The Dutch held twenty-two of the English settlers in custody until they agreed to submit to Dutch authority. The status of that settlement would strain

various English colonies.[137] Therefore, by regulating the sale of Aboriginal lands, such legislation served to check the pace and direction of future outward settlement.[138]

By the early eighteenth century, the nascent colonial governments, which had been established by the Crown, began articulating the prevailing legal view then emanating from London, that: "no English subject can plant in an English colony without leave of the Crown or its assignees".[139] This legal explanation began to find its way into colonial legislation inasmuch as it dove-tailed quite nicely with the policy rationale previously offered in support of local attempts to regulate land cession agreements. In 1717 Connecticut enacted legislation which is representative of this trend. The legislation provided that:

> all lands in this government are holden of the King of Great Britain as the Lord of the fee; and that no title to any lands in this colony can accrue by any purchase

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relations between Connecticut and New Netherlands until the English subjugated the Dutch colony of New Netherlands on 27 Aug 1664. H.C.W. Melick, *The Manor of Fordham* (New York: Fordham University Press, 1950) at 11. Of note, Connecticut did not enact laws to control private purchases of Aboriginal lands until 1663 (Slattery, *L.R.I.C.P. supra* note 20 at 113, refers).

[137]The rival claims of New York and Connecticut to the settlement at Hemstead, Long Island is illustrative of the sort of internecine rivalry which existed between English colonies. See M.F. Flint, "*Long Island Before the Revolution*" (New York: Friedman, 1967) at 304-14.

[138]In the seventeenth century, "the settled population, quite aside from further immigration, was doubling approximately every twenty-seven years". B. Bailyn *et al.*, *The Great Republic: A History of the American People*, vol. I, (Lexington, Mass: D.C. Heath & Co., 1977) at 87.

[139]Slattery, *L.R.I.C.P. supra* note 20 at 116-7, citing Holt's 1675 opinion as reproduced in O'Callaghan, *supra* note 124 at 486-7.

> made of Indians on pretence of their being native proprietors thereof, without the allowance or approbation of this Assembly.[140]

The appearance of such language may also serve to signal that the local governments, whose colonists had been engaged for almost a century in perfecting English territorial claims to North America, now considered that enough of the area referred to in their Crown Charters had been acquired and possessed to permit them to legitimately advance a limited sovereignty claim on behalf of the Crown. Such claims were "limited" in the sense that they appear to have been restricted to lands "in" the government; or, in other words, the lands over which the colonial governments exercised their civil jurisdiction.[141] Other policy initiatives would have to be advanced to extend British sovereignty to include the lands still occupied by Aboriginal groups who had neither ceded the lands they still occupied nor had been conquered by force of arms.

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[140] J.H. Trumbull and C.J. Hoadley, eds., *The Public Records of the Colony of Connecticut* [1636-1776], vol V, (Hartford, 1850-90) 4 at 30; as quoted in Slattery, *L.R.I.C.P. supra* note 20 at 113.

[141] Under modern international law principles they may have been able to advance a more complete claim. In this respect, Green cites *Island of Palmas* (1982) 2 U.N. Rep. Int'l. Arb. Awards, 831, for the proposition that "sovereignty cannot be exercised in fact at every moment and on every point of a territory". As to the origins of this rule, Green points to the works of various "positivist" writers, including Textor, who asserted, as an established state practice, that: "[i]n obtaining possession of an estate there is no need for the party to walk over every particular bit of soil, it being enough that he should enter on some part of it with intent to possess". Green *supra* note 52 at 64-5, quoting J.W. Textor, *Synopsis Juris Gentium* (1680), ch. VIII. tr. J.P. Bate (Washington: Carnegie Classics, 1916) at 66.

viii. Treaties of Peace, Friendship and Offers of Protection.

The commencement of the process of treaty making is deemed particularly significant inasmuch as it heralds the start of a period of direct involvement, by imperial authorities, in the process of formulating Aboriginal policy. This movement has been described as "the centralization of its [the Crown's] relationship with American nations into treaty commonwealths".[142]

The sudden interest of the British Crown in Aboriginal affairs hardly seems coincidental. By 1663 the French Crown had assumed full control over the rights previously granted private trading associations in New France and had issued instructions to its colonial authorities to consolidate its hold over French possessions, "make fresh discoveries and found new colonies".[143] To that end, France would embark on a vigourous round of exploration which would lead to claims being advanced with respect to the Lake Superior region in 1671, and the Mississippi River basin in 1674.[144] This was part of,

> an overall strategy designed to make France into a major imperial power in Europe, using the colonial system to strengthen the economy of France and

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[142]J.Y. Henderson, *supra* note 54 at 196.

[143]Slattery, *L.R.I.C.P. supra* note 20 at 88 citing the 1663 commission given Prouville de Tracy, the Kings Lieutenant-General in South and North America (eng transl. in O'Callaghan, *supra* note 124, vol IX, 17 seq.). Slattery points out that, the 1663 Commission also gave de Tracy the authority to "seize new countries and erect colonies, and in general to extend the King's boundaries as far as possible, with full power to establish the Crown's authority, and to subdue and exact obedience from the local peoples".

[144]D.J. Bercuson, *et al.*, *Colonies: Canada to 1867* (Toronto: McGraw Hill Ryerson Ltd., 1992) at 47.

establish the strength and authority of its monarch.[145]

As previously noted, France adhered to the dominative code of territorial acquisition. As such, her territorial claims in North America were premised on actual settlement or control. In reality however, French settlements were comparatively small in size and number.[146] Therefore France sought to extend the span of her territorial control through the Aboriginal groups with whom she had already formed trading associations. This, she believed, "could best be accomplished by cementing links with independent groups through treaties of friendship and alliance, to be followed hopefully by their acquiescence in the Crown's rule".[147] Indeed, France was able to form military alliances with the Aboriginal groups who inhabited the Illinois River valley during this period. This, in turn, led the French into a sporadic war with the western tribes of the Iroquois Confederacy which lasted from 1687 to 1701.[148]

The English responded in kind to the French strategic initiative by attempting to form their own links with various Aboriginal groups. One practice, which developed in conjunction with the process of treaty making, was that of placing specific Aboriginal

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[145]*Ibid.* at 41.

[146]At this time only about 3,000 French settlers resided in North America. The number of English settlers was approximately 100,000. Furthermore, only about one per cent of the land claimed by France was actually being used by French nationals. *Ibid.* at 46.

[147]Slattery, *L.R.I.C.P. supra* note 20 at 92. He goes on to suggest that "where relations of vassalage were established, it may be inferred that the Indians were considered to hold their lands from the French King and under his ultimate dominion".

[148]Bercuson, *supra* note 144 at 48-51.

groups under the protection of the Crown. As Professor Slattery points out, "the Crown aimed at establishing quasi-feudal relations with Indian peoples, whereby the latter acknowledged the sovereignty of the British Crown, while retaining their original group-identities, leaders, political structures and customs, as well as their lands".[149]

A peace treaty embodying such a provision was concluded between the colonial authorities in Virginia, and various Aboriginal groups, as early as 1646. That treaty contained a provision whereby the Aboriginal signatory acknowledged that he held "his Kingdome from the King's Ma'tie of England". While specific lands were set apart for the continued use of members of the Aboriginal group, "without interruption from the English", another area was reserved for colonial settlement. A more detailed treaty was concluded in 1677. Of note, the 1677 treaty was entered into by special Royal Commissioners, who had been sent from London to Virginia, and whose mandate to conclude a treaty was contained in specific Royal Instructions. After reciting that the Aboriginal signatories "henceforth acknowledge to have their immediate Dependency on, and owne all Subjection to the Great King of England", the treaty went on to provide,

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[149]Slattery, *L.R.I.C.P.* *supra* note 20 at 125. The international law status of such agreements was unclear in the period under discussion. Indeed, as J.Y. Henderson, *supra* note 54 at 201-2, observes, it was not until 1760 that the point was well established under "the law of nations" that these agreements of protection preserved "the international sovereignty of the native governments". At 202-3, Henderson goes on to examine a number of decisions of various courts of the British Empire, citing *R.* v. *Crews, ex parte Sekgome* (1910) 2 K.B. 576 at 619, for the proposition that, unlike an annexation, which results in "the direct assumption of territorial sovereignty. Protectorate is the recognition of the rights of the aboriginal or actual inhabitants of their own country, with no further assumption of territorial rights than is necessary to maintain the paramount authority and discharge the duties of the protecting power."

among other things, that they would be protected "in their Persons; Goods; and Propertyes".[150] In many respect this treaty would serve as the prototype for the later treaties which would follow.[151]

Even where the broader consequences of entering into a particular treaty would not have been apparent, on the face of the document itself, the British were quick to attempt to use any ambiguity to draw conclusions which served to advance their long-term strategic interests. For example, after the British defeated the Dutch in 1664, they were able to persuade the Iroquois to allow them to accede to the terms of the "Two Row Wampum Treaty" of 1643.[152] The terms of that friendship treaty were solidified in 1677 when the concept of a "Silver Covenant Chain of Friendship" was chosen to signify the alliance.[153] Inasmuch as the Iroquois lands separated the English and French settlements, the alliance effectively provided Britain with a buffer zone behind which her colonies and

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[150]Based on an earlier clause, it seems clear that this particular provision was meant to prevent "violent Intrusions of divers English" onto the Aboriginal group's lands.

[151]The 1646 treaty is reproduced in W.H. Hening, ed. *The Statutes at Large: Being a Collection of All the Laws of Virginia from ... the Year 1619*, vol.I, (New York: R & W. & E. Bartow, 1823) at 323-6. The 1677 treaty is set out in Grant and Munro, eds. *Acts of the Privy Council of England, Colonial Series*, vol. I, #1169, at 733-9. All quotes are to Slattery, *L.R.I.C.P. supra* note 20 at 117-119.

[152]Allen, *supra* note 127 at 15, where he goes on to state that the unrecorded Dutch treaty "purportedly stipulated that both the Mohawk (representing the Six Nations Confederacy) and the Dutch were separate but equal, with the two rows of beads symbolizing that neither nation would interfere with the integrity of the other's culture, language, laws, or religious and political systems".

[153]*Ibid.* at 15.

trade would be protected.[154] However, by 1698, the British were attempting to use the treaty to extend Crown sovereignty over the area by trying to convince the Iroquois that "they are and have always been, the subjects of the King of England, they are therefore under the care and protection of the Great King of England".[155]

ix. The Crown-Aboriginal Relationship and the Struggle for Military Domination in the Period 1689-1760.

The contest between Britain and France for supremacy in North America entered a period of intense military activity in 1689 when war between England and France erupted in Europe. In North America the British launched campaigns against Port Royal, Quebec, and Newfoundland. French counterattacks on English settlements followed.[156] While hostilities between the French and English were ended by treaty in 1697, the

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[154]*Ibid.* at 16. Allen, expresses the significance of the agreement in the following terms: "[I]f the Iroquois, who for a time held the military and economic balance of power between France and Britain in North America, decided to switch their allegiance to New France, the French would certainly dominate and control all of North America".

[155]A communication from the Governor of the colony of New York to the mayor of Albany, at Fort William Henry dated 22 August 1698, National Archives of Canada (Ottawa), Record Group 10 (Records Relating To Indian Affairs), vol 2287, file 57 [hereinafter NAC] at 169; as quoted in *Ibid.* at 16. As Allen points out, at p.17, the Iroquois do not appear to have taken such British assertions seriously. He suggests that this "lack of concern was the result of a fundamental misunderstanding between the Iroquois and the British".

[156]The attack on Quebec and Acadia occurred in 1690. While Port Royal was seized, the British did not succeed in taking Quebec. Similarly, the 1696 attack on the French settlement at Placentia Bay was successfully resisted. With the help of its Mi'kmaq allies, the French succeeded in taking control of the whole of Newfoundland for a brief period in 1696. With the assistance of its other Aboriginal allies, the French also launched a series of small-scale raids against the Iroquois, who at that time were allied with Britain. *See Bercuson, supra* note 144 at 49.

Iroquois continued to wage war on the French and their Indian allies for two more years.[157]

Iroquois military successes in the West in the previous century had led to the subjugation of a number of non-Iroquoian Aboriginal groups in the Ohio Valley region. However, as a result of the costly campaigns waged against them by the French and Ojibwa, the Iroquois' hold over the Aboriginal groups of the Ohio Valley had severely weakened by 1701.[158] Seizing on the opportunity, the British persuaded the Iroquois to sign a deed whereby they transferred their "beaver hunting grounds" in the West to the King of England "in trust" and promised to be the Kings "dutifull subjects".[159] In so doing, the British sought to perpetuate the notion of a vast, "ambiguous Iroquois Empire" in the West, in the hope of halting future French incursions into the Ohio Valley and Mississippi River regions.[160]

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[157]By the terms of the European Treaty of Ryswick of 1697, France's claims to Acadia and Hudson's Bay were recognized by England. Similarly, France agreed to acknowledge Britain's possessory claim over Newfoundland. France concluded a separate peace treaty with the Iroquois in 1701, whereby the Iroquois agreed to remain neutral in any future Anglo-French conflict. *Ibid.* at 49.

[158]Allen, *supra* note 127 at 18.

[159]Deed in Trust of the Five Nations of Indians to the King, NAC, *supra* note 155, as quoted in *Ibid.* at 18. From a British perspective, the assumption of subject status had the effect of placing all Iroquois lands under the Crown's jurisdiction. Allen describes this conclusion as having been based on a "fundamental and grievous misunderstanding". He argues that the Iroquois only intended that the King "might be their Protector and Defender".

[160]*Ibid.* at 18-19. As Allen suggests, by giving the Iroquois "subject" status, and by placing their western "beaver hunting grounds" under the Crown's protection, the British wanted to put themselves in the position of being able to argue that such "incursions" constituted a "violation of British territorial and sovereignty rights".

Other European wars involving Britain and France followed in quick succession from 1702 to 1713 and from 1744 to 1748.[161] The wars spilled over into North America where Aboriginal groups were either recruited as allies, with promises of protection, or, sworn to neutrality. The first war came to an end with the 1713 Treaty of Utrecht which, among other things, ceded Acadia to Britain.[162]

The effect of the 1713 cession on the land rights of Nova Scotia's Aboriginal people - the Mi'kmaq - has been the subject of no little debate. Based on France's adherence to the dominative code, with its reliance on real possession or occupation to establish a sovereignty claim, and taking into account the small number of French settlers actually in Acadia, one might well argue that France had only perfected a limited sovereignty claim to Acadia by 1713. If this is the case, then the cession should simply be viewed as transferring lands in respect of which the French could themselves have legitimately advanced a sovereignty claim, together with a preemptive right to attempt to acquire sovereignty over the remainder from those Aboriginal groups who continued to possess it.[163] On the other hand, it seems clear that at least some of the Aboriginal groups in the area had previously submitted to the authority of the French monarch. In this regard, the

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[161]The War of the Spanish Succession and the War of the Austrian Succession (King George's War as it was referred to in North America), respectively. These conflicts are discussed in some detail in Bercuson, *supra* note 144 at 51-2 and 68-70.

[162]*Ibid.* at 51.

[163]Insofar as the property right of the Acadians are concerned, see Slattery, *L.R.I.C.P. supra* note 20 at 132-5, wherein the author concludes that, under the simple conquest (cession) rule, private property rights should have remained in force until altered by a competent authority.

British may well have wanted to assert a more complete sovereignty claim by stepping into the shoes of the French.[164] This would prove impossible given the continued French regional presence in Cape Breton and the loyalty which the Aboriginal groups in Nova Scotia evidently still maintained towards France.[165] The English therefore went about the task of trying to bind the tribes, as vassals, under new treaties of friendship. To that end, the British persuaded some Aboriginal groups to submit to the Crown's authority in 1725

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[164]One might well argue that these bi-lateral agreements, which embodied terms which purported to place an Aboriginal group in a vassal-like status, should be considered terminated when the European signatory could no longer live up to its ongoing obligation of protection. In such circumstances, it would seem that the Aboriginal party should be restored to the legal position it occupied prior to entering into the agreement. In any event, it would have seemed ludicrous to suggest to such groups that the underlying title to lands they still possessed, and were willing and able to defend, could have passed to an enemy which had not defeated them in battle, by virtue of the terms of a European peace treaty to which they had not been a party. The issue arose following the Treaty of Paris of 1783 which ended the American Revolution. A term of that treaty purportedly transferred land to the United States which was possessed by Aboriginal groups which had been allied with the British. The Aboriginal groups in the area were understandably opposed to that term (Allen, *supra* note 127 at 55, refers). In the face of widespread opposition, the American government backed down in 1793, stating: "[w]e now concede this great point; We by the express authority of the President of the United States, acknowledge the property or right of soil of the great country above described, to be in the Indian Nations so long as they desire, to occupy the same. We only claim ... the right to pre-emption, or the right of purchasing of the Indian Nations disposed to sell their lands, to the exclusion of all other White People whatsoever." Speech of the Commissioners of the United States to the Deputies of the Confederated Indian Nations, 31 July 1793 set out in E.A. Cruishank, ed., *Correspondence of Lieutenant-Governor John Graves Simcoe*, vol I, (Toronto: Ontario Historical Society, 1923-31) at 405-9; as quoted in Allen, *supra* note 127 at 80. This conclusion seems consistent with the international law on protectorates which had by then emerged (see note 149, above).

[165]This was a relationship which the English "found impossible to have transferred to themselves for nearly half a century". *Handbook of Indians of Canada* (Ottawa: King's Printer, 1913) at 289. Indeed, for much of this period, a state of hostilities existed between the Aboriginal peoples of Nova Scotia and the British which would have precluded the establishment of such a relationship.

and 1728 by means of treaty provisions wherein delegates from various regional Aboriginal groups agreed to:

> acknowledge His said Majesty King George's jurisdiction and dominion over the said territories of the said Province of Nova Scotia or Acadia, and make our submission to His said Majesty in as ample a manner as we have formerly done to the most Christian King [of France].[166]

In time of peace, the policy of the British Crown, towards the Aboriginal groups with which it was connected, might charitably be labelled "haphazard". Indeed, prior to 1755, and the appointment of Sir William Johnson as Crown agent for the affairs of Indians in the pivotal Northern District, Crown-Aboriginal relations - which were "complicated" by "inter-colonial land rivalries" and a "wrangling disunity" - "fluctuated between the benign and intolerable".[167] Where an Aboriginal group's interests came into conflict with the objectives of the colonial governments, the Crown either sided with the colonies or turned a blind eye. Abuses, particularly those pertaining to land, ran rampant.

One notorious example was the "Walking Purchase" of 1737 whereby lands were fraudulently acquired from the Delaware tribal group by the owners of the proprietary

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[166]Boston Treaty of 15 December 1725 in *Indian Treaties and Surrenders*, vol.II (Ottawa: King's Printer, 1905-12) at 198-9, as cited in Slattery, *L.R.I.C.P. supra* note 20 at 139. At 141 Slattery characterizes this particular treaty "as a prerogative act which confirms that certain indigenous groups are accepted as protected entities and their members as subjects, leaving their internal structure and customs largely intact, but subjecting their relations with the settlers to certain norms".

[167]Allen, *supra* at 12, where he goes on to assert that, prior to 1755, "Indian affairs in the American colonies had been marked by a long, vexing, and generally rudderless period of imperial salutary neglect".

province of Pennsylvania.[168] Realizing that they had been duped, the Delaware launched an unsuccessful protest. With the outbreak of the French and Indian War in 1754, the Delaware sided with the French because they had "been so shamefully dealt with" over the "Walking Purchase".[169]

In 1743, a commission of inquiry was convened in London, to consider a complaint, brought by the Mohegan Indians, which alleged that the colony of Connecticut was attempting to distribute lands that Aboriginal group claimed under various seventeenth century treaties with the Crown.[170] The case, which took 67 years to resolve, provides us with a rare glimpse of contemporary judicial attitudes towards Aboriginal

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[168]Thomas Penn and his brothers had "inherited" the cash-strapped province from his father but lacked the funds to make a fair purchase. Not to be dissuaded, Penn produced a vague deed, that had been executed in 1686, which referred to the purported purchase of a triangular tract of land that ran parallel to the Delaware River and extended "itself back into the woods as far as a man can go in a day and a half". According to Penn, the land had been paid for but never "walked". Four Delaware chiefs agreed to honour the agreement, whereupon Penn produced a map which had been "doctored" to make the area seem much smaller than it actually was. The land was eventually "walked" in 1737 by three of the colonies best athletes, the fastest of which was to receive a five hundred acre bonus. By running, the fastest "walker" was able to cover 60 miles. The purchase is discussed in detail in Morgan, *supra* note 91 at 288-296.

[169]Penn also cheated the winner of the race out of his prize. Ironically, that same man's wife and son were among those killed during a campaign the Delaware launched in 1757 to recover their lands. *Ibid.* at 295-6.

[170]*Governor and Company of Connecticut and Mohegan Indians, by Their Guardians* certified copy book of proceedings before Commissioners of Review 1743 (London 1769)[hereinafter *Connecticut*]. This was actually the third such inquiry into the complaint. The full history of the dispute is discussed in detail in B. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right to Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990) at 41-4.

groups and the nature of the land interest which they were deemed to hold.[171] In the view of the majority of the commissioners, the "Indians" were to be considered a "distinct people" in the absence of evidence tending to establish that they had become subjects of the Crown. Insofar as the status and nature of the Aboriginal land interest is concerned, they held that:

> the Crown looks upon the Indians as having the property of the soil of these countries; and that their lands are not, by his majesty's grant of particular limits of them for a colony, thereby impropriated in his subjects till they have made fair and honest purchase of the Natives.[172]

The peace was again broken in 1754 with the commencement of the French and Indian War.[173] Its immediate cause was the "new and aggressive French policy of constructing a line of frontier posts to connect Lake Erie with the Ohio River".[174] The British colonial militia responded in kind by skirmishing with the French soldiers. The

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[171]The action, which had originally been brought in 1705, would not be resolved until 1772 when the Privy Council confirmed the majority determination of the 1743 commission. The P.C. decision in *Mohegan* v. *Connecticut* is set out in J.H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950) at 425.

[172]*Connecticut*, *supra* note 170 at 126-7, as quoted in J.Y. Henderson, *supra* note 54 at 195. On the facts of the case however, the commissioners ruled against the Mohegans on the issue of the underlying title to the particular lands under consideration. Nevertheless, they did confirm their possessory right to occupy a portion of it.

[173]The war began "unofficially" in North America in 1754 when 800 French troops, under General Duquesne, pushed into the Ohio Valley. They attacked and destroyed a British post, which was under construction, replacing it with a French fort (Fort Duquesne). The Seven Years War (as it was referred to elsewhere) did not officially begin in continental Europe until 1756. It would drag on until peace was imposed under the terms of the Treaty of Paris of 10 February, 1763. Bercuson *supra* note 144 at 70-75.

[174]Allen, *supra* note 127 at 25.

events were viewed with alarm in Britain where Crown officials were reporting that the French:

> are daily Encroaching upon us, and erecting Forts upon the Continent of North America so as to reduce us to a bare narrow possession on the Sea Coast; And for This they think we will not venture a rupture.[175]

The apparent success of the French incursions was also swaying loyalties among the Aboriginal groups who resided in the western region.[176] This alarmed the British who understood well the significance of such a development from the standpoint of perfecting their own regional claims. Rather predictably, the British hurriedly set about strengthening the Crown-Aboriginal relationship.[177]

To that end, William Johnson was appointed, in April of 1755, to administer and manage Indian Affairs in the Northern District.[178] Johnson's task was to inform Aboriginal groups of the King's resolve to "support and protect" those groups who were allied with him and to renew and expand the "chain of friendship". More importantly, he was instructed "to inform the Indians that the King had ordered the prohibition of settlements upon their paternal lands, and to promise redress for tribal complaints and

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[175]Letter of the Duke of Newcastle, Secretary of State for the Southern Department, 15 January 1754, British Library (London), Add. Mss. 32848, folios 85-87; quoted *Ibid.* at 25.

[176]*Ibid.* at 25-6.

[177]As Allen points out, "by the 1750s the looming and final conflict with France for paramountcy in North America turned British vacillation into resolve". *Ibid.* at 12.

[178]A similar appointment was made with respect to the Southern District. The King himself gave his formal approval to these appointments. See *Ibid.* at 25-8.

grievances".[179] This direction served as a formal acknowledgement that the Crown was conscious of the abuses which colonial governments had inflicted on various Aboriginal groups, in relation to their lands, and was serious about preventing such conduct in the future. The wording of the instruction can also be seen as a tacit admission that the Crown's administrators had previously been unable or unwilling to intervene to halt such practices or grant the Aboriginal groups any redress. How is one to view this apparent change of heart? As historian Robert Allen points out, these developments were:

> the direct result of the critical military situation which confronted Britain and her fractious colonies in America during the first years of the last great war for empire between France and England in North America.[180]

Aboriginal groups may be forgiven for maintaining a healthy scepticism towards the sudden interest of the British Crown in their affairs. In fact, like the Delaware people, most of the Aboriginal groups in the Ohio and Upper Great lakes region actively supported the French during this war. Significantly, while the British were able to persuade most of the tribes of the Iroquois Confederacy to "hold fast the covenant chain", only the Mohawk provided a significant military contribution; and, that did not come

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[179]Instructions of Henry Fox, Secretary of State for the Southern Department, to Sir William Johnson of 13 March 1756, in O'Callaghan, *supra* note 124, vol 7 at 76-7; cited *Ibid.* at 28.

[180]*Ibid.* at 28.

until the Battle of Niagara in July 1759.[181] In short, the British had paid dearly for their earlier neglect and the abuses perpetrated by the various colonial regimes.

For their part, the French were not able to capitalize on the advantage which the Aboriginal alliances should have afforded them. They suffered their final North American defeat with the fall of Montreal in 1760. In the end result, "low morale and poor generalship" cost France the war and her possessions in Canada.[182] However, while Britain ultimately emerged victorious, it was left with a serious credibility problem among many Aboriginal groups.

x. The Crown-Aboriginal Relationship between 1760 and 1763.

Imperial policy in North America, in the period immediately following the fall of New France, was shaped by the competing requirement to balance the imperial budget and accommodate the colonists insatiable demand for land. The Aboriginal groups which still occupied their traditional lands were viewed as less of a security threat now that the French had been vanquished. As such, Britain's Aboriginal policy was "intended to reduce Indian expenses in the postwar years whilst at the same time to provide for the orderly and peaceful flow of western settlement".[183] Based on past practice, Aboriginal

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[181]*Ibid.* at 29-30. At p. 27, Allen indicates that the Iroquois "factionalized over how best to preserve and defend the lands of Iroquoia, with the result that the confederacy wavered throughout the war between neutrality, support for the French, and support for the British".

[182]*Ibid.* at 28.

[183]*Ibid.* at 34.

groups might well have cynically concluded that the Crown would only protect their interests to the extent needed to create a stable environment for future settlement. In fact this is exactly what appears to have happened.

At wars end local British military authorities tried to limit the practice of giving gifts to the Aboriginal groups, with whom they had previously been allied, in order to reduce expenses. This shortsighted act of frugality alerted many Aboriginal groups to the transparent nature of Britain's war time promises and assurances. For example, in May of 1762, one colonial trader reported, that the "Indians" responded to the policy change by querying "ye reason why we always was calling them to council during ye war and giving them presents and now take no notice of them".[184] Concluding that the Aboriginal groups did not pose a serious military threat, British General Amherst dismissed such reports.[185] Therefore, while some local officials might have wished "to keep the Indians pacified", if only to further the objects of settlement, there seems to have been a general inability or unwillingness to deal with Aboriginal concerns in a way which would have been meaningful to the Aboriginal groups themselves.[186]

In contrast to the official indifference which seems to have pervaded Crown-Aboriginal relations in this period, imperial authorities were becoming very concerned

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[184]Comments of trader George Croghan in Morgan, *supra* note 91 at 339, citing H.H. Peckham, *Pontiac and the Indian Uprising* (Princeton, N.J.: Princeton University Press,1947).

[185]*Ibid.* at 337. In fact, the cutbacks were part of Amherst's "personal plan to subjugate the frontier by reducing Indian expenses". See Allen, *supra* note 127 at 32.

[186]Bercuson, *supra* note 144 at 122.

with the increasingly independent minded attitude of the colonists.[187] The colonists' attitude was rooted in the "impulse" for population growth and the corresponding demand for new land.[188] With the removal of the French threat, "the growing population, fed by a host of new immigrants from abroad, was pushing farther into the West".[189] The colonial administrators did not appear to be up to the task of controlling the tide of westward migration. Instead, they "seemed usually on the defensive, constantly reacting to new pressures from the Americans rather than developing any positive policy".[190] Their failure to seize the initiative would have its greatest impact on the Aboriginal groups who would soon bear the brunt of the expansionist movement.

The immediate response among Aboriginal groups to these developments was predictable. The application of the cost saving measures and the encroachment on their traditional lands by "backwoodsmen and traders", who practiced "every low Artifice to Overreach and cheat", both "alarmed and provoked" them.[191] These concerns were felt

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[187]"The recent war had highlighted the extent to which the American colonists had slipped into assumptions of political and constitutional autonomy, operating beyond the control of Great Britain." See *Ibid.* at 120.

[188]This was a period when "dynamic and competitive impulses long at work in American society unexpectedly accelerated and intensified". Bailyn, *supra* note 138 at 235.

[189]*Ibid.* at 235.

[190]Bercuson, *supra* note 144 at 117-119. As indicated in Bailyn, *supra* note 138 at 236: "[t]he explosion of migrants bewildered governments, confused boundary lines, and put pressure on the existing western colonists".

[191]Excerpt from a communication signed by Wyndham, Secretary of State for the Southern Department, dated 12 December 1761 and addressed to Sir Jeffrey Amherst, in J.J. Sullivan, ed., *The Papers of Sir William Johnson*, vol 3 (Albany: University of the State Of New York, 1921-65) at 588, as quoted in Allen, *supra* note 127 at 32.

most strongly by those groups who had previously been allied with the French, had not yet formed any particular attachment to the British, and, certainly did not consider themselves British subjects. In 1761, one Ojibwa chief expressed the sense of frustration which these groups evidently felt:

> Englishman, although you have conquered the French you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none. ...
>
> Englishman, your king has never sent us any presents, nor entered into any treaty with us, wherefore he and we are still at war; and, until he does these things, we must consider that we have no other father or friend among the white man, than the king of France.[192]

By the summer of 1761, rumours of a Seneca plan to seize Detroit had reached British authorities.[193] In December of that year, the Indian Superintendent circulated an instruction to the governors of seven colonies insisting they commit themselves to a "just and faithful observance of those treaties and compacts which have been heretofore solemnly entered into" with the Aboriginal groups within their jurisdictions. The communication went on to stress the need to prevent the practice of granting unceded lands over which Aboriginal groups still maintained claims.[194] Given its limited

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[192]The speaker was Minavavana and the speech was made at Michilimackinac to trader Alexander Henry, as quoted in J. Borrows, *Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation*, (1994), 28 U.B.C. L. Rev. 1 at 12.

[193]Allen, *supra* note 127 at 31.

[194]L.W. Labaree, ed., *Royal Instructions to British Colonial Governors 1670-1776* (Washington: American Historical Association, 1973) at 477-8, as quoted in J.Y Henderson, *supra* note 54 at 197-8. The colonies were Virginia, the Carolinas, Georgia, New York, New Hampshire, and Nova Scotia.

distribution, it is doubtful whether knowledge of the existence of this direction would have spread to the Aboriginal groups in the West, where the worst abuses were still occurring, or to the former French territories to the North. In any event, it was a case of "too little too late".

The Treaty of Paris, whose terms officially confirmed the transfer of Quebec and other French possessions in North America, was signed in February of 1763. By May the "Western tribes" of the Ohio Valley, Upper Mississippi and Upper Great Lakes were in open revolt. In a series of coordinated attacks, these Aboriginal groups, under the leadership of Chief Pontiac, assaulted key British military installations and settlements along the frontier. The offensive, which caused widespread panic among the settlers, demonstrated that these Aboriginal groups still possessed a significant military capability. Indeed, they appeared to be on the brink of "accomplishing what the French had failed to do - ousting the English from the entire area".[195]

In London, the immediate events leading up to "Pontiac's Rebellion" were followed closely by the Board of Trade, whose task it was to implement measures to effect the transition to peace following the formal conclusion of British-French hostilities.[196] Realizing the threat that the growing Aboriginal unrest posed to settlements in the West,[197] Crown officials at last began formulating a plan which was intended:

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[195]Morgan, *supra* note 91 at 340-343.

[196]see Slattery, *L.R.I.C.P.* *supra* note 20 at 191-203.

[197]"The Board, in justifying its proposal to issue a Proclamation, refers to 'the late Complaints of the Indians, and the actual Disturbances in Consequence', apparently

> to conciliate the Affection of the Indian Nations, by every Act of strict Justice, and by affording them His Royal Protection from any Incroachment on the Lands that they have reserved to themselves, for their hunting Grounds, & for their own Support & Habitation.[198]

xi. The *Royal Proclamation* of October 7th, 1763.

It was decided that the plan for strengthening the Crown-Aboriginal relationship would benefit from the widest possible distribution. To that end, it was deemed advisable to publish its policy provisions in the form of a Royal Proclamation.[199] Other matters of general import would also be addressed in the provisions of the resulting *Royal Proclamation* of the 7th of October, 1763.[200] These included the creation of new colonies out of the territory ceded under the Treaty of Paris, the delineation of the boundaries of the new and old colonies, the establishment of new colonial governments and courts, and the provision of land grants for those who had provided military service during the previous war. For our purposes however, we shall restrict our discussion of this

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showing some cognizance of the events in America." *Ibid.* at 201.

[198]Excerpt from a communication signed by Lord Egremont, Secretary of State for the Southern Department, dated 27 January, 1763 and addressed to Sir Jeffrey Amherst, in *Collections of the Connecticut Historical Society*, vol XVIII, (Connecticut Historical Society: Hartford, 1860-1967) at 224, as quoted in *Ibid.* at 192.

[199]Slattery, argues that: "[a] Proclamation was an obvious and practical choice. As an instrument under the Great Seal, it carried a legal authority at least equal to that of a Commission, and superior to that held by such lessor instruments as Royal Instructions". *Ibid.* at 200.

[200]*Royal Proclamation* of 1763, R.S.C.1985, App.II, No.1.

important document to those provisions which touch on Aboriginal issues, particularly those provisions which pertain to the Aboriginal interest in land.

The *Royal Proclamation* of 1763 was intended to establish a number of general principles which would ensure that the Aboriginal groups covered under the *Royal Proclamation* would not be "molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds". But what lands were meant to be "reserved" to them?

In earlier provisions, the *Royal Proclamation* established the boundaries of the existing colonies as well as those of the newly created colonies of Quebec, East Florida, West Florida and Grenada.[201] By exclusion, the remaining lands to the Northwest and West of the North American colonies were to be "reserved to" the "said Indians".[202] To that end, the *Royal Proclamation* strictly enjoined all colonial governments from granting "Warrants of Survey" or "Patents for Lands" outside their borders. This particular prohibition was clearly intended to be of a temporary nature, insofar as it was preceded by the qualifier: "for the present, and until our further Pleasure be known".

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[201]The *Royal Proclamation* created these new colonies out of the territories ceded by France, established their boundaries, and effectively fixed the western borders of all the North American colonies by establishing the eastern limits of the area which was to be reserved to the "several nations or Tribes of Indians, with whom We are connected, and who live under Our Protection".

[202]At the time, these lands could not be defined with any greater precision, nor was there any pressing reason to do. If the object was to limit westward settlement, it was sufficient to define the reserved lands by reference to the western boundaries of the British colonies.

Within the boundaries of each colony, traditional Aboriginal lands were to be reserved for the use of the Aboriginal groups who still possessed them. However, the Governor or Commander-in-Chief, as the case might be, still had the authority to grant warrants of survey and issue Crown patents with respect to lands which an Aboriginal group might "be inclined to dispose of" within colonial boundaries. Inasmuch as all private purchases of Aboriginal lands were now strictly prohibited, such lands could only be purchased in the name of the Crown. Furthermore, such a purchase had to take place "at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colonies respectively within which they shall lie". Significantly, these particular provisions were proclaimed in recognition of the fact that in the past, "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". The reference to "our Interests" served as a tacit reminder that Aboriginal discontent tended to manifest itself militarily, and, in the past, had served to undermine Britain's imperial security and mercantile "interests". Indeed, a subsequent clause makes it clear that the provision was intended to prevent irregular land transactions in order to convince the Indians of the King's justice and his determination "to remove all reasonable Cause of Discontent".

Other provisions were included in the *Royal Proclamation* that prohibited squatters from settling on lands that had never been ceded or purchased, regulated trade between British subjects and members of Aboriginal groups, and allowed those who were

"employed in the Management and Direction of Indian Affairs" on reserved lands to apprehend fugitives seeking refuge there.[203]

One final, yet significant, aspect of the *Royal Proclamation* merits our attention inasmuch as it is illustrative of the policy considerations associated with the formulation of relationships between the Crown and Aboriginal groups in the eighteenth century. The issue concerns the fact that the protections contained in the *Royal Proclamation* only applied to those "several Nations or Tribes of Indians with whom We are connected, and who live under Our Protection". Slattery suggests that this phraseology:

> encompasses all indigenous groups occupying territories claimed by the British Crown in North America in October 1763, irrespective of whether these were specifically known to the Crown allied with it, or factually connected with it.[204]

With all due respect, this view does not take into account the significance with which the British viewed the decision, on the part of an Aboriginal group, to place itself under the

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[203]While, it was originally intended that the "Indian territory" be governed by the military Commander-in-Chief of North America, who would be specifically tasked with the responsibility of "protecting the Indian tribes and managing the fur trade", a final decision on the matter had not yet been taken by the 7th of October. Slattery, *L.R.I.C.P. supra* note 20 at 199, refers. Perhaps the British were concerned that the appearance of a military government would aggravate relations with the Aboriginal groups who resided in Indian country. Indeed, some thought was being given to the possibility that "it may become necessary to erect some Forts in the Indian Country, with their consent". See Slattery, p. 193, quoting a general inquiry from Lord Egremont, Secretary of State for the Southern Department, of 5 May 1763, and addressed to the Board of Trade, in A. Shortt and A.G. Doughty, eds., *Documents Relating to the Constitutional History of Canada, 1759-1791*, 2nd ed., vol 1, (Ottawa: King's Printer, 1918) at 127.

[204]Slattery, *L.R.I.C.P. supra* note 20 at 243.

King's protection.[205] Nor does it fully take into account the British Crown's strategy for extending its sovereignty over those Aboriginal groups who were at war with Britain on 7 October, 1763.

The key to understanding the significance of the wording of this particular clause lies in understanding that the Treaty of Paris of February, 1763, served to transfer two distinct proprietary interests to Britain. The first type of interest can be termed a full sovereignty interest over the lands which France actually occupied or possessed in North America. The second type of interest amounted to an unperfected territorial claim to vast areas of the North American interior; a claim France had been attempting to perfect at the time of conquest. In effect, Britain could only claim that it possessed the sole right to treat with the Aboriginal groups who actually possessed the lands in this latter area. However,

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[205]As previously noted, while the British had early on maintained extravagant territorial claims to broad swaths of the North American continent, these claims only gave the British Crown the right, as against all other European nations, to attempt to acquire the sovereignty over the land from the Aboriginal groups who had hitherto possessed it. Therefore, insofar as her European rivals were concerned, Britain could advance a claim to be "connected" with the Aboriginal groups which resided on the lands she claimed. To the extent that it shielded Britain's underlying territorial claims from the intrusive conduct of rival European powers, the fictional "connection" served a largely symbolic function. Perfecting a territorial claim was an entirely different matter. As we have already seen, Britain, and other European nations such as France, traditionally considered that a territorial claim could only be perfected by actually possessing or occupying the lands in question. In practical terms, this meant that a real relationship had to be forged with each Aboriginal group in order to begin the process of perfecting a claim to sovereignty. One approach was to first enter into commercial or military alliances with the Aboriginal groups concerned. To the extent practicable, purchase or cession agreements would subsequently be negotiated. However, by 1677 the British Crown was actively attempting to hasten the process of acquiring sovereignty by trying to incorporate Aboriginal groups into the British Empire as protectorates or vassals. By agreeing to place their lands under the King and become his subjects, an Aboriginal group could be said to be "living under the King's protection" within the meaning of the *Royal Proclamation*.

while Britain could argue that it was now "connected" to such Aboriginal groups, it could hardly be said that these groups, many of whom had taken up arms against the British, were or ever had been "under the King's Protection".[206] Britain needed a strategy to "cement" the peace with such groups and bring them under British protection. As William Johnson would put it, the "reduction of Canada" now afforded,

> us a connection with many [Indian] Nations, with whom before we had no intercourse; it became necessary [therefore] that we should cultivate a good understanding with them, for the security of, and the safety of the public.[207]

By using the language of "connection" and "protection" in the *Royal Proclamation*, the Crown was in effect creating two classes of Aboriginal groups: those who were both "connected" with and under "His Majesty's Protection", and, those who were merely "connected" with the Crown by virtue of the fact that the British had ousted the French and were now the only European power in the theatre of operations. In this respect, it can be argued that the phraseology of the *Royal Proclamation* represents the artful

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[206]Slattery, *L.R.I.C.P. supra* note 20 at 359, appears to suggest that the cessions granted under the Treaties of Utrecht and Paris were sufficient to transfer full sovereignty over "the modern provinces of Nova Scotia, New Brunswick, and Prince Edward Island, the Southern portions of Quebec and Ontario, and perhaps also sections of Manitoba and areas further West". He goes on to conclude that "upon cession ... the land rights of the Indians presumptively continued undisturbed, subject to the Crown's ultimate title". This conclusion would seem to hinge on a finding that France had perfected its territorial claims in the region either through actual possession, or by placing the Aboriginal groups of the region under its protection. It also presupposes that agreements of protection (vassalage) were transferable. On the historical facts, the better view is that France could only claim limited sovereignty over the region based on actual possession. See notes 164 and 165, above, concerning the problems associated with transferring sovereignty via agreements of protection.

[207]William Johnson, "Review of the Trade and Affairs of the Indians in the Northern District of America", 1767, in NAC, *supra* note 155 at 169, as quoted in Allen, *supra* note 127 at 30.

embodiment of a carefully planned strategy to convince the recalcitrant Aboriginal groups to the West that there were tangible benefits to be realized by taking the necessary steps to bring themselves under the protection of the Crown. In this regard, it would have been counter-productive for the British to grant the benefits associated with this special status to those Aboriginal groups who were not prepared to enter into peaceful relations with the British government. That being the case, it is also apparent that the *Royal Proclamation* was intended to have a prospective application.[208] Indeed, little would have been achieved by excluding the very Aboriginal groups which posed the greatest threat to British security simply because they had not yet acknowledged the King's protection on the 7th of October, 1763. On this basis, a strong argument can be made that the legal principles embodied in the *Royal Proclamation* could have been "extended to the western reaches of Canada as these areas fell under British rule".[209]

British policy after 7 October, 1763 seems to bear out this particular assessment. The *Royal Proclamation* was widely distributed among hostile Aboriginal groups, as a prelude to the convening of special conferences called for the purpose of encouraging such

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[208]Slattery, *L.R.I.C.P. supra* note 20 at 337-8, adheres to a "prospective" interpretation. He also argues that, "as a general rule legal provisions create 'open' or 'floating' categories that apply to any persons, actions, or things that fall within their scope at any time after enactment; they are not limited to entities existing at the moment the provision is passed" (B. Slattery, "The Legal Basis of Aboriginal Rights" in Cassidy, Frank., ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen.* (Lantzville, B.C.: Oolichan Books, 1992) 113 [hereinafter Slattery, "L.B.A.R."] at 126.).

[209]Slattery, "L.B.A.R." *Ibid.* at 118, refers to these legal principles as the "common law of aboriginal rights" (Aboriginal common law). For a discussion of the interrelationship between law and policy see note 218, below.

groups to enter into peaceful relations and bring themselves under the King's protection.[210] The conference held at Niagara in July and August 1764 should be viewed in this light.[211] According to William Johnson, the aim of such meetings was to bind the "Western Nations" to the terms of a treaty which would "tie them down (in the Peace)" by means of promises which would:

> assure them of a Free Fair & open trade, at the principal posts, & a free intercourse, & passage into our Country. That we will make no Settlements or Encroachments contrary to Treaty, or without their permission. That we will bring to justice any persons who commit Robberys or Murders on them & that we will protect & aid them against their & our Enemys, & duly observe our Engagements with them.[212]

As these are the very safeguards which the *Royal Proclamation* already guaranteed other Aboriginal groups, these promises would have been meaningless if it could be said that the *Royal Proclamation* already applied to the hostile "Western tribes". Indeed, a peace was

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[210]As Borrows, *supra* note 192 at 21, indicates, Algonquin and Nippising ambassadors "travelled throughout the winter of 1763-64 with a printed copy of the *Royal Proclamation*, and with various strings of wampum, in order to summons the various First Nations to a council with the British" at Niagara. While the invitation to treat was directed to the "Western Nations" or tribes, Borrows points out that diplomats from other important groups would also have been present, perhaps to assist in the negotiations.

[211]Meetings were also held with Aboriginal groups in the Southern District (Slattery, *L.R.I.C.P. supra* note 20 at 193). In this regard, it is important to recall that the Cherokee of South Carolina had been involved in a separate war with the British from 1759-61 which had resulted in the death of over 2000 colonists (Bailyn, *supra* note 138 at 236).

[212]C. Flick, ed., *The Papers of Sir William Johnson*, vol 4 (Albany: University of the State Of New York, 1925) at 328, as quoted in Borrows, *supra* note 192 at 22.

in fact concluded at Niagara, and elsewhere, on the basis of these guarantees, and promises of "Friendship and Attachment".[213]

Although the Aboriginal groups which had participated in Pontiac's Rebellion were effectively brought under the King's protection, it seems unlikely that the negotiations served to extend British sovereignty over the lands they occupied to the extent that the members of the Board of Trade might have hoped. As William Johnson would point out, with reference to a treaty signed by the same groups the following year, the notion of extending sovereignty by such means was inherently problematic:

> these people had subscribed to a Treaty with me at Niagara in August last, but by the present Treaty I find, they make expressions of subjection, which must either have arisen from the ignorance of the Interpreter, or from some mistake; for I am well convinced, they never mean or intend anything like it, and that they can not be brought under our laws, for some Centuries, neither have they any word which can convey the most distant idea of subjection, and should it be fully explained to them, and the nature of subordination punishment ettc, defined, it might produce infinite harm ... and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the principal causes of all our troubles.[214]

Johnson's words would prove prophetic. While Aboriginal groups living within what is now the modern Canadian nation state would eventually experience European

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[213]*Ibid.* at 23. The treaties were solemnized by the exchange of a wampum ("the Great Belt of the Covenant Chain"). Other peace treaties with the "Western tribes" were concluded at Johnson Hall and throughout the Ohio region (Allen, *supra* note 127 at 34).

[214]P. Williams, *The Chain* (LL.M. Thesis, York University, 1982)[unpublished] at 83 quoting Sir William Johnson, as quoted *Ibid.* at 24-25. See note 159, above, with reference to the "earlier attempts towards Sovereignty" and the 1701 effort to acquire sovereignty over the Iroquois' "beaver hunting grounds".

domination first-hand, the process of acquiring sovereignty would not be completed for many years. Nevertheless, most, if not all Aboriginal groups, would over time succumb

> piecemeal to the Crown's pressure to accept its authority, usually only when their economic fortunes and military capacity had waned, and in the shadow of the growing power of the settler communities.[215]

Some Aboriginal groups signed treaties requiring that they formally acknowledge the Crown's authority, and accept the attendant offer of protection; for other groups "the process was more informal and haphazard, and was accompanied by varying degrees of native resistance and protest".[216]

xii. Prologue.

British imperial policy would continue to evolve after 1763.[217] However, the basic

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[215]Slattery, "U.A.R." *supra* note 8 at 734.

[216]Slattery, "U.A.R." *supra* note 8 at 734, where he goes on to observe that among some groups "significant opposition" to the Crown's authority continues.

[217]Of particular note, in the case of *Freeman* v. *Fairlie* (1828), 1 Moo. Ind App. 305, 18 E.R. 117 (L.C.), Master Stephen, the Master in Chancery, blended the "simple settlement" and "simple conquest" rules to create a new rule - the "complex conquest/cession rule". The new rule was to be applied in the "anomalous" situation of the conquest or cession of a people who had a non-Christian, indigenous system of law, which could not be conveniently replaced by the English common law. Master Stephen determined that the old laws should continue with respect to the indigenous group as in a conquest or cession situation. However, the local laws were deemed unsuitable for the English who would instead be governed by English law, just as it would have had the lands been found "uninhabited". The Privy Council adopted the principle set out in *Freeman*, in *Advocate-General of Bengal* v. *Ranee Surnomoye Dossee* (1863), 2 Moo. P.C. (N.S.) 22 (P.C.) at 59-61, where it concluded, *inter alia*, that the settlers "carry with them not only the laws, but the sovereignty of their own state; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws". The "complex settlement/conquest" rule was applied to uphold the validity of a marriage of an Aboriginal (Cree) woman to in a non-Aboriginal man in *Connolly* v. *Woolrych* (1867),

tenets of that policy, as it relates to the Aboriginal interest in land, can be said to have emerged fully developed with the promulgation of the *Royal Proclamation* of 1763. By deciding to incorporate that policy in a Royal Proclamation, the Crown can be said to have chosen to merge imperial policy with imperial law.[218] Inasmuch as Aboriginal

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17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Que. S.C.), aff'd *sub nom Johnstone* v. *Connolly* (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Que. C.A.). The marriage had been entered into on the basis of Aboriginal "customs and usages", in the Athabaskan region. In this regard, the court concluded that the laws and usages of the Indian tribes had survived the conquest and cession by the British and had not been modified thereafter, despite the fact that English traders in the same area were governed by English law. Finally, in *Amodu Tijani* v. *Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.) at 410, the Privy Council concluded that following a conquest or cession, the usufructuary or communal right to possess land which Aboriginal groups enjoy, "must be presumed to have continued to exist unless the contrary is established by the context or circumstances". In light of Lamer C.J.'s judgment in *R.* v. *Coté*, [1996] 3 S.C.R. 139 at 173 (S.C.C.) [hereinafter *Coté*], the Supreme Court of Canada may be taken to have accepted the notion that "the common law recognizing aboriginal title was arguably a necessary incident of British sovereignty which displaced the pre-existing colonial law governing New France".

[218]As Walters, *supra* note 94 at 378, observes, the commentators take different approaches to the relationship between "general crown practice" or imperial policy on the one hand and imperial common law. In this regard, he points out that, "Lester draws a distinction between British recognition of aboriginal rights as a matter of practicality and policy, and recognition of aboriginal rights as a matter of principle at British common law"; whereas Slattery and McNeil argue that "centuries of Crown 'policy' is in fact reflective of the legal principles of colonial law". Slattery terms this "the common law of aboriginal rights" (Slattery, *supra* note 208 at 118). In my view, it is important to appreciate that the principles of imperial law were intended to have a broad and generally uniform application throughout the Empire. Imperial policy, on the other hand, was a highly flexible administrative tool which could be formulated and reformulated on a colony by colony basis, as local circumstances dictated. However, imperial law was not created in a vacuum nor did it evolve all at once. It therefore seems logical to conclude that a policy which had survived the test of time, and which was deemed to have general rather than mere local relevance, would eventually find recognition in imperial law. Indeed, the historical evidence suggests that many features of what originated as local policy pertaining to the Aboriginal peoples of British North America, would ultimately be codified in imperial law (see previous note). Nevertheless, as Slattery, *L.R.I.C.P. supra* note 20 at 11-2, points out: "the origins and genesis of many of the relevant principles are

groups had been "induced by the promise of protection offered in the *Royal Proclamation* to alter their legal position", there would be a solid basis upon which later Canadian courts could find that the Crown was honour bound to uphold its commitment to respect their interests, as a matter of law.[219]

The *Royal Proclamation* of 1763 would itself prove to be an enduring document. In *Calder*, Hall J. would conclude that "[t]his Proclamation was an Executive Order having the force and effect of an Act of Parliament".[220] Nor is there any indication that

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obscure, and the authorities conflicting. The British empire at its height was a remarkably diverse and untidy collection of possessions, and the views taken in the courts over several centuries in every way reflect this fact".

[219]The conclusion that the duties owed were of a fiduciary nature, would, of course, have to await the decisions of the Supreme Court of Canada in *Guerin* and *Sparrow*, which will be discussed in later chapters. For our purposes here, it is important to note that the fiduciary doctrine "requires acceptance of the Crown's primary sovereignty and ultimate title to the soil and the natural resources of Canada. Without the Crown's assertion of both power and discretion, both self-declared, the foundations of the fiduciary duty ... would disappear." A. Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" (1992) 2 N.J.C.L. 163 at 192.

[220]*Calder*, *supra* note 11 at 220. This conclusion is consistent with Maclean, J.'s characterization in *The King* v. *Lady McMaster*, [1926] Ex. C.R. 68 at 72 and the Supreme Court's views in *Easterbrook* v. *R.*, [1931] S.C.R. 210 at 214-15, 217-18. Nevertheless, while it may be seen as having the "force of a statute", as indicated at note 208, *supra*, the *Royal Proclamation* of 1763 is a unique document inasmuch as it lent itself to a "prospective" interpretation. This feature presumably led Hall J. to go on to explain, at p. 395, that "[i]ts force as a statute is analogous to the status of *Magna Charta* which has always been considered to be the law throughout the Empire. It was the law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories." This interpretation may explain Gwynne J.'s otherwise curious description of the *Royal Proclamation* as a kind of "Indian Bill of Rights" (*St Catherine's Milling and Lumber Co.* v. *R.*, *supra* note 50 at 652, refers). Slattery, "U.A.R." *supra* note 8 at 774-5, points out that the *Royal Proclamation* was equivalent to an *Imperial* rather than a *colonial* statute, and as such "was paramount to local statutes under the *Colonial*

the *Royal Proclamation* of 1763 has ever been repealed. On the contrary, in a case involving the repatriation of the Constitution, Lord Denning would hold that the *Royal Proclamation*, is "still of binding force" insofar as both the federal and provincial legislatures are concerned.[221]

While it therefore seems apparent that the *Royal Proclamation* of 1763 is still very much "in force", to what extent, if any, have those provisions dealing with Aboriginal title been otherwise modified or superseded, bearing in mind that that part of the *Royal Proclamation* which strictly enjoined colonial governments from granting "Warrants of Survey" or "Patents for Lands" outside their borders was qualified by the words "for the present, and until our further Pleasure be known"? In fact, the ink was hardly dry on the *Royal Proclamation* before the *Quebec Act* of 1774 expanded the borders of the colony of Quebec westward into "Indian Country".[222] Nevertheless, while the colonies' borders could be and were in fact repeatedly altered, the basic regime which the *Royal Proclamation* had established for acquiring lands which Aboriginal groups were "inclined to dispose of" within the boundaries of the colonies was not altered by the *Quebec Act* or any subsequent enactment.[223]

Laws Validity Act, 1865".

[221]*R.* v. *Secretary of State for Foreign & Commonwealth Affairs*, [1982] 2 All E.R. 118 at 125, [1981] 4 C.N.L.R. 86 (C.A.).

[222](U.K.), 14 Geo. III, c.83 (R.S.C. 1985, App. II, No. 2) [hereinafter *Quebec Act*].

[223]The situation with respect to the *Quebec Act* is outlined in D. Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: Native Law Centre, 1989) at 29-30. She points out that while that Act did not specifically address itself to the question of Aboriginal land rights, instructions subsequently issued by the Governor of Quebec on

Of course, as we have seen, many Aboriginal groups had entered into treaties with the British long before the *Royal Proclamation* had been conceived of. Did the *Royal*

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3 January, 1775, do in fact "conform to the purchase regime imposed by the Royal Proclamation". D. Johnston goes on to outline how the principles of the *Royal Proclamation* of 1763 were perpetuated in the provisions of successive versions of the *Indian Act*, S.C. 1876, c.18, which maintained "[t]he prohibition on alienation of reserve lands without surrender" and gave "explicit statutory recognition" to the "principle of voluntary cession" by means of "both substantive and procedural guarantees". Nevertheless, she documents the gradual erosion of the "surrender requirement" through "ever-increasing categories of exceptions" as well as the corrosive effect of the federal expropriation power on the principle of voluntary cession (pp.71-91, refer). To the extent that the *Indian* Act, R.S.C. 1985, c.I-5, represents a "watering-down" of some of the principles which underscore the Aboriginal land rights portions of the *Royal Proclamation*, it would seem that the Canadian government has acted as if it had the implicit authority to make the Crown's "pleasure known" through the provisions of the *Indian Act*. One's perception of the appropriateness of the federal government's actions, would seem to turn on the interpretation accorded s. 91(24) of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c.3 [hereinafter *Constitution Act, 1867*], which, on its face, purports to grant authority to the Crown in right of Canada to make laws in relation to "Indians, and Lands reserved for the Indians". For example, in M. Asch and P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta. L. Rev. 498 at 510, the authors argue that s. 91(24) simply provides that "as between Parliament and provincial legislatures, Parliament has the exclusive authority to negotiate with Canada's indigenous population and to regulate Indian affairs if and when negotiations have resulted in treaties of mutual consent" and, as such, can "easily be read as not authorizing Parliament to pass laws in relation to native people absent their consent". The better view would seem to be that, inasmuch as "Aboriginal rights are intimately connected with the special status and capacities of Indian peoples and the possession and use of their land ... they form an intrinsic part of the subject matters covered by section 91(24)". With the passage of the *Statute of Westminster*, 22 Geo. V, c.4 (U.K.), Canada was released from the bonds of imperial law and could, pursuant to s. 91(24), lawfully enact legislation to "regulate or extinguish" Aboriginal rights which had previously been guaranteed under any imperial statute including, by analogy, the *Royal Proclamation* of 1763. See Slattery, "U.A.R." *supra* note 8 at 775. With the coming into force of s. 35(1) of Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Constitution Act, 1982*], it may now be argued that the protections guaranteed under the *Royal Proclamation* are, to the extent that they have survived intact, protected as "existing" Aboriginal rights. Put another way, s. 35(1) may itself be seen as but the latest example of the Crown making known its pleasure - in this case to "recognize and affirm" the *status quo*.

Proclamation of 1763 supersede these earlier treaties? While the *Royal Proclamation* does not explicitly address itself to this issue, there can be little doubt that its provisions were meant to complement rather than abrogate the terms of pre-existing treaties. Had the *Royal Proclamation* done otherwise, safety and security in the established colonies would have been undermined, which would have been contrary to the stated aims of the *Royal Proclamation* itself.[224] Furthermore, there is no indication that the *Royal Proclamation* was meant to serve as a substitute for the treaty-making process. On the contrary, successive British and Canadian governments would continue to utilize the treaty mechanism as the preferred means of bringing Aboriginal groups under the sovereignty of the Crown, acquiring lands for settlement purposes, and quieting title. In this respect, the treaties of Niagara of July and August 1764 are illustrative of the complimentary role which the treaty-making process was intended to play in defining particular Crown-Aboriginal relationships. Therefore, while the *Royal Proclamation* may be seen to have established a new and comprehensive policy to guide future Crown-Aboriginal relations, any specific obligations incurred by the Crown under the provision of any pre-existing or subsequent treaty would continue to bind the Crown. Such treaty provisions can also be said to impact upon the nature and extent of the specific fiduciary duties which may now be said

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[224]In considering the validity and effect of a 1760 treaty of protection entered into between a British General and the Hurons of Lorette in *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, Lamer J. rejected the Respondent's contention that the Royal Proclamation of 1763 had extinguished the 1760 treaty rights because it had not expressly confirmed them. In doing so, he observed, at pp. 1064-65, that, "[t]he Proclamation confers rights on the Indians without thereby necessarily extinguishing any other right conferred on them by the British Crown under a treaty".

to be owed individual Aboriginal groups.[225] In sum, while it may be convenient to generalize about certain common features of the Crown-Aboriginal relationship which trace their origin to the *Royal Proclamation* of 1763, the question of assessing the specific duties owed particular Aboriginal groups must necessarily involve a study of the totality of the unique historic relationship which the Crown established with each Aboriginal group, including the provisions of any applicable treaties which were entered into either before or after 1763.[226]

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[225]Indeed, as we shall see in Chapter five, the specific terms of individual treaties can themselves serve as the basis for specific fiduciary obligations. In other words, while the *Royal Proclamation* may in fact have set the base standard for the future treatment of and relationship with the Aboriginal peoples who inhabited those parts of Canada where it has been deemed to have application, it must still be read in conjunction with the treaties which the Crown employed to cement its relationship with individual Aboriginal groups both before and after 1763.

[226]It may be appropriate to view the Crown-Aboriginal relationship as a multi-faceted relationship which can raise fiduciary obligations which are both unique and specific to each Aboriginal group. As such, one should be careful in attempting to apply the general principles which underscore the Crown-Aboriginal relationship generally, to a given fact situation, without having due regard for the implications of any specific treaty obligations which the Crown may have incurred. In this respect, it may be important to recall the wide diversity which existed between the various Aboriginal groups who inhabited North America at the point of European contact. This diversity may, in part, explain the emphasis which was placed on specific provisions in some treaties but not others. As well, it would be a mistake to assume that the colonial authorities who negotiated such treaties were always mindful of imperial concerns or the need to attempt to apply consistent principles to the task at hand in a geo-political climate which placed a premium on expediency. While it is beyond the scope of this thesis to attempt to delineate the relationship which the Crown established with each Aboriginal group, suffice it to say that the historic forces which shaped each relationship will continue to have relevance as we attempt to apply fiduciary principles to the many variants of the Crown-Aboriginal relationship which can be said to exist today.

Did the *Royal Proclamation* end the abusive practices which it was designed to halt? As Allen points out, in the newly created Indian territory, the traders "flaunted the licensing requirements". Worse,

> American backwoodsmen and land speculators also ignored the Indian boundary line and the general provisions of the *Royal Proclamation* to the point that the thirst for Indian lands became almost universal.[227]

Indeed, in the face of blatant defiance of the Crown's authority, the boundary line was moved west in 1768 and a treaty of cession negotiated with the Aboriginal groups who lived there. Nevertheless, "the irregular land encroachments practiced on the frontier by the competing colonies and provinces continued".[228] Indeed, such practices even had the support of the Governor of Virginia, Lord Dunsmore, who justified the conduct of American settlers, and the resulting war with the Shawnee, in the following terms:

> they (the settlers) do not conceive that Government has any right to forbid their taking possession of a Vast tract of Country, either uninhabited, or which Serves only as a Shelter to a few Scattered Tribes of Indians. Nor can they be easily brought to entertain any belief of the permanent obligation of Treaties made with those People, whom they consider, as little removed from the brute Creation.[229]

Ultimately, the Crown gave up any pretence of attempting to manage the Aboriginal relationship within its North American colonies. In 1768 it transferred all responsibility

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[227]Allen, *supra* note 127 at 35.

[228]*Ibid.* at 37.

[229]Dunsmore's letter of 24 December 1774 to the Earl of Dartmouth in R.G. Thwaites and L.P. Kellogg, eds., *The Documentary History of Dunsmore's War, 1774*, (Madison: Wisconsin Historical Society, 1905) at 371, as quoted *Ibid.* at 41-42.

for trade and "Indian affairs" to the colonial legislatures - in effect turning its back on the Aboriginal groups who were under its protection.[230]

In what would become the Atlantic Canadian provinces, the plight of Aboriginal groups only worsened under colonial control. The governments of these colonies took the position that the *Royal Proclamation* did not apply to them. They claimed to have derived a full title from the French by cession under the Treaty of Utrecht, which they "assumed, rightly or wrongly, to have obviated the requirement for the voluntary cession of lands under Indian occupation".[231] In the face of imperial indifference, the Aboriginal groups in the region suffered "a rapid and wholesale dispossession of their lands".[232]

It was not until 1975 and the decision in *R.* v. *Isaac*, that the question of the applicability of the *Royal Proclamation* of 1763 over the maritime provinces of Canada was finally addressed. In this respect, MacKeigan, C.J.N.S. would write that:

> I am of the opinion that the Proclamation in its broad declaration as to Indian rights applied to Nova Scotia including Cape Breton. Its recital (p.127) acknowledged that in all colonies, including Nova Scotia, all land which had not been 'ceded to or purchased by' the Crown was reserved to the Indians as '*their Hunting Grounds*'.[233]

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[230]*Ibid.* at 36-7.

[231]D. Johnston, *supra* note 223 at 24.

[232]*Ibid.* at 24.

[233](1975), 13 N.S.R. (2d) 460 at 478 (N.S.C.A.). It is important to note, as did MacKeigan, C.J.N.S., that in 1763 the old colony of Nova Scotia had encompassed all of what is now considered to be the Province of Nova Scotia, as well as the Provinces of Prince Edward Island, New Brunswick and parts of eastern Quebec. *R.* v. *Isaac* turned on the applicability of a provision of what was, in effect, a provincial hunting and gaming statute, to Aboriginal peoples exercising the "usufructuary rights" associated with their "Indian title" on a Cape Breton Indian reserve. In finding that "Indian land rights" were

On its face, there can be little doubt that the *Royal Proclamation* was meant to apply in Quebec. Furthermore, when the British initially assumed control there, the land rights of the Aboriginal groups were respected.[234] However, the situation rapidly changed

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"inextricably part of the land to which the provincial game law cannot extend", the Chief Justice concluded that the *Royal Proclamation* confirmed the "customary common law" right of Aboriginal peoples to use the natural resources located on their reserves (p. 469 refers). The Court did not decide the broader issue of whether such customary rights continue to exist with respect to resources located off a reserve. In this regard, the Chief Justice seemed to suggests that this latter question would turn on whether or not Aboriginal title could be said to have been extinguished by prerogative acts, such as "setting apart reserves and opening the rest of the land for homestead grants and settlement" (see p.476). In light of Dickson, C.J.'s comments in *Sparrow*, *supra* note 3 at 1099, it would seem that only the Sovereign's "clear and plain" intention will suffice to prove an extinguishment which is alleged to have occurred prior to 1982 and the coming into force of s.35(1) of the *Constitution Act, 1982*. Moreover, the burden of proof is on the Crown. Judging by the views of Macfarlane J.A. in the case of *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 at 163 (B.C.C.A)[leave to appeal & cross-appeal to S.C.C. granted 109 D.L.R. vi], it may be difficult to find a "clear and plain intention" to extinguish Aboriginal title based on "Colonial Instruments" which merely "declare the existing situation", i.e. "vest ownership of all land in the Crown and establish a comprehensive land settlement scheme giving the Crown the sole right to create other ownership or proprietary land interests".

[234]D. Johnston, *supra* note 223 at 91. Indeed, in December of 1763, Royal Instructions were issued to James Murray, the first Governor of Quebec, requiring that he "cultivate and maintain a strict Friendship and good correspondence" with the Aboriginal groups within the province and avoid molesting or disturbing "them in the Possession of such parts of the said Province, as they at present occupy or possess". These instructions went on to refer to the need to comply with the terms of the *Royal Proclamation*. See D.G. Smith, ed., *Canadian Indians and the Law: Selected Documents, 1663-1972*, The Carleton Library No. 87 (Toronto: McLelland and Stewart Limited, 1975) at 4-5, as quoted *Ibid.* at 28. Also see D. Schulze, "The Privy Council Decision Concerning George Allsopp's Petition, 1767: An Imperial Precedent on the Application of the Royal Proclamation to the Old Province of Quebec" [1995] 2 C.N.L.R. 2 at 25, where the author argues that "the Privy Council applied the Royal Proclamation's provisions concerning lands reserved for Indians to the old Province of Quebec" in 1767 when it refused to grant a settlement petition in respect of Aboriginal lands which had not been surrendered in accordance with the provisions of the *Royal Proclamation*.

when control over Indian Affairs was transferred from the imperial to the colonial authority. Indeed, the colonial government had begun issuing licences to those individuals who wished to settle in "any indian country" as early as 1777. Further abuses would follow. By 1791, the traditional lands of Aboriginal groups in the province, which by then were being described as the "waste lands of the Crown", were being used to accommodate the influx of Loyalist settlers which followed the American Revolution.[235] Nor have contemporary Aboriginal groups fully succeeded in their efforts to uphold the Indian land rights provisions of the *Royal Proclamation* within what is now the Canadian province of Quebec. Baudouin J.A.'s views are characteristic of the restrictive interpretation of the *Royal Proclamation* which the Courts have consistently chosen to apply when addressing the question of traditional Aboriginal land rights within that province:

> I am convinced, with respect, that the Royal Proclamation of 1763 was an attempt at consolidation ... it only involved Indian territory outside the colonies that already existed or were to be set up, on the one hand, and land located inside the colonies, that had been set aside previously, specifically for Aboriginal people, on the other. The latter lands were in fact mission lands (where, in some cases, several bands were gathered together) and Indian villages set up or authorized by the French authorities.[236]

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[235]*Ibid.* at 32-3. As D. Johnston observes: "Loyalists were permitted to settle in Indian Country within the province without obtaining a licence from the governor, let alone observing the formalities of cession and purchase".

[236]*R.* v. *Coté*, [1994] 3 C.N.L.R. 98 at 107-8. Baudouin J.A.'s comments follow on the heels of judgments issued by other members of the Quebec Court of Appeal in *R.* v. *Adams*, [1993] 3 C.N.L.R. 98, and *Sioui* v. *Procurer general du Quebec*, [1987] 4 C.N.L.R. 118. Appeals in all three cases have now been heard by the Supreme Court of Canada: *Coté*, *supra* note 217; *R.* v. *Adams*, [1996] 3 S.C.R. 101; and, *Sioui*, *supra* note 224. Lamer, who penned the majority judgments in each case, avoided confronting the question of the

The terms of the *Royal Proclamation* were generally observed in the annexed territory which would become Ontario.[237] The difference in the practices which developed between Quebec (Lower Canada) and Ontario (Upper Canada) may be explained with reference to the relative strength of the Aboriginal groups which inhabited each area. In this regard,

> [t]he government of Quebec could disregard the land rights of the settled tribes with relative impunity. The western tribes, in the annexed area, were another matter. The security of the western posts and the fledgling Loyalist settlements dictated a course of fair dealing.[238]

The Canadian Government choose to comply with the spirit, if not the letter, of the *Royal Proclamation* with respect to the prairie lands inhabited by Aboriginal groups of the old North West. In this regard, the decision to incorporate its principles into successive versions of the *Indian Act*[239] can be seen as largely a "function of pragmatism".

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application of the *Royal Proclamation* within the Province of Quebec. Lamer C.J. did not even mention the *Royal Proclamation* in *Adams*, whereas in *Coté*, *supra* note 217 at 167, he declined to "wade" into what he referred to as the "the murky historical waters surrounding the legal effect of the Proclamation" in Quebec, choosing instead to dispose of the case on other grounds. The Supreme Court decisions in *Adams* and *Coté* are discussed in greater detail in Chapter five.

[237]D. Johnston, *supra* note 223 at 47-9. Under the *Quebec Act* (1774), *supra* note 223, the boundaries of Quebec were expanded to encompass the area which would later be designated Upper Canada.

[238]*Ibid.* at 47-8. As D. Johnston points out, at p.35, in Quebec "the 'settled' Indians' ... territorial claims were viewed as having been circumscribed by the boundaries of their respective settlements".

[239]The *Indian Act, 1876*, S.C. 1876, c.18, was a consolidation of legislation pre-existing in various Canadian jurisdictions. Its modern equivalent is the *Indian Act*, R.S.C. 1985, c.I-5. The history of this piece of legislation is traced in J.R. Ponting and R. Gibbins, *Out of Irrelevance: A Socio-political Introduction to Indian Affairs in Canada* (Toronto: Butterworths, 1980) at Ch. 1.

Simply put, "territorial security dictated respect for Indian land rights".[240] Nevertheless, with the exception of a small number of land cessions on Vancouver Island, "most of British Columbia was seized and settled without formal surrender of Indian lands".[241] Nor have the Courts ever conclusively ruled on the issue of whether or not the provisions of the *Royal Proclamation* are of any force and effect in that particular province.[242] In short,

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[240]D. Johnston, *supra* note 223 at 71. These lands would come to form the provinces of Manitoba, Saskatchewan and Alberta.

[241]R. White-Harvey, "Reservation Geography and the Restoration of Native Self-Government" (1995) 17 Dal L.J. 587 at 601. He goes on to point out that: "[t]he official position of British Columbia has been that the *Royal Proclamation* of 1763 does not apply to British Columbia, and that aboriginal title never existed".

[242]This is not to say that the issue has not been litigated, only that it has never been effectively resolved by the Supreme Court of Canada. Indeed, the six judges of that Court who considered it necessary to deal with the particular question in *Calder*, *supra* note 11, split on the issue of whether the provisions of the *Royal Proclamation* applied to British Columbia during the period under consideration in that case (the period prior to 1871). The contrasting sides of what is in fact an ongoing debate were canvassed in the various judgments delivered by the British Columbia Court of Appeal in *Delgamuukw* v. *British Columbia*, *supra* note 233, of which the judgments of Macfarlane J.A. (concurred in by Taggart J.A.) and Wallace J.A. constituted the majority view. For his part, Macfarlane J.A. adopted the reasons of the trial judge in concluding, *inter alia*, at p. 154-5 that "neither the Proclamation nor the policy which gave rise to it apply to Indian lands in British Columbia". In a separate judgment, Wallace J.A. cited McEachern C.J., the trial judge, for the proposition that *Royal Proclamation* never applied directly to British Columbia, inasmuch as: " the Crown was not 'connected' in any way with the Indians of the Canadian West in 1763. They did not live under the Crown's protection, and they owed the Crown no actual, legal or notional allegiance" (see p. 226). Nor was he persuaded that a document, which he described as "a variety of Royal fiat", could serve to reflect the common law of the day (see p. 227). In one of two dissenting judgments, Lambert J.A. expressed the view that the *Royal Proclamation* was "a reflection of the policy of the Colonial administration of Great Britain in 1763 towards the Indians ... and must be taken to have been in accordance with the common law as it was seen at that time and ... a statement of the common law by the highest authority" (p. 367 refers). However, Lambert J.A. refrained from expressing any view on either the application or effect of the *Royal Proclamation* in British Columbia. For his part, Hutcheon J.A. also concluded that

while strong central control over "Indian Affairs" had been restored, it came too late to prevent the almost wholesale loss of Aboriginal control over the traditional lands which Aboriginal groups had once possessed in many parts of Canada. Furthermore, based on past practice, there was little to suggest that further encroachments would not occur when the government found it expedient to do so.

C. Conclusions:

While the collective nature of Aboriginal title owes is existence to the historic attitudes and practices of Aboriginal societies, other features of Aboriginal title can be traced to the powers and responsibilities assumed by the Crown in relation to the lands Aboriginal groups occupied. As an "autonomous" common law doctrine, Aboriginal title can be said to bridge the gap "between native systems of tenure and the European property systems applying in the settler communities".[243]

Although the Crown's policy towards Aboriginal land was influenced, to some extent, by the broader rules and principles of imperial common law, the powers and responsibilities of the Crown were largely assumed for reasons of equity, convenience and,

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the *Royal Proclamation* "reflected British policy of acceptance of aboriginal rights to land" (see p. 385).

[243]The common law is still the basis of most Aboriginal groups' possessory rights to land to the extent that those rights have not been extinguished by "proclamations, statutory provisions, treaties or other acts". Aboriginal title can also exist in a "modified or attenuated form" as rights to harvest natural resources in areas previously ceded. Slattery, "U.A.R." *supra* note 8 at 744-5, refers.

most importantly, to further Britain's own regional interests. In this regard, it is important to appreciate that the tone of Britain's early relations with the Aboriginal peoples of North America was largely dictated by Britain's own strategic requirements.

Early Crown-Aboriginal relations were formulated in an era of intense competition among European powers for dominance abroad. While it might have been prudent for Britain to advance extravagant claims to vast areas of North America within the European context, in the colonial environment the demands of expediency and convenience dictated a more pragmatic approach. Because Aboriginal groups held the military balance of power, Aboriginal interests had to be taken into account. As such, Aboriginal groups were bound to figure prominently in Britain's local strategy for extending its military, political and economic influence over North America.

Imperial strategists would demonstrate an amazing capacity to develop policies which were calculated to strengthen Crown-Aboriginal relations when the need arose. While the Crown did acquire some Aboriginal lands by means of military conquest, for the most part it choose to adopt the Puritan practice of acquiring Aboriginal land equitably, by means of a "fair purchase". In large measure the choice served imperial interests. Simply put, it was far more cost-effective and convenient to acquire lands by means of a peaceful cession agreement than by waging war. At the same time, it was possible to "play" the Crown-Aboriginal relationship to further British territorial ambitions and trade while simultaneously undermining the claims of rival European states.

The history of British imperial policy, insofar as North America's indigenous population is concerned, might well appear to have been one of general indifference punctuated by "periodic bouts of British fairness and justice".[244] The appearance of schizophrenia can only be understood by appreciating that British imperial policy was primarily motivated by and directed towards British requirements. When Aboriginal interests could be seen to coincide with British aims, such as when an Aboriginal group came into conflict with another European power, British policy could be invoked to take advantage of the situation by responding to Aboriginal concerns. Conversely, where British and Aboriginal interests came into conflict with each other - and conflict was inevitable given the widely divergent world views which the two groups held - British national interests would normally dictate the outcome. However, in such circumstances, the protests of Aboriginal groups could only be ignored where doing so did not impact adversely on some other British policy priority, such as the prosecution of the fur trade or the security of British settlements. Not surprisingly, when Aboriginal power weakened or when events elsewhere took precedence, imperial policy could be cruelly indifferent. In sum, while British imperial policy was capable of being managed in conflict situations by balancing Aboriginal and non-Aboriginal interests, the outcome would invariably favour those interests which most closely served imperial goals.

When it became apparent that the abuses associated with private land purchases were acting as a destabilizing influence on the Crown-Aboriginal relationship, and

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[244]Allen, *supra* note 127 at 193.

threatening Britain's larger interests, the Crown took steps to regulate such transactions by inserting itself between the colonists and Aboriginal groups. In the process, the British Crown would claim that it had acquired sovereignty over those lands.

The Crown's sovereignty or power over the Aboriginal peoples of Canada was exerted piecemeal over an extended period of time. The process by which each Aboriginal group became reliant upon the Crown was largely a function of history and historic forces. Therefore, the portrait of Crown-Aboriginal relations which emerges is far from uniform. Furthermore, the Crown often took an *ad hoc* approach to dealing with the Aboriginal peoples of North America. This hardly seems surprising given the oft-times fluid geo-political situation in the colonies and the idiosyncratic whims of local officials. Echoes of this particular approach can still be seen reflected in the specific and unique fiduciary duties which are now owed particular Aboriginal groups as a result of certain "unique" treaty provisions. This is not to say that there were not some common, defining moments in the evolution of the Crown-Aboriginal relationship as a whole.

Notwithstanding the British Crown's initial motivation for pursuing what might charitably be described as a "liberal" Aboriginal policy, by 1763 certain principles had been established which could not be officially denied if strong Crown-Aboriginal relations were to continue. True, the French defeat at Quebec and Montreal signalled the end of the intense period of European rivalry which had largely served to shape Britain's Aboriginal policy. However, the ongoing security threat posed by the continued presence and military strength of Aboriginal groups could hardly be ignored. Having previously embarked on a more or less liberal policy of dealing with Aboriginal groups, Britain was

bound to uphold its basic tenets, or risk the consequences of Aboriginal displeasure. Indeed, it may be argued that Britain had little choice but to officially recognize certain principles pertaining to Aboriginal title. Furthermore, if Britain was to restore the peace and shore up its credibility, it had to act decisively. The *Royal Proclamation* was the means chosen to formally announce its intention to legally bind itself to these principles. Therefore, with the *Royal Proclamation*, imperial policy and law can be seen to have merged for the first time. With the *Royal Proclamation* of 1763, Britain was forced to concede that she was obliged, as a matter of imperial common law, to treat with Aboriginal groups in order to bring them under British authority or to acquire their lands. For their part, Aboriginal groups were encouraged to place reliance on the Crown and the guarantees enshrined in the treaties they entered into as well as the provisions of the *Royal Proclamation* of 1763. Accordingly, it would be a mistake to ignore or underestimate the relevance and importance of these defining source documents for a vast number of Canada's Aboriginal groups.

Implementation would be another matter entirely. With its American colonies on the verge of revolt, Britain choose to transfer its responsibility for "Indian Affairs" to its colonial governments. Without strong central control, the Aboriginal policy embodied in the *Royal Proclamation* would be placed at the mercy of regional politics and self-interest.

Confederation restored central control over "Indian Affairs" in Canada. More importantly, the essential features of Aboriginal title were recognized in the *Indian Act*.

However, by that time much of Canada had been settled without regard to the provisions of the *Royal Proclamation*.

As the history of the Crown-Aboriginal relationship amply demonstrates, the Aboriginal peoples of Canada have been traditionally and uniquely vulnerable to the exercise of the Crown's power - particularly where Aboriginal interests came into conflict with non-Aboriginal interests, including the interests of the Crown itself. Indeed, a strong argument can be made that, historically, the Crown has proven both unable and unwilling to live up to its many and varied obligations to the Aboriginal peoples of Canada.[245] Some means had to be found to safeguard Aboriginal interests in the future. By choosing to define the historic Crown-Aboriginal relationship in fiduciary terms, the Supreme Court of Canada would provide Aboriginal groups with a means of holding the Crown to an equitable standard of conduct. A detailed consideration of this unique characterization, and the duties which may be said to flow from it, will now be undertaken, having particular regard to the defining judgments of the Supreme Court in *Guerin*, *Sparrow*, and the *Van der Peet* trilogy.[246]

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[245]This conclusion begs the question: will a fiduciary characterization of the Crown-Aboriginal relationship lead to a more equitable result in the future? As we shall observe in later chapters, the answer to this question revolves around the central issue under consideration in this thesis, namely, the ability of the Crown to discharge its fiduciary obligations in conflict situations.

[246]*R.* v. *Van der Peet*, *supra* note 12; *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528; and, *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648.

Chapter 4 - The Application of Fiduciary Principles to Define the Crown-Aboriginal Relationship.

A. Introduction:

In this chapter, the analysis shifts to a consideration of the application of fiduciary principles to define the Crown-Aboriginal relationship. Our objective is to arrive at a more precise understanding of the Crown-Aboriginal fiduciary relationship with a view to determining what obligations now bind the Crown and what standards the Crown is now obliged to uphold. In short, this chapter seeks to ascertain what it is that the law now requires that the Crown do or refrain from doing in relation to the Aboriginal peoples of Canada in the sorts of circumstances exemplified in the two paradigm situations set out in the introductory chapter.

If the extent and diversity of learned discourse on the subject serves as any valid indicator, then this is one area of the law which seems prone to confusion and error. This apparent tendency may, in turn, serve to explain the obvious difficulties which some of our courts have encountered when they have attempted to apply fiduciary standards and principles to individual examples of the Crown-Aboriginal relationship.[1]

While it will be left for later chapters of this thesis to consider whether the fiduciary standard is workable and appropriate in this context, we can at least conclude that the fiduciary nature and content of the Crown-Aboriginal relationship is discernable.

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[1]This will be discussed in detail in Chapter five.

In this regard, it will be argued in this portion of the thesis that, in order to better understand the *sui generis* nature of the Crown-Aboriginal relationship, it is essential to appreciate the oft-times subtle distinction between the general duty which the Crown owes all Aboriginal peoples by virtue of its fiduciary status, on the one hand, and the more specific duties which may arise whenever the Crown purports to exercise a particular discretion in relation to specific Aboriginal interests held by individual Aboriginal groups, on the other. Indeed, as we will shortly come to appreciate, once the dual nature of the Crown-Aboriginal relationship is fully understood, the basis for much of the existing confusion evaporates.

The methodology adopted for this chapter will, of necessity, be largely of the case analysis type inasmuch as it is the courts who have acted to define the law in this area, a process which commenced in 1984 with the Supreme Court of Canada decision in *Guerin et al.* v. *The Queen.*[2]

What then is the true nature of the Crown-Aboriginal fiduciary relationship and the duties which are said to result from such a characterization? While it is submitted that a thorough understanding of the Supreme Court of Canada's 1984 decision in *Guerin*, its 1990 decision in *Regina* v. *Sparrow*[3] and its 1996 decisions in the *R.* v. *Van der Peet* trilogy of cases,[4] are all essential to any meaningful discussion of the nature, scope and

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[2][1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to S.C.R.].

[3][1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

[4]*R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [hereinafter *Van der Peet* cited to D.L.R.]; *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528

implications of a fiduciary characterization of the Crown-Aboriginal relationship, the starting point for such an analysis must necessarily be the decision in *Guerin*, and more specifically the judgment of Dickson J.[5]

B. *Guerin et al.* v. *The Queen*:

The *Guerin* decision concerned the circumstances appertaining to the lease of a portion of the Musqueam Reserve to a developer in 1958 for the purpose of establishing a golf course. While the lease was entered into following a formal surrender, the Musqueam Band was not informed of all the terms of the proposed lease. Other matters were negotiated with the lessee after the surrender vote and simply inserted in the lease. Nor did the Band even receive a copy of the actual lease until over twelve years had elapsed. The chief and councillors of the Musqueam Band sued the federal Crown to recover damages on their own behalf as well as on behalf of all other members of the Musqueam Band for breach of trust. For its part, the Crown argued that "if there was a trust it was, at best, a 'political trust', enforceable only in Parliament and not a 'true trust', enforceable in the courts".[6]

[hereinafter *Smokehouse* cited to D.L.R.]; and, *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [hereinafter *Gladstone* cited to D.L.R.].

[5] *Guerin*, *supra* note 2 at 364.

[6] *Ibid.* at 371.

i. The Judgments.

Dickson, Estey and Wilson JJ. wrote separate judgments in the case. While all agreed that the Crown was liable to pay the Band damages, the judgments reveal a marked difference in the approaches taken by each of the three judges insofar as the basis for such liability is concerned.[7]

In choosing to dispose of the action on the basis of the law of agency, Mr Justice Estey concluded that the Crown had, in effect, acted as an agent for the Band when it had obtained the surrender in order to effect an alternate use of reserve lands. Estey J. characterized this particular type of surrender as a "release". He went on to determine, on the unique facts of the case, that the Crown (agent) was guilty of having failed to carry out the instructions issued to it and had thereby breached the agency relationship.[8]

For her part, Madame Justice Wilson concluded that s. 18 of the *Indian Act* [9] recognized the existence of a fiduciary obligation on the part of the Crown with respect to Indian reserves which imposed upon the Crown a duty "to protect and preserve the band's interests from invasion or destruction".[10] Wilson J. was clearly of the view that

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[7]Dickson J.'s judgment was concurred in by Beetz, Chouinard and Lamer JJ. Wilson J.'s judgment was concurred in by Ritchie and MacIntyre JJ.

[8]*Guerin*, *supra* note 2 at 391-95.

[9]S.18(1) of the *Indian Act*, R.S.C. 1970, c.I-6, which was the provision under consideration in *Guerin*, reads as follows: "[s]ubject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band".

[10]*Guerin*, *supra* note 2 at 350.

this particular obligation had its "roots in the aboriginal title of Canada's Indian's" rather than in the particular terms of the *Indian Act*.[11] She went on to conclude that, because the Crown is obliged to hold surrendered lands for the benefit of a Band, the Crown becomes a "full-blown trustee" whenever reserve lands are surrendered.[12] When, on the unique facts of this case, the Crown purported to grant a lease of the land to a third party on terms which were unacceptable to the Band, the Crown breached the terms of its equitable trusteeship. Moreover, in attempting to conceal the terms of the lease the Crown's actions constituted "equitable fraud". Wilson J. based her assessment of damages on the equitable principle of restitution.[13]

The majority judgment in *Guerin* was penned by Dickson J. In his view, the "Crown's obligations *vis-a-vis* the Indians" could not be defined as a trust, either express or implied, inasmuch as "the Indian's right in the land disappears" whenever reserve land is unconditionally surrendered. Noting that "[n]o property interest is transferred which could constitute the trust *res*", he concluded 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". Nor in his opinion could it be said that the Crown had itself been

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[11]*Ibid.* at 349. Wilson J. based this conclusion on what she termed a statutory acknowledgement "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 and make sure that any purpose to which reserve land is put will not interfere with it" (p. 349 refers).

[12]*Ibid.* at 355.

[13]*Ibid.* at 356-63.

enriched such that one could conclude that a constructive trust existed.[14] Of significance, Dickson J. did find 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 Indian's behalf". While not to be confused with a trust, or even an agency relationship, Dickson J. described the obligation in question as "trust-like" and "*sui generis*".[15] On the unique facts in *Guerin*, this conclusion led to a finding that the Crown had breached the fiduciary obligation it owed the Musqueam Indian Band when it "obtained a much less valuable lease than that promised" in connection with the surrender, and further, that it "must make good the loss suffered in consequence" of having done so without consultation with the plaintiff band.[16]

ii. Understanding the Implications of Dickson J.'s Decision in *Guerin*.

Commentators and jurists alike seem to find themselves drawn back to *Guerin* in an effort to comprehend the true nature of the Crown-Aboriginal relationship and the basis and origins of the fiduciary characterization employed by Dickson J. in the course of penning his judgment in that case.[17]

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[14]*Ibid.* at 375, 386.

[15]*Ibid.* at 386-87.

[16]*Ibid.* at 389. In understanding the result it is important to appreciate that the trial judge had made a finding of fact that the surrender would never have been approved had all the terms of the lease been disclosed to the Band.

[17]Interestingly enough, Dickson C.J. found himself doing just that in co-authoring the landmark judgment in *Sparrow*. See *Sparrow*, *supra* note 3 at 1108.

To fully appreciate the implications of Dickson's analysis, it is necessary to examine in detail his views concerning the nature of the "concept" of Aboriginal title and the "proposition of inalienability". In this regard, the following paragraph from that decision is considered to be of particular significance:

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.[18]

From the ambiguous wording of the last sentence of this passage, is Dickson J. meaning to say that one may characterize the relationship between the Crown and Aboriginal peoples as a fiduciary one, for all purposes, without the need for further analysis; or, is he saying that the Crown is only a fiduciary in respect of the Aboriginal land interest when it is proposed to alter the status of Aboriginal lands? Put another way, do we have a fiduciary relationship or only the necessary theoretical framework upon which a fiduciary relationship may be grafted where the circumstances so warrant?

In *Guerin*, Dickson J. does not provide us with a categorical answer to this fundamental question. Nevertheless, Dickson J.'s analysis of the interrelationship between the "concept" of Aboriginal title and the "proposition" of inalienability was an undeniably critical first step towards a full understanding of the *sui generis* nature of this Crown-Aboriginal relationship. Furthermore, while it is the interplay between these two

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[18]*Guerin*, *supra* note 2 at 376.

notions which Dickson J. evidently considered significant, it should be remembered that each has an independent existence.

a. The "Concept" of Aboriginal Title.

After reviewing the leading decisions on the subject, Dickson J. concludes, in *Guerin*, that "Indian title is an independent legal right which, although recognized by the *Royal Proclamation* of 1763, none the less predates it".[19] In reaching this conclusion, he appears to have accepted Chief Justice Marshall's hypothesis, in *Johnson and Graham's Lessee* v. *M'Intosh*,[20] which was to the effect that "Indian" land rights "both predated and survived" European sovereignty claims.[21] But what is it about the "Indian" interest in land that "survived" - albeit in a somewhat "diminished" form - what Dickson characterizes as "the principle of discovery"?[22] The answer seems reasonably clear: Dickson J. defines "Indian title" as an "independent legal interest" which comprises "rights" of "occupancy

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[19]*Ibid.* at 378.

[20](1823), 8 Wheaton 543, 21 U.S. 240 [hereinafter *M'Intosh*].

[21]*Guerin*, *supra* note 2 at 378.

[22]*Ibid.* at 377-78. Dickson J. seems to accept as valid the proposition that "the principle of discovery" justified European claims to sovereignty and "gave the ultimate title in the land to ... the nation which had discovered and claimed it". He does not explain how one might "discover" an inhabited land nor does he challenge the accepted logic by which the underlying title in the land was said to pass to the Crown. Nevertheless, he seems to be suggesting that the process of discovery and colonization had the same effect as conquest. For a further treatment of this issue see Chapter three of this thesis, especially the sections entitled "European Territorial Ambition in the 'Age of Discovery'" and "The Basis of the British Crown's Claim to Sovereignty".

and possession".[23] Of significance, Dickson J. goes on to conclude that "the Indian interest" in both reserve lands and traditional tribal lands is one and the same interest.[24] In other words, Aboriginal title is not dependant upon the existence of a "reserve" within the meaning of the *Indian Act*.[25] This should not be particularly surprising given that Aboriginal title predates the creation of the reserve system and cannot be said to be a "creation of either the legislative or executive branches of government".[26]

b. The "Proposition" of Inalienability.

While Dickson found the fiduciary relationship to be rooted in the concept of Aboriginal or Indian title, the conclusion "that the Crown is a fiduciary" was held by him to be dependant upon the further proposition of inalienability, or, in other words, the notion that:

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[23]In Dickson J.'s words, *Ibid.* at 382, "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 is its nature completely exhausted by the concept of a personal right."

[24]*Ibid.* at 379. Dickson J. cites *Attorney-General for Quebec* v. *Attorney-General for Canada*, [1921] 1 A.C. 401 at 410-11 (the *Star Chrome* case) as authority for this conclusion. This is a curious reference indeed. The *Star Chrome* case involved a determination of the status of lands which, pursuant to a pre-confederation statute, had originally been appropriated for the "use and benefit" of a particular Aboriginal group and which had "vested in trust for the Indians". While not technically "reserve" lands, the lands were in an analogous to reserve lands state. Therefore, although the court in *Star Chrome* concluded that the lands were to be treated as reserve lands for the purposes of a 1882 surrender, the claim in that case should not necessarily be considered as amounting to an unrecognized aboriginal title claim to "traditional tribal lands".

[25]*Indian Act*, R.S.C. 1985, c. I-5, s.2.

[26]*Guerin*, *supra* note 2 at 385.

> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place .... .[27]

Dickson traces the origins of the "proposition of inalienability", except upon surrender to the Crown, to the *Royal Proclamation* of 1763.[28] As Dickson J. points out, successive federal statutes continued to uphold this concept, "the relevant provisions in the present Act being ss. 37-41".[29]

As we have seen in Chapter two, an undertaking "to act in relation to a matter in the interests of another" lies at the heart of our current understanding of the fiduciary construct.[30] Based on the foregoing, one might reasonably conclude that the "undertaking" which underscores the Crown-Aboriginal relationship directly relates to the Crown's decision to intervene in all land transactions between Aboriginal peoples and

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[27] *Ibid.* at 376.

[28] *Ibid.* at 376 as well as 383 where Dickson J. summarizes its effect in the following terms: "[t]he Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be made by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay". A detailed analysis of the *Royal Proclamation, 1763*, R.S.C. 1985, App.II, No.1, [hereinafter *Royal Proclamation*] is contained in Chapter three of this thesis.

[29] *Ibid.* at 383. Note that Dickson J. does not refer to s. 18(1) of the *Indian Act, supra* note 9, in this context. The *Indian Act, 1876*, S.C. 1876, c.18, was a consolidation of legislation pre-existing in various Canadian jurisdictions. Its modern equivalent is the *Indian Act*, R.S.C. 1985, c. I-5. The history of this piece of legislation is traced in J.R. Ponting and R. Gibbins, *Out of Irrelevance: A Socio-political Introduction to Indian Affairs in Canada* (Toronto: Butterworths, 1980) at Ch. 1.

[30] J.R.M. Gautreau J., "Demystifying the Fiduciary Mystique" (1989) 68 Can. Bar Rev. 1 at 7.

third parties. But what is the actual undertaking? In Dickson J.'s words, "the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties".[31] While Dickson J. stops short of characterizing this undertaking as a unilateral one, he does conclude that the Crown "took this responsibility upon itself in the *Royal Proclamation* of 1763",[32] which probably amounts to the same thing.

iii. The Applicable Standard of Conduct in *Guerin*.

But what, in practical terms, is the standard of conduct which the Crown is obliged to uphold given the existence of the fiduciary relationship identified by Dickson J. in *Guerin*? Seemingly, it is "both more general and more exacting than the terms of any particular surrender".[33] It requires that the Crown act with the "utmost loyalty", inasmuch as "equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal".[34] Applying this standard to the facts in *Guerin*, Dickson J. concluded that the Crown could not "promise the band that it will obtain a lease of the latter's land on certain stated terms, thereby inducing the band to

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[31]*Guerin*, *supra* note 2 at 383.

[32]*Ibid.* at 376. In this context, the term "responsibility" would seem to denote the "obligation" to protect Aboriginal interests in dealings with third parties. This general "obligation" should not be confused with Dickson J.'s subsequent use of the term to describe specific fiduciary duties which the Crown may owe Aboriginal peoples in particular fact situations.

[33]*Ibid.* at 389.

[34]*Ibid.* at 389.

alter its legal position by surrendering the land, and then simply ignore that promise to the band's detriment".[35]

iv. A Fiduciary Relationship for all Purposes?

Can we conclude from the foregoing that the relationship between the Crown and Aboriginal peoples is of a fiduciary nature? While this is the conclusion which Dickson J. would later advance in *Regina* v. *Sparrow*, in *Guerin* he seemed prepared only to ascribe a fiduciary quality to the relationship where the Crown's "obligation" carries with it some discretionary power, as follows:

> Professor Ernest Weinrib maintains ... that 'the 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'... . I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that <u>where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary</u>. Equity will then supervise the relationship by holding him to the fiduciaries strict standard of conduct.(emphasis added)[36]

Applying this principle to the facts in *Guerin*, Dickson J. found that a distinct duty was owed by the Crown in respect of reserve lands whenever the discretion inherent in s.18(1) of the *Indian Act*[37] was to be exercised. This conclusion was based upon the fact that:

> Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s.18(1) of the Act.[38]

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[35]*Ibid.* at 389.

[36]*Ibid.* at 384.

[37]S.18(1) of the *Indian Act*, is reproduced *supra* note 9.

[38]*Guerin*, *supra* note 2 at 383-84.

and further,

> 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.[39]

One may deduce from this latter passage that, in *Guerin*, Dickson J. had not yet arrived at the conclusion that a general fiduciary relationship existed in circumstances which did not involve the surrender of reserve lands. In contrast, Wilson J. concluded that the Crown was also under a fiduciary obligation with respect to unsurrendered reserve lands on the basis of a "historic reality", which is to say, "that Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it".[40] Her comments suggest that this "historic reality" has resulted in a corresponding vulnerability or reliance on the part of the Aboriginal peoples concerned.[41]

While the finding that "the fiduciary principle is a general one, governing all aspects of the relationship between the Crown and aboriginal peoples",[42] would have to await subsequent judicial interpretation, the importance of *Guerin* is that it "initiates" a

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[39]*Ibid.* at 385.

[40]*Ibid.* at 349.

[41]See W.R. McMurtry and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" [1986] 3 C.N.L.R. 19 at 31, wherein it is argued that Aboriginal peoples were induced by the "promise of protection to alter their legal position".

[42]A. Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" (1992) 2 N.J.C.L. 163 at 176.

"dialogue" which continues to have relevance to the development of the fiduciary principle in the Aboriginal context.[43]

C. A Variation on a Theme: the Decision in *Regina* v. *Sparrow*:

Based on the majority judgment in *Guerin*, it might have been argued that fiduciary duties were only owed Aboriginal peoples when a surrender of reserve lands occurred.[44] While clearly that decision still stands for the proposition that a specific fiduciary obligation will arise whenever a surrender of reserve lands takes place, it now seems relatively clear that the fiduciary construct may have application in many other situations involving Aboriginal interests which are not expressly related to the Aboriginal interest in land. In this regard, the landmark decision of Dickson C.J. and La Forest J. in *Sparrow*[45] was of singular importance in advancing the application of fiduciary principles to protect Aboriginal interests outside the narrow confines of the beneficial interest in reserve lands.

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[43]B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 [hereinafter Slattery, "U.A.R."] at 732.

[44]In point of fact, the only "discretion" which Dickson J. identifies in *Guerin* is that which relates to s. 18(1) of the *Indian Act*, *supra* note 9. That section only applies to "reserve" lands. The term "reserve" is defined in s.2 of the Act and would not include traditional tribal lands in respect of which a particular band claims an Aboriginal title interest which the Crown does not recognize.

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

The facts in *Sparrow* are fairly straightforward. The appellant, who was a member of the Musqueam Indian Band, had been charged, pursuant to a provision of federal fishing legislation, with using an illegal drift-net. In his defence, he argued that he was exercising an "existing" Aboriginal right which took precedence over the legislative provisions in question.

In considering the meaning of s.35(1) of the *Constitution Act, 1982*, the Supreme Court of Canada concluded, in reasons jointly delivered by Dickson C.J. and La Forest J., that:

> In our opinion *Guerin* together with *R* v. *Taylor and Williams* (1981),62 C.C.C. (2d) 274, 34 O.R. (2d) 360 (C.A.), ground a general guiding principle for s.35(1). That is the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[46]

What the Court now seemed to be saying was that the overall relationship between the "government" and Aboriginal peoples is a fiduciary one.[47] However, because the relationship is all-encompassing, and not dependent upon a surrender of reserve lands, it

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[46]*Ibid.* at 1108. Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Constitution Act, 1982*].

[47]Categorical support for this proposition was finally given by the Supreme Court of Canada in *Quebec (Attorney General)* v. *Canada (National Energy Board)* (1994), 112 D.L.R. (4th) 129 at 147 [hereinafter *National Energy Board*], as follows: "[i]t is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada". Iacobucci J. cited *Guerin* as the authority for this assertion of law.

raises a general rather than specific fiduciary obligation.[48] While the responsibility to act in a fiduciary capacity is said to serve as the "guiding principle" for interpreting s. 35(1) of the *Constitution Act, 1982*, the fiduciary relationship in fact predates that section - it is a "historic" relationship.

i. The Nature of the Crown's Fiduciary Duty.

One might be excused for wondering how the general "responsibility" which the Crown ("government") has to "act in a fiduciary capacity" compares to the specific obligations which were said to bind the Crown when, for example, a surrender of reserve lands occurs (the situation in *Guerin*), or whenever the government purports to take action which could result in an infringement of Aboriginal rights (the *Sparrow* situation)? Are we talking about the same thing? In my view, there are clear differences.

From *Sparrow* we can conclude that the Crown will always be held to a "high standard of honourable dealing" with respect to Aboriginal peoples.[49] While the general

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[48]See M.J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 U.B.C. L. Rev. 19 at 27 , where it is argued that "[t]his passage suggests a hybrid of the Dickson and Wilson JJ. judgments in *Guerin*, whereby the Crown-Aboriginal relationship neither requires a surrender to trigger the fiduciary duty nor represents an express trust".

[49]While it is difficult to see how this standard varies from the standard of "fairness" which is said to be the governing consideration whenever the honour of the Crown is involved, there is an important distinction to be made insofar as the issue of enforceability is concerned. The finding of a responsibility to act in a fiduciary capacity means that general fiduciary principles can be used to assess whether a breach of the "high standard of honourable dealings" has occurred and to provide a remedy for such a breach. On the other hand, the "honour of the Crown" has a nebulous quality which makes it difficult to apply in a litigation context.

duty of the Crown, as a fiduciary, will always be that of "utmost loyalty", the *sui generis* nature of the Crown-Aboriginal relationship may also lead to the conclusion that certain specific, additional fiduciary duties are also owed - depending upon the unique facts of each individual case.

Looking at the decision in *Guerin*, we can conclude that specific statutory provisions may give rise to specific, fiduciary duties which are in addition to the fiduciary's more general duty of "utmost loyalty". Nor is there any reason to suppose that an express undertaking, such as might be embodied in the provisions of a treaty or other form of agreement, would not also give rise to such specific, additional duties when coupled with a discretion to act. Given the clearly defined nature of the source of such obligations, one would expect that the standard of conduct required would be readily ascertainable in such cases.

Turning to s. 35(1) of the *Constitution Act, 1982*, we see from *Sparrow* that the obligation to act in a fiduciary capacity with respect to Aboriginal peoples requires that:

> ... federal power be reconciled with 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.[50]

This was said to be in keeping with the "interpretive principle" set out in *Nowegijick* v. *The Queen* and the "high standard of honourable dealings" which the Crown is obliged to uphold.[51] The Court in *Sparrow* implies that this latter "standard" derives from Dickson

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[50] *Sparrow*, *supra* note 3 at 1109.

[51] *Ibid.* at 1109. In *Nowegijick* v. *The Queen* (1983), 144 D.L.R.(3d) 193 at 198 [hereinafter *Nowegijick*], the principle was advanced that, "treaties and statutes relating

J.'s findings in *Guerin*. As such, the Court's comments should be read in light of the earlier conclusion, which was to the effect that *Guerin*, together with *R.* v. *Taylor and Williams*,[52] ground the general guiding principle for s. 35(1), namely, that "the government has the responsibility to act in a fiduciary capacity".[53] When these two passages are read together one is seemingly drawn to the conclusion that "acting in a fiduciary capacity" means upholding the Crown's "high standard of honourable dealing". Nevertheless, there is a "twist": for the purposes of s. 35(1), the reconciliation process - or in other words adherence to the so-called "justification test" - provides both the means of discharging the

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to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians". This does not mean that the intentions of the Crown can be ignored, however. Indeed, in *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 [hereinafter *Sioui*] at 1069 and 1071 (S.C.C.), Lamer J. emphasized, in relation to an early treaty, that:

> [e]ven a generous interpretation of the document ... must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror. ...
> Defining the common intent of the parties on the question of territory in this way makes it possible to give full effect to the spirit of conciliation, while respecting the practical requirements of the British.

See as well note 44 of Chapter five, and the discussion of the *Nowegijick* principle in the *Attorney-General of Quebec* v. *Eastmain Band et al.* (1992), 99 D.L.R. (4th) 16 at 27-28 (F.C.A.) and *R.* v. *Howard*, [1994] 3 C.N.L.R. 146 at 150 (S.C.C.) cases. Insofar as the interpretation of legislation is concerned, see La Forest J.'s judgment in *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193 at 236 [hereinafter *Mitchell* cited to D.L.R.], where he indicated that:

> I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation or view. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.

[52](1981), 62 C.C.C. (2d) 227 (O.C.A.)[hereinafter *Taylor and Williams*].

[53]*Sparrow*, *supra* note 3 at 1108.

obligation with respect to "existing aboriginal and treaty rights" and a further example of the imposition of a specific type of fiduciary obligation.[54] In this case, the specific obligation is one which is constitutionally-based.

ii. Discretion or Power?

Turning from the question of the nature of the duty owed, one might well wonder what the conclusion that the government has "the responsibility to act in a fiduciary capacity with respect to aboriginal peoples" means from the standpoint of the supposedly all-important element of discretion? Put another way, what is the nature and quality of the discretion which serves to form the basis of such a general duty, if indeed such a discretion can be said to exist? Unfortunately, in *Sparrow*, the Court gives us little to go on. The judgment speaks of the "source" of the fiduciary obligation rather than the obligation itself. In other words, the focus is on the "nature of Indian title" and the "historic powers and responsibilities assumed by the Crown",[55] which, in light of Dickson J.'s earlier comments in *Guerin*, in connection with the principle of inalienability, might

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[54]The *Sparrow* justification test is concisely summarized in *R.* v. *Coté*, [1994] 3 C.N.L.R. 98 at 104 (Que. C.A.), in the following terms:

> (1) Determine the existence, scope and characteristics of the right the violation of which is alleged. (2) Establish *prima facia* interference with that right. (3) Determine whether the infringement is justified according to the following criteria: (a) Is there a 'legitimate' or valid legislative or regulatory objective? (b) Is the honour of the Crown upheld in its special relationship with the Aboriginal peoples because the Crown fulfilled its duty as a trustee? (c) Is the infringement minimal? (d) Where there has been expropriation ... has fair compensation been paid? (e) Where applicable, were the Aboriginal peoples consulted concerning the measures adopted?

[55]*Sparrow*, *supra* note 3 at 1108.

well appear to be a reference back to the "obligation" to protect the Aboriginal title interest in dealings with third parties. If this is correct, then it would seem to suggest that a similar undertaking is at the heart of both the general duty referred to in *Sparrow* as well as the more specific type of duty referred to in *Guerin*. However, such a conclusion still does not explain what, if any, discretion is at play, although it is considered that three possibilities exist.

First, it may well be the case that the "principle of inalienability", referred to above, embodies an element of discretion and that it is that discretion which serves to colour the relationship as a whole. If so, what is the nature of that discretion? One might speculate that some element of discretion is implicit in any land transfer scheme in which the Crown assumes the responsibility of safeguarding Aboriginal interests by interposing itself between Aboriginal people and third parties. In other words, the Crown's undertaking to so act presumes an active rather than passive role for the Crown's representatives in safeguarding the Aboriginal title interest - a role which seems to imply the exercise of a discretion which would include, but not necessarily be limited to, the specific discretion which arises during the surrender process.[56]

A second, somewhat related, possibility is that Dickson C.J. had simply concluded that, in all dealings with the government, Aboriginal peoples are always at the mercy of

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[56]If discretion is indeed implicit in the principle of inalienability, which featured so prominently in the *Royal Proclamation*, such a discretion could be said to predate and transcend the more specific discretion which underscores s. 18(1) of the *Indian Act*. Were that not so, it would be difficult to see how such a discretion could serve as the basis for a fiduciary relationship to govern all aspects of all dealings between the Crown and Aboriginal peoples.

government decision-making. If that is indeed the case, then the requisite "discretion" may be seen to reside in the federal executive's exclusive legislative authority over "Indians and lands reserved for Indians".[57] While this is indeed a possibility, it begs a response to the further question: does the use of the term "government" include the provincial government?[58]

A third possibility, and one which turns the question on its head, is that in casting the relationship in fiduciary terms, the Court in *Sparrow* may simply have concluded that its *sui generis* nature is not dependant upon a finding of "discretion" at all. In this regard, one will recall that, in *Guerin*, Dickson J. choose to refrain from commenting upon whether Ernest Weinrib's description of the role of discretion, as the "hallmark" of the fiduciary relation, was "broad enough to embrace all fiduciary obligations".[59] While such a determination was unnecessary on the facts of *Guerin*, in so commenting, Dickson J. clearly left the door open for a contrary finding. In this vein, it may also be relevant to

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[57]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3 [hereinafter *Constitution Act, 1867*], s.91(24), refers.

[58]In McMurtry and Pratt, *supra* note 41 at 32, the point is made that s. 91(24) deals only with a legislative power, whereas fiduciary responsibilities are owed "by the executive branch of the federal government not because Parliament has created them but because of pre-existing law and policy". It should be noted, however, that McMurtry and Pratt's comments predate *Sparrow*. The better view would now seem to be that, while the trust relationship "attaches primarily to the Federal government", it will also bind provincial governments in situations where they "have powers and rights enabling them to affect adversely Aboriginal interests protected by the relationship", B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 [hereinafter Slattery, "F.N.C."] at 270 refers. See also *Mitchell*, *supra* note 51 at 237-38, where the words "Her Majesty" are discussed in some detail in this context.

[59]*Guerin*, *supra* note 2 at 384.

consider what was not said in *Sparrow*. As previously noted, in his characterization of the government's responsibility to act in a fiduciary capacity, no mention is made of the issue of discretion.[60] Indeed, the Court's conclusions in *Sparrow* are reached after a discussion of the so-called "*Nowegijick*" principle[61], and the principle that "the honour of the Crown" is always involved in the interpretation of treaties and that no appearance of "sharp dealing" should be sanctioned.[62] The explanation for the Court's apparent silence on the issue may be explained by the fact that, as of 1989 and the decision in *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*,[63] the validity of Wilson J.'s "three general characteristics" of fiduciary relationships, as set out in *Frame* v. *Smith*,[64] had gained widespread acceptance. In this regard, it may be recalled, from our discussion in Chapter two, that the "second" such characteristic places the exercise of a "power" on an equal

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[60]In *Guerin*, Dickson J. had concluded that for an undertaking to result in the imposition of a fiduciary obligation with respect to a surrender of reserve lands, it must be coupled with the discretion to act which is inherent in s.18(1) of the *Indian Act*. In Sparrow, Dickson J. does not find it necessary to take his analysis that extra step. That is not considered insignificant.

[61]The principle referred to in *Nowegijick*, *supra* note 51 at 198.

[62]This principle flows out of the decision in *Taylor and Williams*, *supra* note 52.

[63][1989] 2 S.C.R. 574, 61 D.L.R (4th) 14 [hereinafter *Lac Minerals*].

[64][1987] 2 S.C.R. 99 [hereinafter *Frame*]. Wilson J. delineates the characteristics at p. 136, in the following terms:

> [r]elationships in which a fiduciary obligation have been imposed seem to possess three general characteristics: 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.

Frame is discussed in more detail in Chapter two of this thesis.

footing with the exercise of a "discretion". Having found that the Crown had assumed a "historic power" with respect to Aboriginal peoples in *Sparrow*, it in effect became unnecessary for the Court to find a discretion, *per se*.

Although further clues as to the nature of the discretion or power being exercised, as well as the content of the Crown's undertaking, would be provided by the Supreme Court in later judgments,[65] on a strict reading of *Sparrow* it cannot be said by which of the three possibilities the Court was swayed.

D. Beyond *Sparrow*: the *R.* v. *Van der Peet* Trilogy of Cases:

As previously noted, in *Guerin* Dickson J. had concluded that the fiduciary relationship between the Crown and the Aboriginal peoples of Canada has its roots in the concept of "aboriginal, native or Indian title" which he found to be comprised of "rights of occupancy and possession" which predated the *Royal Proclamation* of 1763. However, the conclusion that the Crown was a fiduciary was considered by him to be dependant on the "proposition of inalienability" - a proposition which he traced to the *Royal Proclamation* of 1763. Of course, this particular conclusion was premised on the unique set of circumstances which arose in *Guerin*, namely, the conduct of the Crown in relation to a transfer of reserve lands.

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[65]See especially Lamer C.J.'s judgment in *Van der Peet*, *supra* note 4, at 293, which is discussed in detail *infra*.

In *Sparrow*, Dickson C.J. and La Forest J. took the logic inherent in Dickson's judgment in *Guerin* one step further by concluding that the government's "historic" responsibility to act in a fiduciary capacity with respect to Aboriginal peoples should serve as "the guiding principle" for s. 35(1). Unfortunately, the rationale for this finding was never really explained - except to say that the "historic relationship" mandates it. This is considered problematic from the standpoint of determining why the Crown should be considered to be a fiduciary vis-a-vis the Aboriginal peoples of Canada in situations which do not pertain to Aboriginal title. Put another way, *Sparrow* does not provide us with any information concerning the nature and scope of the undertaking which forms the basis of the general fiduciary duty owed by the Crown. Nor, as we have seen, does the Court explain what if any discretion or power is being exercised by the Crown. Finally, while it seems relatively clear that one of the Aboriginal rights recognized and affirmed by s.35(1) includes the specific type of fishing right claimed in *Sparrow*, the nature and content of the term "aboriginal rights", as it is used in the *Constitution Act, 1982*, remained largely undefined. It would be a further six years before the Supreme Court would again turn its attention to these matters. The opportunity arose in a series of cases which may conveniently be referred to as the *Van der Peet* trilogy.

i. Defining the Nature and Content of Aboriginal Rights: A "Purposive" Approach.

In *Van der Peet*,[66] as well as in *R. v. N.T.C. Smokehouse*,[67] and *R.* v. *Gladstone*,[68] the

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[66]In *Van der Peet*, *supra* note 4, the appellant, Dorothy Van der Peet, was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with a contravention of s.27(5) of the

Supreme Court of Canada was required to consider "how ... the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*" were to be defined.[69]

British Columbia Fishery (General) Regulations, SOR/84-248, which prohibited the sale of salmon caught under the authority of an Indian food fishing licence. The appellant member of the Sto:lo Aboriginal group had sold ten such salmon but argued that the provision infringed her existing Aboriginal right to sell fish, violated s. 35(1) of the *Constitution Act, 1982*, and was therefore invalid. A majority of the Supreme Court found that the appellant had failed to demonstrate that the exchange of fish for money or other goods was an integral part of her band's distinctive pre-contact culture and, as such, concluded that it was not protected by s. 35(1).

[67]As in *Van der Peet*, the appellant commercial food processing company in *Smokehouse*, *supra* note 4, was charged with a violation of s.27(5) of the *British Columbia Fishery (General) Regulations*. It was also alleged to have committed a breach of a provision of those regulations (s.4(5)) which proscribed the purchase and sale of fish not caught under the authority of a commercial fishing licence. In this respect, the information alleged that the appellant had purchased 119,435 pounds of salmon which had been caught by members of the Sheshaht and Opetchesaht Bands under the authority of Indian food fishing licences. The Appellant argued that because the regulations violated Aboriginal rights protected by s.35(1) of the *Constitution Act, 1982*, they were of no force and effect. A majority of the Supreme Court dismissed the appeal on the basis that, "[t]he findings of fact made by the trial judge do not support the appellant's claim that, prior to contact, exchanging fish for money or other goods was an integral part of the distinctive cultures of the Sheshaht or Opetchesaht" (p. 539, refers).

[68]The Appellants in *Gladstone*, *supra* note 4, had been charged under s. 61(1) of the *Fisheries Act* with attempting to sell herring spawn on kelp caught without the proper licence, contrary to s.20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324. They argued that the Regulations violated the Aboriginal rights they enjoyed as members of the Heiltsuk Band. In allowing the appeal, and directing a new trial on the issue of the justifiability of the government's herring allocation scheme, the majority of the Supreme Court stated that, the "exchange of herring spawn on kelp for money or other goods was a central, significant and defining feature of the Heiltsuk prior to contact" and "that the exchange of herring spawn on kelp on a scale best characterized as commercial was an integral part of the distinctive culture of the Heiltsuk" (p. 660, refers). The case is discussed in greater detail in Chapter 5 of this thesis.

[69]*Van der Peet*, *supra* note 4 at 294.

In doing so, Lamer C.J., who wrote the majority judgment in all three cases,[70] found it necessary to explore the reasons why Aboriginal rights existed in the first place.[71]

Just as Judson and Hall JJ. had concluded in *Calder* that the basis of Indian title lay in the "fact" that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries",[72] in *Van der Peet* Lamer C.J. stated that:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other

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[70]The majority judgments in *Van der Peet* and *Smokehouse* were written by Lamer C.J. and concurred in by La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. In both these cases separate dissenting judgments were written by L'Heureux-Dubé and McLachlin JJ. The majority judgment in *Gladstone* was written by Lamer C.J. While concurring in the result, L'Heureux-Dubé and McLachlin JJ. wrote separate judgments. La Forest J. penned the lone dissent in that case. It may be significant to recall that Lamer J., as he then was, had concurred in Dickson's judgment in *Guerin*. Furthermore, while the unanimous judgment of the court was delivered by Dickson C.J and La Forest J. in *Sparrow*, Lamer J. also sat as a member of the panel which decided that case.

[71]*Van der Peet, supra* note 4 at 294. To quote Lamer C.J., "[i]n order to define the scope of aboriginal rights, it will be necessary first to articulate the purposes which underpin s.35(1) ... . Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible."

[72]See *Calder et al.* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 (SCC) [hereinafter *Calder* cited to D.L.R.], where, at pp. 152 and 156, Judson J. stated, with reference to the Privy Council's decision in *St. Catherine's Milling & Lumber Co.* v. *R.*, (1888) 10 A.C. 13 (P.C.), that he did not consider "the Proclamation to be the sole source of Indian title"; and further, that: "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries".

> minority groups in Canadian society and which mandates their special legal, and now constitutional status.[73]

Lamer C.J. further determined that:

> the explanation of the basis of aboriginal title in *Calder*, *supra*, can be applied equally to aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying 'the land as their forefathers had done for centuries'.[74]

Having established why Aboriginal rights exist, Lamer C.J. stated that any test for identifying the Aboriginal rights "recognized and affirmed" by s. 35(1) "must ... aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans".[75] Not surprisingly, he

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[73] *Van der Peet*, *supra* note 4 at 303. It is important to recognize Lamer C.J.'s reliance on "Canadian, American and Australian jurisprudence" in support of the proposition that Aboriginal rights are "based in the prior occupation of North America by distinctive aboriginal societies" (see pp. 304 and 309). In this regard, at pp 304-10, Lamer C.J. notes with approval Dickson J.'s judgment in *Guerin*, *supra* note 2, the judgments of Hall and Judson JJ. in *Calder*, *supra* note 72, the judgment of Brennan J. in *Mabo* v. *Queensland* [No. 2] (1992), 175 C.L.R. 1 (Aust. H.C.) [hereinafter *Mabo*], as well as a number of "general principles" articulated in the Marshall decisions (*M'Intosh*, *supra* note 20 and *Worcester* v. *State of Georgia* (1832), 6 Peters 515, 31 U.S. 530).

[74] *Van der Peet*, *supra* note 4 at 304.

[75] *Ibid.* at 310. Significantly, Lamer C.J. does not refer solely to contact with the British. The reason would become evident in *R.* v. *Coté*, [1996] 3 S.C.R. 139 (S.C.C.) [hereinafter *Coté*]. The respondent in that case had argued, at pp. 168 and 170, that "no aboriginal right could have survived the assertion of French sovereignty over the territory of New France" and that upon the French capitulation, "pre-existing French colonial law was fully received under the terms of the *Quebec Act*". In reply, Lamer C.J. observes, at p. 170, that "some legal historians have suggested that the French Crown never assumed full title and ownership to the lands occupied by aboriginal peoples in light of the nature and pattern of French settlement in New France" (see Chapter three where, in relation to notes 146 and 163, the argument is made that France's territorial claims were based on actual settlement and control and that French settlements in North America were comparatively small in size and number). Lamer C.J.'s further comments, at p. 173-73,

concluded that, "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right".[76]

In *Van der Peet*, Lamer C.J. would further determine that Aboriginal title is but one aspect of Aboriginal rights. He expressed the relationship between the two concepts in the following terms:

> aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise

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suggest that the question of the treatment of Aboriginal rights under the French Regime may well be moot on the basis that "the common law recognizing aboriginal title was arguably a necessary incident of British sovereignty which displaced the pre-existing colonial law governing New France", a proposition he attributes to Slattery U.A.R., *supra* note 43 at 737-38 (for a detailed discussion of the rights of Aboriginal peoples at common law see notes 217 and 218 of Chapter three of this thesis). Nevertheless, in *Coté*, Lamer C.J. did not consider that he had to resolve the issue on the basis that "the French Regime's failure to recognize legally a specific aboriginal practice, custom or tradition ... clearly cannot be equated with a 'clear and plain' intention to extinguish such practices under the extinguishment test of s.35(1)" (p. 174-75, refers). In this regard, he was of the view that the approach being advocated by the respondent "would create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical ideosyncrasies of colonization over particular regions of the country" (p.175 refers).

[76]*Ibid.* at 310. As Lamer C.J. would write in *Smokehouse*, this essentially involves a two-stage analysis. The first stage in the analysis "requires the Court to determine the precise nature of the claim being made, taking into account such factors as the nature of the action said to have been taken pursuant to an aboriginal right, the government regulation argued to infringe that right, and the tradition, custom or practice relied upon to establish the right". The second stage "requires the Court to determine whether the practice, tradition or custom claimed to be an aboriginal right was, prior to the contact with Europeans, an integral part of the distinctive aboriginal society of the aboriginal people in question" (see *Smokehouse*, *supra* note 4 at 536-38).

> from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land.[77]

Borrowing from the analysis in *Sparrow*, Lamer C.J. also concluded that any "purposive" analysis of s. 35(1) "must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples".[78] In this regard, Lamer stated that:

> The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions must be given a generous and liberal interpretation. ...
>
> The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s.35(1), such doubt or ambiguity must be resolved in favour of aboriginal peoples.[79]

This passage is essentially a re-statement of Dickson and La Forest's findings in *Sparrow* and adds little to our understanding of the rationale by which the Crown should be deemed to have become a fiduciary. That is not to say that Lamer C.J. does not provide us with some clues however. One clue lies in the explanation provided as to why Aboriginal rights are constitutionally protected. In this context. Lamer C.J. concludes that:

> what s.35(1) does is provide the constitutional framework through which the fact that aboriginals live on the land in distinctive societies, with their own practices,

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[77] *Van der Peet*, *supra* note 4 at 320.

[78] *Ibid.* at 301.

[79] *Ibid.* at 301-02.

> traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. (emphasis added)[80]

Lamer C.J.'s reference to the fact that some Aboriginal groups continue to "live on the land in distinctive societies, with their own practices, traditions and cultures" provides a clear indication that the fact of sovereignty did not, in and of itself, automatically extinguish the "customs and usages" of the Aboriginal peoples of Canada. Is there a linkage to be made between that fact and the acquisition of sovereignty which serves to explain how the Crown became a fiduciary? The historical evidence suggests that there is.

ii. The Reconciliation of the Sovereignty of the Crown with Aboriginal Rights: *Van der Peet* and the Argument for a New Perspective on a Historic Undertaking.

As we have seen in Chapter three, by the latter half of the eighteenth century, the preferred means used by the British Crown to gain sovereignty over the lands possessed by Aboriginal groups in North America was to place those Aboriginal groups "under the protection" of the Crown. This practice, which had actually been followed by the British to some extent in the period prior to 1763, was codified in the *Royal Proclamation* together with a broad guarantee that the Aboriginal groups concerned would not be "molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them,

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[80] *Ibid.* at 303.

as their Hunting Grounds".[81] The guarantee was accompanied by a number of principled measures which were designed to insure the maintenance of peace and orderly settlement in the Crown's sovereign territories by safeguarding the interests of the Aboriginal groups concerned. One principle which was embodied in this guarantee was the proposition of the inalienability of Aboriginal land title except to the Crown by means of a public purchase, which was the means chosen to reconcile the Aboriginal groups pre-existing interests in land with the sovereignty of the Crown. Significantly, this was also the "proposition" which led Dickson J. to conclude that the Crown was a fiduciary in the circumstances described in *Guerin*.

Based on Lamer C.J.'s conclusions in *Van der Peet*, it would seem that it is not only the Aboriginal land interest which must be reconciled with the sovereignty of the Crown, but, that the process of reconciliation embraces "the practices, traditions and cultures" of the Aboriginal groups themselves. This should not be surprising given Lamer C.J.'s conclusions concerning the similar origins of both Aboriginal rights and Aboriginal title and the fact that the latter interest exists as a sub-set of the former. Taking the premise a step further, one might argue that the broader guarantee that the Aboriginal groups concerned would not be "molested or disturbed" extends beyond the Aboriginal title interest to embrace the "practices, traditions and cultures" of the Aboriginal groups themselves. If this is indeed the case, then perhaps it is this guarantee which serves as the

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[81] *Royal Proclamation*, *supra* note 28.

undertaking which supports the conclusion that the Crown is a fiduciary vis-a-vis the Aboriginal peoples of Canada in circumstances which do not pertain to Aboriginal title?[82]

An alternate and in many ways more likely approach would be to view the singular act of extending "the protection of the Crown" to an Aboriginal people, in return for the giving up of any claim to an independent or sovereign status, as imposing an obligation on the Crown to respect the protected people's "practices, traditions and cultures". On this view, one might well conclude that it is the guarantee of protection inherent in the act of assuming the mantle of "protector" which serves as the requisite undertaking.[83] The attraction of this approach lies in the fact that it is not necessarily dependant upon the application of the *Royal Proclamation*. Nor would it necessarily matter that in some cases the Crown had unilaterally assumed the role of protector by exercising the sovereign powers of the state and simply "governing" the Aboriginal group concerned without benefit of agreement or treaty.

There is some support for this latter approach in law. In this regard, it is important to recall that the English common law did not automatically abrogate the

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[82]In McMurtry and Pratt, *supra* note 41 at 31, it is argued that the *Royal Proclamation* "created an inchoate fiduciary relationship with respect to the lands of all Indian nations covered by the Royal Proclamation", and that as a result, "all dealings between Indian people and the Crown are clothed with a fiduciary aspect".

[83]In P.W. Hutchins & D. Schulze, "When do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Sask. L. Rev. 97 at 114, the authors argue that "[t]he essence of the relationship forged by the Aboriginal peoples with the Crown since contact and developed through the treaties is that the Aboriginal peoples gave up some aspects of their external sovereignty in return for the Crown's promise of protection of their interests, notably their internal sovereignty".

customs and usages of indigenous peoples. Rather, the common law ultimately adopted the position that personal and communal rights were presumed to continue to exist unless the contrary is established by the context or circumstances, a possibility which had been hinted at by the Quebec Supreme Court as early as 1867 in relation to Aboriginal "customs and usages", in what was then the Athabaskan region of Western Canada.[84] Indeed, it may even be argued that the rights of Aboriginal peoples merged in the common law itself.[85] It may also be significant to note, in this context, Lamer C.J.'s

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[84]For a detailed discussion of the common law position see note 217 to Chapter three of this thesis and in particular the commentary pertaining to the decision in *Amodu Tijani* v. *Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.). The Canadian case referred to is *Connolly* v. *Woolrych* (1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Que. S.C.), aff'd *sub nom Johnstone* v. *Connolly* (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Que. C.A.) wherein the validity of the marriage of an Aboriginal (Cree) woman to in a non-Aboriginal man was upheld. In that case, the court concluded that the laws and usages of the Indian tribes had survived the conquest and cession by the British and had not been modified thereafter, despite the fact that English traders in the same area were governed by English law. An excellent summary of the common law position is set out in the dissenting judgment of Lambert J.A. in *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470 at 650-57, 5 W.W.R. 97 at 283-290 (B.C.C.A.)[hereinafter *Delgamuukw* cited to W.W.R.][leave to appeal & cross-appeal to S.C.C. granted 109 D.L.R. vi].

[85]This is clearly the case with respect to the Aboriginal title interest. In this regard, see *Roberts* v. *Canada*, [1989] 1 S.C.R. 322 (S.C.C.). That case turned on whether or not the law pertaining to Aboriginal title amounted to "an existing body of federal law". Writing for the five member panel of the Supreme Court of Canada which heard that case, Wilson J. determined that the right to use and occupy reserve lands derived from the executive act which originally established the Indian reserve, from the provisions of the *Indian Act* which "codify the pre-existing duties of the Crown towards the Indians", as well as from "the common law of aboriginal title which underlies the fiduciary obligations of the Crown" (emphasis added) (p.340 refers). She not only went on to conclude that "the law of aboriginal title is federal common law" but also concluded that the common law is encompassed within the meaning of the term "existing federal law". Insofar as the other rights of Aboriginal peoples are concerned, Slattery has argued, since 1987, that "the Crown, in offering its protections to such peoples, accepted that they would retain their lands, as well as their political and cultural institutions and customary laws" (see Slattery,

detailed references to the 1992 decision of the High Court of Australia in *Mabo*, and in particular the majority judgment of Brennan J. In that judgment, Brennan J. acknowledges the fallacy of treating an inhabited territory as a legal dessert in order "to deny the possibility of native title recognized by our laws".[86] After citing this particular passage from *Mabo*, Lamer C.J. states that "[t]his position is the same as that being adopted here .... 'traditional laws' and 'traditional customs' are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples".[87] This does not rule out the possibility that some Aboriginal rights may simply have been abandoned

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"U.A.R." supra note 43 at 736-37). Slattery suggests that the legal principles pertaining to Aboriginal law can be discerned in colonial government practice, were applied automatically to new colonies, and were eventually incorporated into Canadian common law. See also Slattery, "F.N.C." *supra* note 58 at 271-73, wherein the author goes on to argue that the fiduciary relationship is "grounded in historical practices" that emerged in the early colonial period and which by 1760 had "crystallized" to form part of the colonies' "basic constitutional law". He views the *Royal Proclamation* of 1763 as being reflective of that law, a law which later would emerge as part of the common law of Canada and be reflected in s.35(1) of the *Constitution Act, 1982*, which served to "entrench the trust relationship with Aboriginal peoples" so as to "afford protection to Aboriginal land rights, laws, <u>and powers of self-government</u>, and perhaps also Aboriginal languages and culture" (emphasis added). In *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821, the Supreme Court of Canada was asked to consider whether the sections of the Criminal Code which regulate gambling infringed the plaintiffs' Aboriginal right of self-government. Writing for the majority of the Court, Lamer C.J. determined, at p.834, that the exact nature of the activity claimed to be a right was the right "to participate in, and to regulate, high stakes gambling activities" on the reservations. He then went on to apply the test laid down in *Van der Peet* to conclude, at p. 834, that the evidence "does not demonstrate that gambling, or that the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations". Inasmuch as the court dismissed the plaintiffs' appeal without deciding whether s. 35(1) includes the right of self-government, the legal status of that latter right remains unresolved.

[86]*Mabo*, *supra* note 73 at 58.

[87]*Van der Peet*, *supra* note 4 at 308.

prior to the coming into force of s.35 - a prospect which Lamer C.J. clearly hints at in *Van der Peet.*[88] In addition, there is nothing in Lamer's judgment which would suggest that Aboriginal rights could not have been extinguished by the Crown in the same period through the manifestation of a clear and plain intention, just as Aboriginal title could have been. Indeed, this would explain why the protections embodied in s.35(1) were needed in the first place.

To the extent that this general fiduciary obligation may be viewed as either the embodiment of the guarantee which was given in exchange for sovereignty, or the consequence of having taken on the protector's mantle, or both, it makes some sense to interpret the rights which are "recognized and affirmed" by s.35(1) having regard to the general fiduciary obligations which are now said to bind the Crown in its dealings with the Aboriginal peoples of Canada. This view of the Crown's general obligation is also considered to fit neatly with the rationale which Lamer C.J. provides in *Van der Peet* to explain the entrenchment of Aboriginal rights in the *Constitution Act, 1982*, which is to the effect that s.35(1) was the means chosen to acknowledge and reconcile Aboriginal rights with the sovereignty of the Crown. One might go on to theorize that, in the context of those Aboriginal rights which do not pertain to Aboriginal title, the term

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[88]*Ibid.* at 316, where Lamer C.J. goes on to refer to this latter principle as the "concept of continuity", pointing out that "the practices, traditions and customs protected by s.35(1) <u>are ones that exist today</u>, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact" (emphasis added). Not surprisingly, he concludes, at p. 318, that: "[t]he fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right".

sovereignty must include the Crown's political jurisdiction or power over the Aboriginal peoples of Canada, rather than simply the Crown's sovereignty over the land mass upon which they reside. In this regard, one might well conclude that it is the "power to govern" which serves to define the term "federal power" as that term was used by the Court in *Sparrow*, and that it is in fact the "power to govern" which must be reconciled with the "federal duty" when considering the requirements raised by the Crown's obligation to act in a fiduciary capacity with respect to the Aboriginal peoples of Canada. This in turn suggests that, for the purposes of this particular fiduciary relationship, it is appropriate to focus on the power being exercised by the fiduciary as well as the expectations of the Aboriginal peoples concerned.

As we have seen in Chapter two, La Forest J.'s 1994 judgment in *Hodgkinson* v. *Simms*,[89] ushered in a test for the existence of fiduciary duty which built on the "expectation" analysis which he had developed in *Lac Minerals*. In *Hodgkinson*, La Forest J. concluded that discretion as well as vulnerability, influence and trust were merely "non-exhaustive evidentiary factors to be considered". According to La Forest, what was really required was "evidence of a mutual understanding that one party had relinquished its own self-interest and agreed to act solely on behalf of the other party" - the key question being "whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the

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[89][1994] 3 S.C.R. 377 (S.C.C.)[hereinafter *Hodgkinson*].

subject matter at issue".[90] Does such a "mutual understanding" exist for the purposes of the Crown-Aboriginal relationship?

Taking a historic view of the Crown-Aboriginal relationship, it seems clear that the Crown's undertaking was at the heart of the process by which many Aboriginal groups were brought under the protection of the Crown.[91] Nevertheless, some uncertainty would seem to remain as to whether the subject matter of the undertaking would have been understood by all parties to have extended beyond the Aboriginal title interest, to embrace the "practices, traditions and cultures" of the Aboriginal groups themselves. As previously noted, in light of the judgment of Lamer C.J. in *Van der Peet*, an argument can be made in favour of just such a proposition.

In the context of the Crown-Aboriginal fiduciary relationship, the analysis of La Forest J. in *Hodgkinson* does raise a number of theoretical problems however. In particular, can it really be said that the Crown ever agreed to act "solely" on behalf of the Aboriginal people of Canada given that the responsibilities of government are many and varied and the Aboriginal peoples of Canada are comprised of many separate and diverse Aboriginal groups? Is it logical to presume that the Crown would ever have agreed that it owed exclusive duties to each Aboriginal group, given the possibility that the interests

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[90]*Ibid.* at 409-10.

[91]Not all Aboriginal groups would subscribe to the notion that at some defined historical moment they reached such a "mutual understanding" with the Crown. Indeed as we have seen, the Crown may well have assumed the role of protector in some cases by simply exercising the powers of state and governance in relation to the Aboriginal groups concerned.

of one Aboriginal group might well conflict with the interests of another? And what of the Crown's other priorities and the interests of non-Aboriginal Canadians? In short, does the assignment of what is normally thought of as an exclusive private, rather than public, law duty of care really make sense in the government context?

To frame the question in the manner proposed by La Forest J., one might well ask whether it would have been reasonable for each Aboriginal groups to have expected that the Crown would or could always act exclusively in their best interests? The answer is by no means self-evident. While there would now seem to be a clear consensus among most Aboriginal leaders that the Crown has a moral if not legal obligation to act in their best interests, it is difficult to assess whether the view is attributable to the Crown's "historic" undertaking or whether it is instead reflective of more pragmatic, politic considerations. Assuming, for argument's sake, that the former explanation is the more prevalent one, it would be difficult to gauge the extent to which the Aboriginal peoples of Canada "reasonably" consider that the obligation to act in their best interests must always prevail over all other government priorities and initiatives in the event of a conflict.

E. Conclusions:

As we have seen in Chapter two, a fiduciary owes a "general" duty of loyalty, good faith and avoidance of a conflict of duty or self-interest. The duty derives from the fiduciary's undertaking "to act in relation to a matter in the interests of another". As the

Lac Minerals case suggests, a fiduciary relationship can exist in situations which do not immediately give rise to a more specific duty. However, depending on the particular nature of any given undertaking, additional "specific" duties may also be owed. Generally they embrace more onerous requirements than those which will arise in connection with the "general" fiduciary duty.

In light of *Sparrow*, we know that the Crown has a "general" responsibility to act in a fiduciary capacity with respect to the Aboriginal peoples of Canada. The responsibility has been more specifically described as a duty to uphold "a high standard of honourable dealings". In the Crown-Aboriginal relationship, "specific" additional fiduciary duties can also be seen to arise in connection with the particular application of a Crown discretion or power to act which is expressly provided for by statute, treaty or agreement. Such was the case in *Guerin*. "Specific" duties also may be owed in relation to the operation of s.35(1) of the *Constitution Act, 1982*, which demands the justification of any government regulation which infringes upon existing Aboriginal and treaty rights. This "specific" type of fiduciary duty was first articulated in *Sparrow*.

The Crown's "general" responsibility to act in a fiduciary capacity with respect to the Aboriginal peoples of Canada may be said to derive from the Crown's "historic" undertaking to act on the behalf of the Aboriginal peoples of Canada to protect their "practices, traditions and cultures" in dealings with third parties. It seems logical to conclude that the Crown incurred this responsibility in consequence of assuming sovereignty over both the land mass of what is now Canada and the Aboriginal people who reside there, by which it is meant that the Crown either: extended its protection to

them, and their lands, in return for their giving up of any claim to an independent sovereign status, or, unilaterally took up the "mantle of protector" by simply exercising the power of governance over them, or both. In this context, the proposition of the "inalienability" of Aboriginal land title, except to the Crown by means of a public purchase, was but one policy initiative advanced by the Crown in furtherance of the "guarantee of protection" embodied in its undertaking.

While it was the proposition of inalienability which led Dickson J. to conclude that the Crown was a fiduciary on the facts in *Guerin*, it now seems clear that the broad undertaking, which is at the heart of the overarching Crown-Aboriginal fiduciary relationship referred to in *Sparrow*, may impose duties on the Crown which extend well beyond the Aboriginal land interest. Furthermore, we now know that the Aboriginal title interest is only one component of "Aboriginal rights", as that term was defined by Lamer C.J. in *Van der Peet*. In this regard, there can now be little doubt that the Aboriginal peoples of Canada have a multiplicity of "interests" or "rights" related to the distinctive "practices, traditions and practices" which the Crown undertook to protect. The affirming provisions of the *Constitution Act, 1982*, serve to acknowledge and reconcile these Aboriginal rights with the sovereignty of the Crown.

It may be argued that the requisite "characteristics" of fiduciary relationships, as first enunciated by Wilson J. in *Frame*, are all present in the Aboriginal context".[92] For example, in terms of the first and second criteria, it seems evident that the Crown has

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[92]The criteria are set out, *supra* at note 64.

some scope for the unilateral exercise of a discretion or power, or both, in relation to the rights of Aboriginal peoples. While for most purposes this may amount to little more than the power of governance, in some cases, such as in relation to the Aboriginal title interest, the Crown's intervenor status is indicative of the exercise of a power which far exceeds that which is involved whenever the interests of non-Aboriginal Canadians is being considered.

In terms of the third criteria, there may be some debate as to whether or not the Crown's conduct has engendered a state of dependency on the part of the Aboriginal peoples of Canada.[93] Nevertheless, as the record of Crown dealings with Aboriginal peoples amply demonstrates, the Crown's ability to effect Aboriginal interests, coupled with Aboriginal reliance, affirms that the position of the Aboriginal peoples of Canada is not without an element of vulnerability.[94]

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[93] Professor Slattery considers the notion of reliance to better fit the reality of Crown-Aboriginal relations on the basis that "[t]he sources of the general fiduciary duty do not lie, then in a paternalistic concern to protect a 'weaker' or 'primitive' people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help" (see Slattery, "U.A.R." *supra* note 43 at 753). This is reminiscent of the logic implicit in the "historic reality" argument advanced by Wilson J. in *Guerin* (see the text and commentary *supra* pertaining to notes 40 and 41). The term "dependence", which recalls the paternalistic policies of the Canadian government in the nineteenth century, is considered repugnant by many Aboriginal Canadians.

[94]Bryant, *supra* note 48 at 31, argues that "[i]t is justifiable to infer that dependence or reliance colours the Crown-aboriginal relationship, thereby exhibiting a feature that typically attracts fiduciary analysis". See also R.H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990) at 183, wherein it was stated, in reference to the Aboriginal peoples of Canada, that: "there is no question that they are peculiarly vulnerable to or at the mercy

While it is considered that there is at least some doctrinal support for the Supreme Court's conclusion that the Crown-Aboriginal relationship should be assessed according to fiduciary principles, there remains some doubt as to whether that conclusion is consistent with the test laid down in *Hodgkinson*, and whether the application of fiduciary principles to define the Crown-Aboriginal relationship is really appropriate in view of the "no-conflict" proscription which features so prominently in fiduciary doctrine. The issue has implications which transcend purely academic concerns, for while it is possible to define the nature of the duties owed by the Crown, it is by no means clear how the fiduciary standard can be upheld and those duties discharged in conflict situations.

Having achieved a broad appreciation of the true nature of the Crown-Aboriginal relationship, we will now turn to consider the practical issues and considerations surrounding the discharge of the Crown's fiduciary duties through a detailed consideration of the growing body of jurisprudence pertaining to the Crown-Aboriginal fiduciary relationship. As we shall see, in determining what fairness now requires that the Crown do or refrain from doing, Canadian judges have had to find workable solutions to problems which the Supreme Court did not address in the cases discussed in this chapter. Indeed, it is, in large measure, the judicial response which will determine the appropriateness and utility of the fiduciary characterization of the Crown-Aboriginal relationship which Dickson J. first invoked in his landmark judgment in *Guerin*.

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of the Crown. Their disadvantaged and dispossessed circumstances are not relatively different from a century ago."

Chapter 5 - The Search for Pragmatic Solutions to Theoretical Problems: Judicial Perspectives on the Crown-Aboriginal Fiduciary Relationship.

A. Introduction:

The historic record bears witness to the fact that the Crown entered into many separate relationships with the Aboriginal peoples of Canada.[1] As we have seen in Chapter three, the Crown's early relations with the Aboriginal peoples of North America were largely dictated by Britain's own strategic requirements.[2] However, in advancing its own sovereign interests, the Crown was obliged to acknowledge that Aboriginal persons lived on the land in distinctive societies, a fact which led the Crown to take a number of principled measures to safeguard Aboriginal interests. This latter development is most apparent in relation to the protections afforded the Aboriginal title interest - protections which prompted Dickson J. to use the term "fiduciary" in describing the Crown-Aboriginal relationship in his landmark judgment in *Guerin et al.* v. *The Queen*[3]. In light of the Supreme Court of Canada decision in *Regina* v. *Sparrow*, we now know that the responsibility to act in a fiduciary capacity serves as the "guiding principle" for the

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[1]While it may be convenient to speak of "a" Crown-Aboriginal relationship there are, in theory, as many potential relationships as there are distinct Aboriginal groups.

[2]While British imperial policy was capable of being managed in conflict situations by balancing Aboriginal and non-Aboriginal interests, the outcome almost invariably favoured those interests which most closely served imperial objects.

[3][1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to S.C.R.].

interpretation of the rights recognized and affirmed under s.35(1) of the Constitution.[4] Moreover, given Lamer C.J.'s judgments in the *Van der Peet* trilogy,[5] it may also be said that the process of reconciliation extends to Aboriginal "practices, traditions and cultures".

The historical experience suggests that the Crown has either proven unable or unwilling to live up to the many and varied obligations owed the Aboriginal peoples of Canada in situations where Aboriginal interests have come into conflict with non-Aboriginal interests, including the interests of the Crown itself. Having said that, it must also be appreciated that the Crown entered into its relationships with Aboriginal groups without regard to the fiduciary principles which underscore fiduciary doctrine as it has evolved in the waning years of the twentieth century. In this respect, it may be relevant to recall that the Crown has traditionally maintained that its only duty was to play the role of intermediary in Aboriginal land transactions involving third parties.[6] Indeed, with the possible exception of the Aboriginal interest in land, the Crown has, until very recently, always viewed its relationship with the Aboriginal peoples of Canada either in political terms or as a function of its legislative role.

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[4][1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.]. Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Constitution Act, 1982*].

[5]*R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [hereinafter *Van der Peet* cited to D.L.R.]; *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528 [hereinafter *Smokehouse* cited to D.L.R.]; and, *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [hereinafter *Gladstone* cited to D.L.R.].

[6]As the experience of Aboriginal groups in British Columbia amply illustrates, the reality has fallen far short of even that limited guarantee.

In this chapter, we will examine how Canadian courts have approached the requirement to apply fiduciary principles to redefine the historic nature of the Crown's dealings with specific Aboriginal groups. The analysis will focus on the attempt, by Canadian courts at all levels, to find workable solutions to the practical problems posed by the need to apply fiduciary standards and principles to various aspects of that relationship. The methodology adopted here will largely be of the case analysis type. To the extent that the issues may be said to transcend jurisdictional boundaries, the case commentaries reflect a cross-section of decision-making at various judicial levels, including the Supreme Court in situations where that Court's sparse pronouncements may be indicative of future trends.

Indeed, as we have seen in the previous chapter, there are a number of outstanding theoretical and practical issues pertaining to the Crown-Aboriginal fiduciary relationship which the Supreme Court did not fully resolve in either *Guerin*, *Sparrow*, or the *Van der Peet* trilogy. To that end, the cases which follow have been selected having regard to three interrelated issues which have been brought sharply into focus as Aboriginal litigants attempt to invoke fiduciary principles to achieve redress in a wide range of situations and contexts. The three issues which will be addressed in the case commentaries and subsequent discussions pertain to the requirement to:

1) define the circumstances under which fiduciary duties are owed by the Crown;
2) identify who is to be held responsible to uphold the Crown's obligations; and
3) determine the nature and extent to which the obligation to avoid a conflict of duty or interest has application to the Crown as a fiduciary.

The three issues, which are in evidence on the facts presented in each of the two prototypical paradigm situations presented in Chapter one, are considered to be interrelated and often arise and are examined by the courts simultaneously. For this reason, it is not considered practical to attempt to isolate the issues in presenting the case commentaries which are canvassed in this chapter. In this area of the law, perhaps more so than in others, context really is everything. Having said that, it may be noted that the case summaries have been presented in chronological order - an approach which is believed to be in keeping with the measured pace at which the principal judicial developments in this field of law have occurred since 1984. Although this approach avoids the needless repetition of factual information, it is acknowledged that the resulting commentaries may well appear to lack structure. While this impression may, in part, be accentuated by the disparate approaches taken by the courts in a number of the cases, an effort will be made at the end of this chapter to draw on the various issues and themes explored in the case commentaries with a view to formulating detailed, coherent conclusions concerning the courts' treatment of the three issues under consideration here.

B. The Initial Response to *Guerin* - Judicial Perspectives, 1985-1990:

i. *Kruger* v. *The Queen*.

The 1985 decision of the Federal Court of Appeal in *Kruger* v. *The Queen*[7] is noteworthy for two reasons. While the case provides us with an early example of the

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[7](1985), 17 D.L.R. (4th) 591, [1986]1 F.C. 358 [hereinafter *Kruger* cited to D.L.R.].

expansion of fiduciary principles outside the narrow confines of a surrender of reserve lands, *Kruger* is also significant from the standpoint of the conflict of interest prohibition ("no conflict rule") which underscores the fiduciary's general duty of loyalty.

The facts in *Kruger* were somewhat similar to those in *Guerin*, although there are some important differences. *Kruger* involved an expropriation of two parcels of reserve land rather than a surrender of reserve lands for subsequent sale or lease to a third party. The two parcels of reserve land involved were expropriated by the federal government for public works related to transportation (the building of an airport) and national defence (an emergency aircraft landing field). While a surrender was obtained with respect to one of the two parcels, it did not occur until after the land had been expropriated. Furthermore, in obtaining that surrender, which had the effect of ratifying a compensation package, the government did not advise the Penticton Band that it had reason to believe that the earlier expropriation had been illegal.

A breach of the Crown's fiduciary obligations was raised by the Band with respect to the expropriation action taken by the Department of Transport. The Band argued that the expropriation action prevented the Indian Affairs Branch of the Department of Mines and Resources from protecting the Band's interests, in that it prevented that latter Department from refusing to sell or lease the lands, except on "appropriate" terms. In this respect, the appellant Band submitted that the Crown had dealt with the property in a manner which served its own interests rather than those of the Band. In relation to the surrender, the Band further argued that it had not provided "fully informed consent" and could not have done so given the Band's lack of knowledge concerning the alleged

illegalities surrounding the earlier expropriation action. Lastly, the Band argued that as a fiduciary the Crown had not exercised the requisite degree of care in determining the level of compensation.

The Court found for the Respondent and dismissed the appeal. Writing for the majority, Urie J. expressed the view that the two government Departments were not in conflict, notwithstanding the fact that the decision which was taken "may not have been wholly in accord with the view of the Indians as to the worth of their lands".[8] Nevertheless, he did acknowledge that, "from the perspective of the Crown in its Department of Transport incarnation there were competing considerations".[9] The conclusion on the conflict issue would appear to have been directly influenced by the fact that it was the Crown, rather than a private person or entity, which was cast in the role of fiduciary. In this regard, Urie J.'s conclusion that the duty was owed to the people of Canada as a whole, including the Indians, not to "improvidently expend their monies",[10] reflects a certain pragmatism which is fully revealed in the following passage:

> If the submissions advanced by the appellants were to prevail, the only way that the Crown could successfully escape a charge of breach of fiduciary duty in such circumstances would have been, in each case, to have acceded in full to their demands or withdrawn from the transactions entirely. The competing obligations on the Crown could not permit such a result. <u>The Crown was in the position that it was obliged to ensure that the best interests of all for whom its officials had</u>

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[8] *Ibid.* at 649.

[9] *Ibid.* at 654.

[10] *Ibid.* at 648.

> responsibility were protected. The Governor in Council became the final arbiter (emphasis added).[11]

On the unique facts of the case, Urie J. went on to find that there had been no withholding of information in relation to the surrender. In any event, having already concluded that the expropriations were valid, the surrender was deemed to be superfluous.

Heald J., who was in the minority on the conflict of interest issue, was clearly of the view that the two federal departments were in a "conflict concerning the manner in which the Indian occupants of Parcel A should be dealt with".[12] Indeed, while the Indian Affairs Branch acted diligently to protect the Aboriginal interest, the Ministry of Transport pursued its mandate with respect to air transport. Had he not found the action to be statute barred, Heald J. would have found a breach of a fiduciary duty based on the principle 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".[13]

Insofar as the adequacy of the compensation was concerned, Urie J. found that the fiduciary "principle" propounded by Dickson J. in *Guerin* applied in a situation which did not involve a surrender, on the basis that the Crown had a "precise obligation" to "ensure that the Indians were properly compensated for the loss of their lands as part of the

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[11]*Ibid.* at 654-55. Waters suggests that the decision of Urie J. in *Kruger* would likely not survive close scrutiny, based, as it seems to be, on a misconception concerning Crown indivisibility (see D.M.W. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 411 at 420).

[12]*Kruger*, *supra* note 7 at 607.

[13]*Ibid.* at 607.

obligation to deal with the land for the benefit of the Indians". Nevertheless, in assessing the role of the Crown in discharging its obligations, he went on to observe, in the next breath, that "[h]ow they ensured that lies within the Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty".[14] Applying this standard, Urie J. concluded that the Crown had lived up to its obligations in arriving at a compensation package. In determining that a statutory discretion with respect to the payment of compensation was sufficient to trigger the application of the fiduciary principle, Urie J. obviously did not view Dickson J.'s decision in *Guerin* as restricting the application of fiduciary principles to a situation involving the surrender of reserve lands. This latter finding was concurred in by Stone J. and, as such, may be said to reflect the opinion of the majority of the Court.[15]

The result in *Kruger* is less than satisfying from a beneficiary's standpoint. Nor would it accord with a purist's view of fiduciary doctrine. In this regard, Urie J.'s judgment suggests that the fiduciary's duty of loyalty should not necessarily be viewed in exclusive terms where the Crown is a fiduciary. Moreover, in acknowledging the inherently conflicted nature of the Crown's position, Urie J. seems to suggest that any fiduciary duties arising out of the Crown-Aboriginal relationship may be assessed by the

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[14]*Ibid.* at 647 (emphasis added).

[15]While Heald J. concluded, *Ibid.* at 597, that the "fiduciary obligation and duty discussed in *Guerin* would also apply to a case such as this" he did not comment on the implications of the Crown's statutory discretion to act.

Crown and discharged having regard to any other competing interests and obligations which it may owe. Finally, in casting the Governor in Council in the role of arbitrator, the exercise of the discretion is elevated to the executive rather than departmental level where the cabinet confidence serves to shelter decision-making from public scrutiny.[16] One is left to ponder how a beneficiary could ever prove a breach of duty under such circumstances.

ii. *Alexander Band No. 134* v. *Canada (Minister Of Indian Affairs and Northern Development)*.

In 1990 the Federal Court of Canada, Trial Division, had occasion to consider whether the type of fiduciary duty referred to in *Guerin*, in connection with a surrender of reserve lands, obligated the Crown to "use governmental powers to achieve unilaterally a revision of the mineral leases covering the plaintiffs' reserve", by enacting a particular

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[16]While the approach has not been followed in any of the other cases under consideration in this chapter it may well be appropriate where the use of the expropriation power contained in s. 35 of the *Indian Act* is being considered, bearing in mind that the use of that power is conditional upon the consent of Governor in Council. In this regard, see McLachlin J.'s recent dissent in *Opetchesaht Indian Band* v. *Canada*, [1997] SCC File No. 24161 [unreported] where, in commenting on the exercise of the expropriation power, she observes, *obiter*, that "[t]he procedure is strictly regulated and subject to consent of the Governor in Council, exercised by Cabinet, <u>which owes the Indians a fiduciary duty to act in their best interests</u>" (emphasis added). McLachlin J. goes on to suggest that "the process is politically sensitive and open to public scrutiny". While the sensitive nature of the process is beyond dispute, it is difficult to understand her use of the term "open" to describe decision-making at the Cabinet level.

regulation at an earlier date. The case was *Alexander Band No. 134* v. *Canada (Minister Of Indian Affairs and Northern Development)*.[17]

While the Court in the *Alexander Band* case found that the fiduciary's general duty of utmost loyalty obliged the Crown to "seek to achieve" as good a return from the lands as could "reasonably and lawfully" be expected, it dismissed the plaintiffs' action on the basis that the subject matter of the particular regulation under consideration was of a general nature which "went far beyond any possible fiduciary obligation owed ... these particular plaintiffs".[18] In reaching this conclusion, Strayer J. contrasted the role of the Crown in the *Alexander Band* case with its role in *Guerin*; pointing out that in *Guerin* the Crown was essentially acting as a private party in negotiating the golf club lease, whereas in the instant case, "[t]he enactment of the regulation must be seen as primarily the performance of a political duty".[19] This latter finding seems to have been based on the fact that the regulation in question had a general application "to all Indian lands in Canada".[20]

The result in the *Alexander Band* case might well have been different had the Court been asked to determine whether "the early adoption of a simple provision to increase the revenue of the plaintiffs from their particular mineral rights, so as to equate these returns

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[17][1991] 2 F.C. 3, 39 F.T.R. 142, (sub nom. *Bruno* v. *Canada*) 2 C.N.L.R. 22 at 28 [hereinafter *Alexander Band* cited to C.N.L.R.].

[18]*Ibid.* at 30.

[19]*Ibid.* at 30.

[20]*Indian Oil and Gas Regulations*, C.R.C. 1978, c. 963, 21(7).

to those of other Alberta bands, was a matter of fiduciary obligation".[21] In this regard, Strayer J. suggests, *obiter*, that it was "wholly consistent" with the protective role assumed by the Crown with respect to Aboriginal interests,

> 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.[22]

In short, the Court seems to be suggesting that the requirement to uphold a specific fiduciary duty may well impact on the Crown's legislative powers; and further, that the discretion exercised by "legislatures and those having delegated legislative powers" may well be subjected to judicial review in an appropriate case, in consequence of such obligations.

C. The Crown-Aboriginal Relationship in the Post *Sparrow* Era - Judicial Perspectives, 1991-1996:

i. *Lower Kootenay Indian Band* v. *Canada*.

As in *Guerin*, the *Lower Kootenay* case involved a consideration of the Crown's conduct in relation to the surrender of reserve lands.[23] The Plaintiff Band argued, *inter alia*, that the Crown had breached its fiduciary duty in not responding to its repeated

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[21]*Alexander Band, supra* note 17 at 29, where Strayer J. points out that he is "constrained by the terms of the Special Case" to an examination of the *Indian Oil and Gas Regulations*.

[22]*Ibid*. at 29.

[23]*Lower Kootenay Indian Band* v. *Canada* (1991), 42 F.T.R. 241 (F.C.T.D.)[hereinafter *Lower Kootenay*].

requests to terminate a lease which had been entered into on surrender. The Band considered the lease "inadequate and unacceptable". Given the Crown's failure to perfect the surrender by obtaining the necessary Order-in-Council, the Band also argued that the Crown ought to have known that the lease was void *ab initio*.[24] Dubé J., the trial judge, agreed, finding that the Crown had not acted in a "reasonably prudent and provident manner" at the time of the surrender and lease. In this regard, it was deemed significant that the Crown had ignored the Band's stated desire to avoid being "locked into a long-term lease" as well as a Royal Commission recommendation.[25] He also found that the Crown "was both negligent and in breach of its fiduciary duty" in failing to perfect the surrender by obtaining the requisite Order-in-Council and in not advising the Band of that failure.[26] The trial judge went on to conclude that the Crown should have acted on the Band's repeated requests to terminate the lease and agreed that this failure constituted a breach of its fiduciary duty, and or negligence, or both.[27]

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[24]The facts and arguments are recited *Ibid.* at 244-246. The technical breach pertained to the Crown's failure to have the surrender approved by Governor in Council. The surrender and lease had been effected in 1934. While the Crown realized the error in 1948 it did not take any action to terminate the lease until 1984.

[25]*Ibid.* at 282-3.

[26]*Ibid.* at 283-4. In determining that the lack of an Order-in-Council invalidated the leases, the trial judge adopted the conclusions of the Exchequer Court in *St. Ann's Shooting & Fishing Club Ltd.* v. *R.*, [1949] 2 D.L.R. 17 (Ex. Ct.), aff'd. [1950] S.C.R. 211, and *R.* v. *Cowichan Agricultural Society*, [1950] Ex. C.R. 448 (Ex. Ct.), noting, at 270, that it was the Crown who "had pleaded the invalidity of the leases for the lack of an Order-in-Council" and was therefore "hardly in a position now to submit that the Indians in this case should be estopped from putting forth the very same argument".

[27]*Ibid.* at 284.

In *Lower Kootenay*, Dubé J. cited from Dickson J.'s judgment in *Guerin* in support of the proposition that "there is a general fiduciary obligation owed by the Crown in Right of Canada towards Indian bands in respect of their lands".[28] While he referred to the *Sparrow* finding of a general "Government" responsibility "to act in a fiduciary capacity with respect to aboriginal peoples", he expressed the view that a specific fiduciary duty "to exercise its discretion" in dealing with reserve lands would only arise "on surrender".[29] Dubé J. went on to conclude that, while that particular fiduciary duty "crystallized" on surrender, it would continue to exist for the duration of any lease which might subsequently be entered into.[30]

The *Lower Kootenay* case provides us with an early example of one court's attempt to apply the fiduciary standard to a series of transactions involving a particular Aboriginal group, the Crown and third parties. That case also serves to illustrate how the onus on the parties will vary according to whether or not a conflict of interest had been established. In this regard, Dubé J. explained that:

> In the case of a conflict of interest, the onus is that of a trustee, which is more onerous, to show that the Crown is acting in the best interest of the cestui que trust. In the absence of that conflict of interest, there is no prima facie case, and it is for the plaintiffs to show that the Crown did not act in their best interest. ... So long as the Crown's discretion is exercised honestly, prudently and for the benefit of the Indians, there is no breach of their fiduciary duty. Whether or not

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[28]*Ibid.* at 278.

[29]*Ibid.* at 278-81.

[30]*Ibid.* at 281.

> the Crown obtained the best price is not the test .... It would have been ... had there been a conflict of interest.[31]

ii. *Gitanmaax Indian Band* v. *British Columbia Hydro and Power.*

In the 1991 decision of the British Columbia Supreme Court in *Gitanmaax Indian Band* v. *British Columbia Hydro and Power*[32], the plaintiff Band brought an action alleging, in part, that the Crown was in breach of a fiduciary obligation in failing to include a condition in an Order-in-Council which would have ensured that the reserve lands, granted to the defendant utility, reverted to the Band when they were no longer being used for the purpose intended. The Court dismissed the action without determining whether "the federal Crown failed in its duty by not considering a transfer on condition, or making clear that there was a condition of transfer". In this regard, the Court concluded that, "although the defendant is an emanation of the Crown, it is not the Crown but a separate entity. The Crown is not a party to this action, and such an argument does not bear on the issues between the parties here".[33]

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[31]*Ibid.* at 280. The plaintiff did not allege that the Crown was in a conflict of interest in that case.

[32](1991), 84 D.L.R 562 (*sub nom. Robinson et al.* v. *British Columbia Hydro and Power Authority*)[hereinafter *Gitanmaax*].

[33]*Ibid.* at 566.

iii. *Gitludahl* v. *British Columbia (Minister of Forests).*

In *Gitludahl* v. *British Columbia (Minister of Forests),*[34] Newbury J., was asked to consider the plaintiffs' application for a permanent injunction to prohibit the Provincial Minister of Forests from consenting to the transfer of a forest licence. The licence allowed the licensee to conduct logging operations on lands which the plaintiffs had traditionally used for "hunting, fishing and other sustenance activities". The lands in question were also the subject of land claims litigation.[35]

The plaintiffs, who were acting for the Gitksan people, argued that the Minister was under a fiduciary duty to permit Aboriginal peoples "to use any 'unoccupied or vacant Crown land' for sustenance purposes" until such time as the land was "dedicated to another purpose".[36] In dismissing the plaintiffs' application, Newbury J. concluded

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[34][1992] B.C.J. No. 2930 (B.C.S.C.) (QL) [hereinafter *Gitludahl* cited to QL].

[35]At the time of the application in *Gitludahl*, the B.C.C.A. had yet to render its decision in *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470, 5 W.W.R. 97 [hereinafter *Delgamuukw* cited to W.W.R.][leave to appeal & cross-appeal to S.C.C. granted 109 D.L.R. vi].

[36]*Gitludahl, supra* note 34 at para 6. The plaintiffs' arguments reflect McEachern J.'s finding, in *Delgamuukw et al.* v. *The Queen in right of British Columbia et al.* (1991), 79 D.L.R. (4th) 185 at 482 (B.C.S.C.), that "the Crown would be in breach of its fiduciary duty if it sought arbitrarily to limit aboriginal use of vacant Crown land". In *Gitludahl*, the applicant's argued that the duty articulated by McEachern J. included "a right of consultation (not a veto), a right to require that aboriginal sustenance from and cultural activities upon unoccupied Crown land are not impaired arbitrarily or unduly, and the right to some 'sustenance priority'" (para 6). McEachern J.'s order was not varied on appeal. However, while the British Columbia Court of Appeal agreed that the Gitksan had the right to use any unoccupied or vacant Crown land for subsistence purposes, it declined to determine whether this was "a right based on the fiduciary duty of the Crown or an unextinguished aboriginal right" because "no appeal was taken from this part of the order, nor was any argument presented in relation to it" (see *Delgamuukw, supra* note 35 at 182, 234).

that, notwithstanding the fact that the Minister had not yet consented to the transfer, the land in question was no longer "vacant or unoccupied land" inasmuch as it had already been "licensed" by the Department. This conclusion seems to have been motivated by the Court's reluctance to expand the scope of the Crown's fiduciary duty. In this regard, Newbury J. stated that:

> If I were to hold otherwise, then all decisions of the Minister or of his department dealing with the use of land which has already been licensed or leased and has not been returned to the Crown would import the fiduciary duty.[37]

However, while she was not prepared to grant the plaintiffs' application, Newbury J. did suggest, *obiter*, that the Provincial Minister of Forests and his Department should at least have considered "the Gitksan's concerns about past and future logging practices", and that their failure to do so did "not reflect well on the honour of the Crown".[38]

iv *Attorney-General of Quebec* v. *Eastmain Band et al.*

In the 1992 decision of the Federal Court of Appeal in *Attorney-General of Quebec* v. *Eastmain Band et al.*,[39] the issue arose as to whether the 1975 *James Bay and Northern Quebec Agreement* was subject to reassessment on the basis that there were ambiguities in the agreement pertaining to the requirement for environmental review - ambiguities which the Band argued had to be construed in its favour in accordance with the principle

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[37]*Gitludahl, supra* note 34 at para 8.

[38]*Ibid.* at para 10.

[39](1992), 99 D.L.R. (4th) 16 [application for leave to appeal to the S.C.C. dismissed][hereinafter *Eastmain Band*].

laid down in *Nowegijick*.[40] They argued that the *Nowegijick* principle derived from the fiduciary relationship which exists between Aboriginal peoples and the Crown.[41] Decary J.A. noted that this principle "had been substantially diluted by the Supreme Court in *Mitchell*".[42] In any event, he stated that the *Nowegijick* principle rested on the historic vulnerability of Aboriginal peoples and concluded that there was no vulnerability with respect to the Aboriginal parties to this particular agreement.[43]

Decary J.A. went on to address the issue of the conflict of interest that is at the heart of much of the Crown's modern dealings with Aboriginal peoples, in the following

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[40]*Nowegijick* v. *The Queen* (1983), 144 D.L.R. (3d) 193 at 198 [hereinafter *Nowegijick*]. The *Nowegijick* principle is discussed in Chapter four, note 51.

[41]The argument would appear to have been loosely drawn from Dickson C.J.'s judgment in *Sparrow*, *supra* note 4 at 1109, where it was stated that the Crown's obligation to act in a fiduciary capacity required "the justification of any government regulation that infringes upon or denies aboriginal rights" - a conclusion said to be in keeping with the "interpretive principle" set out in *Nowegijick* and the "high standard of honourable dealings" which the Crown is obliged to uphold.

[42]*Eastmain Band*, *supra* note 39 at 26, citing La Forest' J.'s judgment in *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193 at 236 [hereinafter *Mitchell* cited to D.L.R.]. *Mitchell* is discussed in Chapter four at note 51.

[43]*Eastmain Band*, *supra* note 39 at 24. In light of the *Eastmain Band* case, it has been suggested that "fiduciary obligations do not arise or at least do not have much effect where Aboriginals seem to be negotiating with the Crown as equals" (P.W. Hutchins and D. Schulze, "When do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Sask. L. Rev. 97 at 113). The plaintiffs in the *Eastmain Band* case may be excused for arguing that the *Nowegijick* principle derives from the Crown-Aboriginal fiduciary relationship inasmuch as the element of vulnerability figures prominently in the language used to explain both concepts. As we concluded in Chapter four, the Crown's ability to effect Aboriginal interests, coupled with Aboriginal reliance, affirms that the position of the Aboriginal peoples of Canada is not without an element of vulnerability and vulnerability is one of the three characteristics of fiduciary principles enumerated by Wilson J. in *Frame* v. *Smith*, [1987] 2 S.C.R. 99 (S.C.C.), a case discussed in greater detail in Chapter two.

terms:

> Here again we must be careful not to speak in absolute terms. When the Crown negotiates land agreements today with the aboriginals, it need not and cannot have only their interests in mind. It must seek a compromise between that interest and the interest of the whole of society, which it also represents and of which the aboriginals are part, in the land in question. ...
>
> Even if we ascribe a fiduciary character to the relationship between the Crown and the aboriginals, it requires good faith and reasonableness on both sides and presumes that each party respects the obligations that it assumes towards the other. ...
>
> Thus while the interpretation of agreements such as those which prevailed in 1975 must be generous, it must also be realistic.[44]

In reaching these conclusions, it would appear that Decary J.A. was motivated, at least in part, by his concern that a broad application of the *Nowegijick* principle would prove too onerous for the Crown.

v. ***Delgamuukw* v. *British Columbia*.**

In 1993, the British Columbia Court of Appeal had occasion to consider a number of significant issues pertaining to the validity of Aboriginal title claims to traditional (non-reserve) tribal lands within the province of British Columbia. The case was *Delgamuukw* v. *British Columbia*.[45] From the standpoint of this portion of the thesis, the case is significant in that in it the Court signalled its willingness to extend fiduciary principles to

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[44]*Eastmain Band*, *supra* note 39 at 27-28. For the most part, the Supreme Court of Canada may now be taken to have adopted this approach in light of its decision in *R.* v. *Howard*, [1994] 3 C.N.L.R. 146 at 150, where the Court considered that the fact that band signatories to a 1923 treaty were "businessmen, a civil servant and all were literates" meant that the treaty would have been understood by them.

[45]*Delgamuukw*, *supra* note 35.

the test for the "extinguishment" of Aboriginal title.[46] In this regard, Macfarlane J.A. argued that:

> the clear and plain intention test should be applied with as much vigour to aboriginal title as it is to traditional property rights. This approach stems from the special relationship between the Crown and aboriginal people which has existed since the assertion of sovereignty and which is particularly apparent in relation to Indian interests in land.

He went on to conclude that:

> If the fiduciary obligation of the Crown to Indians in relation to the sale of their lands provides a 'guiding principle' for the application of s. 35 of the *Constitution Act, 1982*, then surely it must bear on the proper test to be applied to legislation purporting to extinguish aboriginal title.
>
> In this, as in all dealings between aboriginal people and our government, the honour of the Crown is engaged. ...
>
> In my view, the honour of the Crown, arising from its role as the historic protector of aboriginal lands, requires a clear and plain intention to extinguish aboriginal title that is express or manifested by unavoidable implication (emphasis added).[47]

In arriving at these conclusions, Macfarlane J.A. makes reference to Dickson C.J.'s judgment in *Sparrow*, which, as we have seen, stands, *inter alia*, for the proposition that the Crown will always be held to a "high standard of honourable dealings" with respect

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[46]Other Aspects of the case are discussed Chapter three, in connection with the question of the applicability of the *Royal Proclamation* of 1763, R.S.C. 1985, App.II, No.1., within the province of British Columbia (see Chapter three, note 242).

[47]*Delgamuukw*, *supra* note 35 at 156-7. While none of the other judges expressly took this approach, Taggert J.A. concurred with Macfarlane J.A.'s judgment generally, and in a separate judgment, Wallace J.A. stated, at 227, that he was in "complete agreement with the reasons and conclusions of Macfarlane J.A." on the issue of extinguishment. In short this quotation from Macfarlane J.A.'s judgment can be taken to reflect the views of the B.C.C.A..

to the Aboriginal peoples of Canada. Moreover, as a fiduciary, the duty of the Crown will always be that of utmost loyalty.[48]

The case also reveals a divergence of opinion concerning the extent to which the Crown can balance Aboriginal interests against the interests of other non-Aboriginal Canadians. For his part, Macfarlane J.A. advocated a "co-existence" approach to the rights of Aboriginal peoples, whereby:

> the Indian interest and other interests can co-exist to a large extent, and that consultation and reconciliation is the process by which the Indian culture can be preserved and by which other Canadians may be assured that their interests, developed over 125 years of nationhood, can also be respected.
> ...
> Aboriginal rights need to be considered on the facts pertinent to particular people and specific land. Aboriginal rights can never be determined in a vacuum. The particular rights need to be defined... . Once defined they must be considered in light of surrounding circumstances. It is necessary to consider whether they are in conflict or can co-exist with other activities.
> ...
> A proper balancing of all those interests is a delicate and crucial matter.[49]

In reaching these conclusions, Macfarlane J.A. seems to have been influenced by the fact that the plaintiff's claim covered 22,000 square miles of land in central British Columbia; and that similar claims advanced by other Aboriginal groups, "cover all or most of British Columbia including all of the major cities".[50]

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[48]Of note, Macfarlane J.A. appears to blur the distinction between the "fiduciary obligation" and the "honour of the Crown". In this regard, see the portion of Chapter four entitled "The Nature of the Crown's Fiduciary Duty", wherein it is observed, at note 49, that it is difficult to see how the fiduciary standard varies from the standard of "fairness" which is said to be the governing consideration whenever the honour of the Crown is involved.

[49]*Delgamuukw, supra* note 35 at 179-180.

[50]*Ibid.* at 379.

In contrast, Lambert J.A., who wrote a forceful dissent in the case, expressed the view that:

> Those aboriginal titles and aboriginal rights are now recognized, affirmed and protected by the common law and by the constitutional amendment adopted by the Canadian people in 1982. Considerations about whether the Indian claims are 'all or nothing', or about whether the claims can be determined on the basis of a 'co-existence' approach are not, in my opinion, relevant considerations in determining the entitlements of the Indian peoples as a matter of law.[51]

vi. *R.* v. *McPherson.*

The 1994 Manitoba Queen's Bench decision in *R.* v. *McPherson*[52] is significant, not only because it serves as a rare example of the application of the doctrine of Aboriginal rights to resolve an alleged infringement of Métis hunting rights, but because it is also illustrative of the difficulties which lower courts can encounter when attempting to reconcile what are perceived to be conflicting interests.

The *McPherson* case was an appeal from a 1992 Manitoba Provincial Court decision pertaining to a charge of hunting moose out of season in contravention of a section of the provincial *Wildlife Act*. Although the trial judge determined that the accused members of the Métis community had established an Aboriginal right to hunt moose which had been unnecessarily infringed by a provincial regulation restricting the hunting season

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[51]*Ibid.* at 379.

[52][1994] 2 W.W.R. 761.

length, he nevertheless went on to find the accused guilty after purporting to make a suspended declaration of legislative invalidity.[53]

In taking this extraordinary step, the trial judge evidently considered that he had little option but to declare the regulation invalid on the basis that the restrictions it imposed could not be sustained using the justification test laid down in *Sparrow*. While he reached this conclusion after finding that there had been "a lack of consultation" in allocating quotas and setting the season dates during the year in question,[54] he apparently did not appreciate that, as a judge of the Provincial Court, he had no authority to make such an order against the Crown.

While the trial judge found that the province had not made the "link between the question of justification and the allocation of priorities in this particular hunt", he went on to opine that, "in determining its trust relationship", the government was entitled to "direction from the court as to which persons of Métis ancestry have, in fact, an aboriginal right to hunt".[55] In this respect, he was obviously concerned that "to nullify the season dates would have the effect of allowing open hunting to everyone and this would have an almost irreversible detrimental impact upon wildlife".[56] He therefore imposed the temporary suspension on the declaration of invalidity in order to provide the province with "a reasonable period of time to enter into the consultations necessary to determine

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[53]*R.* v. *McPherson*, [1993] 1 W.W.R. 415 (Man. Crim. Div.).

[54]*Ibid.* at 433.

[55]*Ibid.* at 432.

[56]*Ibid.* at 435.

the number of Métis persons in Manitoba who may be entitled to the aboriginal rights as set out herein", and to enact regulations which would have the effect of both complying with "the government's fiduciary duty to aboriginal persons" and allowing the government "to properly manage, maintain and hopefully enhance big game populations". One can only conclude that, in going on to find the accused guilty as charged, the trial judge must have considered that the accuseds' Aboriginal rights, not to mention their rights to an acquittal, were somehow subordinate to the other societal interests which he had identified. Not surprisingly, in determining that the regulation should be "read-down so as not to apply to such aboriginal persons", rather than made the subject of a such a declaration, the appellate level Court overturned the convictions and acquitted the accused.[57]

vii. *Quebec (Attorney General)* v. *Canada (National Energy Board).*

The issue of whether or not the Crown's fiduciary relationship with Aboriginal peoples would impose duties on government agencies which exercise a decision-making power delegated to them by Parliament, was one of the issues which the Supreme Court of Canada had to decide in *Quebec (Attorney General)* v. *Canada (National Energy Board).*[58] The agency in question was the National Energy Board. In concluding that the Crown-Aboriginal fiduciary relationship did not impose a duty on that Board to make its decisions in the "best interests" of Aboriginal parties, or to change its hearing process to

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[57]*McPherson*, *supra* note 52 at 768.

[58](1994), 112 D.L.R. (4th) 129 [hereinafter *National Energy Board*].

include "superadded" disclosure requirements, the Court considered the Board's "quasi-judicial" function as being "inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it".[59] It should be noted that this case dealt with constitutionally enshrined Aboriginal title rights rather than reserve lands.[60]

While the Court did not attempt a further refinement of the issue of *which* government bodies would stand in the position of fiduciary for the purposes of discharging the Crown's general responsibility to act in a fiduciary capacity, it did quote from its decision in *Lac Minerals* in support of the proposition that not every aspect of a fiduciary relationship "takes the form of a fiduciary obligation".[61] But what does this mean in light of Dickson C.J.C.'s comments in *Sparrow*? In my view, it can only mean that the Crown's general responsibility to act in a fiduciary capacity will not always lead

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[59]*Ibid.* at 148. In Hutchins, *supra* note 43 at 122-23, the authors note the Court's references to the fact that the Board functioned at arm's length from the government. They argue that "[t]he essential criterion therefore seems to be independence in the judicial sense". The better view would seem to be that that factor simply assisted the Court in characterizing the Board's role as a "quasi-judicial" decision maker. It was that latter characterization which proved decisive.

[60]Compare the *National Energy Board* decision with the decision of the British Columbia Supreme Court in *Gitludahl*, *supra* note 34, wherein Newbury J., suggested, *obiter*, that a Provincial Minister of Forests and his Department would likely owe a duty to the Aboriginal plaintiffs (the Gitksan people) to "consider the Gitksan's concerns about past and future logging practices" on lands in respect of which the Gitksan had Aboriginal sustenance gathering rights.

[61]*National Energy Board*, *supra* note 58 at 147 citing *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 [hereinafter *Lac Minerals* cited to D.L.R.].

to the imposition of specific fiduciary obligations beyond the previously identified (in *Sparrow*), all-pervasive, general underlying requirement to uphold a "high standard of honourable dealing". However, as indicated in Chapter four, specific obligations will be imposed in *Guerin*-type situations or in furtherance of the preservation of constitutionally protected Aboriginal and treaty rights (*Sparrow*-type situations).

viii. *St. Mary's Indian Band* v. *Cranbrook (City).*

The 1994 decision of the British Columbia Supreme Court in *St. Mary's Indian Band* v. *Cranbrook (City)* is noteworthy for the proposition that the creation of a reversionary interest in surrendered lands will serve to perpetuate the Crown's duty to "deal with land on the Indians' behalf".[62] The case revolved around the plaintiff Band's attempts to force the city of Cranbrook to pay taxes it claimed were owed in relation to lands which had been surrendered to the Crown, transferred to the Department of Transport, and subsequently leased to the city of Cranbrook for the construction and operation of a municipal airport. Of note, both the surrender form and the Order-in-Council transferring the "management, charge and direction of the land" to the Department of Transport contained a clause which provided that the lands "were to revert to the St. Mary's Indian Band free of charge" in the event that they "cease to be used for public purposes".[63] Notwithstanding the fact that the interest "did not give rise to any future interest as a matter of real property law", Spencer J. found that it raised a duty on

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[62](1994), 114 D.L.R. (4th) 752 (B.C.S.C.) at 763 [hereinafter *St. Mary's Indian Band*].

[63]*Ibid.* at 755.

the part of the Crown "to deal with this land on the Indian's behalf after it was surrendered by the band", including a "fiduciary duty to ensure that the reversionary provision is observed".[64]

The Court in the *St. Mary's Indian Band* case did not specifically indicate which federal Department - Indian Affairs or Transport - owed the fiduciary duty. On the facts, it was unnecessary for the Court to make that distinction. However, given Spencer J.'s conclusion that such a duty would arise at the time title was transferred,[65]one might conclude that the fiduciary duty was owed by Indian Affairs inasmuch as the subsequent

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[64]*Ibid.* at 763. Spencer J. went on to determine, at p. 756, that the surrender was a "qualified" one which, having been made "otherwise than absolutely", rendered the property "designated lands" within the *Indian Act* meaning of "reserve". He therefore concluded that, to the extent that the property constituted reserve lands, the lands were subject to taxation under a band by-law passed pursuant to s. 83(1) of the *Indian Act*, R.S.C. 1985, c. I-5. On appeal, the finding that the surrender was a qualified one was reversed as was the follow-on finding that any taxes were owed by the City of Cranbrook (*St. Mary's Indian Band* v. *Cranbrook (City)* (1995), 126 D.L.R. (4th) 539 (B.C.C.A), rev'd (26 June 1997), S.C.C. File No. 24946 (S.C.C.)(unreported)). In this regard, the Supreme Court, per Lamer C.J., found that the terms "absolute" and "conditional" were not mutually exclusive, pointing out that to conclude otherwise would be "to deny the *Indian Act* reality that there can be conditions to an absolute surrender" (para 19 refers). However, while the finding was reversed, Lamer C.J. did not take issue with the proposition that the creation of a reversionary interest in surrendered lands will serve to perpetuate the Crown's duty to deal with those lands on the behalf of the band concerned.

[65]In this regard, he concluded, *Ibid.* at 759, that "the Crown would be under a fiduciary duty to the band to ensure that whatever title is passed was bound by whatever qualification had been established in the surrender so that the Crown could regain title and once more hold the lands on behalf of the band" (emphasis added).

lease between the Department of Transport and the municipality did not serve to alienate title.[66]

The judgment also speaks obliquely to the conflict issue. In this regard, Spencer J. suggests, *obiter*, that, in the event of a conflict between the Aboriginal interest, which was to be protected by the Crown using a fiduciary standard, and the rule against perpetuities, the "contest" should be resolved by balancing the public policy considerations involved. His observations on the subject seem premised on the view that the "policy in favour of protecting the Indian interest in land should prevail" over a rule designed "to encourage the free transferability of property for the benefit of society".[67] This approach would appear to suggest that, when faced with a conflict situation, it would be open to the Crown to weigh the various public policy interests concerned in determining whether or not to act on its fiduciary obligations to a particular Aboriginal group. Unfortunately, there is little guidance given concerning the criteria to be used when evaluating the competing interests involved.

ix. *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*.

In 1995, the Supreme Court of Canada once more had occasion to consider the obligations of the Crown within the context of a surrender of reserve lands. The case was

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[66]The validity of this approach would seem to be borne out by McLachlin J.'s judgment in *Blueberry River*, *infra* note 68 at 206.

[67]*St. Mary's Indian Band*, *supra* note 62 at 763.

Blueberry River Indian Band v. *Canada (Department of Indian Affairs and Northern Development)*.[68] As in *Guerin*, a surrender of reserve lands was involved.[69]

The *Blueberry River* decision has been criticized as being "intellectually unsatisfying in that it fails to illuminate the Crown/Indian fiduciary relationship or rationalize the concepts central to the surrender of Indian land that are at the core of the decision".[70] It has been less charitably described as "a further setback in the development of jurisprudence on the Crown-Aboriginal fiduciary relationship".[71] Indeed, while the

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[68][1995] 4 S.C.R. 344; 130 D.L.R. (4th) 193 [hereinafter *Blueberry River* cited to D.L.R.]. The *Blueberry River* case was an appeal from the 1993 decision of the Federal Court of Appeal in *Apsassin et al.* v. *The Queen in right of Canada* (1993), 100 D.L.R. (4th) 504, [1993] 3 F.C. 28 [hereinafter *Apsassin* cited to D.L.R.], which was decided on the basis of the expiration of a limitation period.

[69]More specifically, the *Blueberry River* case dealt with the implications of a surrender of mineral rights "to lease" for the Band's benefit, as well as a surrender "to sale or lease" which had occurred in 1945. The latter surrender resulted in the 1948 transfer of the land to the Director of *The Veterans' Land Act* (DVLA) for $70,000. By inadvertence, the 1948 transfer did not exclude the mineral rights, notwithstanding a "long-established" Department of Indian Affairs (DIA) policy of reserving mineral rights for the benefit of Aboriginal groups. By 1949 the DIA had realized its mistake and became aware of the potential value of the mineral rights. Nevertheless, the DIA took no action to nullify the sale and the DVLA subsequently resold the land to war veterans. In 1976 oil and gas were discovered on the former reserve lands. The plaintiffs began their action in 1978.

[70]J.P. Salembier, "Crown Fiduciary Duty, Indian Title and the Lost Treasure of I.R. 172: The Legacy of *Apsassin* v. *The Queen*" [1996] 3 C.N.L.R. 1 at 1. Salembier goes on to observe, at p. 3, that "[a]lthough both the majority and minority reasons are couched in terms of Crown fiduciary duty and the *sui generis* Indian interest, they serve more to obscure than to clarify the spare and Delphic pronouncements with which those concepts were introduced more than a decade ago in *Guerin*".

[71]O.B. Griffiths, "Case Comment on *Blueberry River*: Is the Crown Fiduciary Obligation in the Currents of Change?" [1996] 3 C.N.L.R. 25 at 26. Griffiths suggests, at 44, that "those observers who hoped that the Supreme Court's judgment in *Blueberry River* would provide answers and resolutions to the conundrum of Crown fiduciary obligations to Aboriginal peoples will be disappointed to receive only more questions and problems".

unique facts of the case did present the Court with the rare opportunity to clarify a number of outstanding issues pertaining to the nature of the Crown-Aboriginal relationship, and the corresponding duties owed by the Crown in relation to the Aboriginal title interest, for the most part the Court declined to take up the challenge. Having said that, the case is not entirely without interest from a academic perspective.

The plaintiffs in *Blueberry River* had alleged a number of breaches of the Crown's fiduciary duties in relation to the surrender and resulting sale of reserve lands. More specifically, they argued that, in failing to properly advise the Band prior to a 1945 surrender, the Crown had allowed the Band to make an improvident surrender decision. In failing to prevent that surrender the Band claimed that the Crown had breached a fiduciary obligation. The Band also submitted that the Crown had breached its fiduciary duty in neglecting to reserve the mineral interests for the Band's future benefit and in not obtaining the best price for the sale of the reserve lands.

The Supreme Court of Canada concluded that the Crown had not wrongly failed to prevent the 1945 surrender on the basis that the Crown's obligation was only to prevent exploitative bargains, *i.e.* bargains which were "foolish or improvident". On the facts of this case the 1945 surrender could not be so characterized.[72] In this regard,

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[72]In support, Gonthier J. cited the trial judge's factual findings, noting in particular that the plaintiff's had known, "for some time" that an "absolute" surrender of the reserve lands was being contemplated, that the consequences of such a surrender had been "fully explained", and that "*they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172*, in return for the money ... and with their being furnished with alternate sites near their trapping lines to be purchased from the proceeds" (*Blueberry River*, *supra* note 68 at 200-01).

Gonthier J., who delivered the majority decision in the *Blueberry River* case,[73] found that, "the Band gave its full and informed consent, the Crown fulfilled its fiduciary duty in relation to the surrender, and the parties complied with the statutory surrender procedures".[74] He went on to note that the Crown was obliged to respect the Band's decision to surrender the reserve lands, arguing that, "the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason their decisions must be respected and honoured".[75]

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[73]The majority judgment was concurred in by La Forest, L'Heureux-Dubé and Sopinka JJ.. While concurring in the result, separate reasons were provided by McLachlin J. whose judgment was concurred in by Cory and Major JJ.

[74]*Blueberry River*, *supra* note 68 at 199.

[75]*Ibid.* at 200, where Gonthier J. expresses the view that, "when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings". This approach should be contrasted with McLachlin J.'s largely technical interpretation of principles of common law property, which led her to conclude, at p.226, that the 1945 surrender "to sell or lease" did not include the mineral rights in the reserve inasmuch as they had already been surrendered "for lease" in 1940. Nor did she consider the 1945 surrender to amount to a revocation of the 1940 surrender which, in her view, obliged the DIA to continue to lease the mineral rights. In finding that the 1945 surrender had included the mineral rights, Gonthier J. criticized McLachlin J.'s approach arguing, at p.199, that "it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intentions of the parties", and in particular those of the Band. Of note, Gonthier J's "intentions based" approach was applied by Laskin J.A. in *Chippewas of Kettle & Stony Point* v. *Canada (Attorney General)* (1996), 31 O.R. (3d) 97 at 105-06, to uphold the validity of a surrender - notwithstanding that the alleged payment of "bribes" by a prospective purchaser "may afford grounds to make out a case of breach of fiduciary duty against the Crown".

While Gonthier J. did not find that the Crown had acted improperly with respect to the surrender, or that the sale price was unreasonable,[76] he did accept the plaintiffs' argument that the Crown had failed to deal with the surrendered land in the best interests of the Band. In this regard, Gonthier J. observed that the reserve lands were surrendered to the Crown "in trust 'to sell or lease'".[77] He characterized that surrender as a "*variation of a trust in Indian land*". [78] Having done so, Gonthier J. concluded that,

> [b]y taking on the obligations of a trustee in relation to I.R. 172, the DIA was under a fiduciary duty to deal with the land in the best interests of the members of the Beaver Band. This duty extended to both the surface rights and the mineral rights.[79]

Gonthier J. went on to find that the fiduciary duty obligated the Crown to reserve the mineral rights for the Bands' future benefit when it sold the surface rights - a finding which he deemed consistent with the Department of Indian Affairs' (DIA) long-standing

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[76]Gonthier J. accepted McLachlin J.'s conclusion that the trial judge had erred in finding that the Crown had breached its fiduciary duty to the Band by selling the land for $70,000 (*Ibid.* at 205). In this regard, McLachlin J. found, at p.215, that the Crown had "adduced evidence showing that the sale price lay within a range established by the appraisals", thereby establishing on a *prima facie* basis that the sale price was reasonable, evidence which the Band failed to rebut.

[77]*Ibid.* at 203. In reaching this determination, Gonthier J. described the Band's interests as "a trust in Indian land" (p.202). In the next breath, he emphasized that, "my reasons should not be interpreted to equate a trust in Indian land with a common law trust". However, he also noted that the issue had not been resolved in *Guerin*, adding that, "for lack of a better label, I think that it is appropriate to refer to these surrenders as trusts in Indian land". Salembier, *supra* note 70 at 20, suggests that Gonthier J.'s use of trust language "indicates that he may be ready to reconsider Dickson J.'s rejection of the true trust model in that case".

[78]*Blueberry River*, *supra* note 68 at 202-03.

[79]*Ibid.* at 203.

policy of reserving out mineral rights "for the benefit of the aboriginal peoples when surrendered Indian lands were sold off".[80]

Having determined that the Crown had breached its fiduciary obligation in not reserving out the mineral rights, both judges concluded that the Crown was under a continuing obligation to revoke the sale, which it had failed to do, notwithstanding that the *Indian Act* provided the Crown with a means of doing so.[81] In this regard, Gonthier J. indicated that the DIA, as a fiduciary, had clearly not acted with "reasonable diligence" in dealing with the reserve "according to the best interests of the Band" inasmuch as,

> a reasonable person in the DIA's position would have realized by August 9, 1949, that an error had occurred and would have exercised the s.64 power to correct the error, reacquire the mineral rights, and effect a leasing arrangement for the benefit of the Band.[82]

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[80]*Ibid.* at 204, where Gonthier J. concludes that, in the absence of a "clear mandate" from the Band, the Crown was "under a fiduciary duty to continue the leasing arrangement" which had been established under the terms of an earlier (1940) surrender. In contrast, a majority of the FCA in *Apsassin, supra* note 68, found no breach of duty on the basis that there was believed to be no value in the mineral rights at the time of the surrender and that the band members intended to surrender their entire interest.

[81]*Indian Act*, R.S.C. 1927, c.98, s.64. Gonthier J. evidently considered s. 64 of the Act to be "very significant" in that, "it gave the DIA the power to revoke an erroneous sale or lease of Indian lands. Inasmuch as the mineral rights in I.R. 172 were sold inadvertently, s.64 provided the DIA with the power to reacquire the reserve lands, and thus afforded the DIA a 'second chance' to effect a lease of the mineral rights" (*Ibid.* at 205).

[82]*Ibid.* at 205. In *Apsassin, supra* note 68, the Federal Court of Appeal attempted to determine when the Crown's specific fiduciary obligations in relation to a surrender of Aboriginal title would terminate. In this regard, Marceau J.A.'s concluded, *inter alia*, at p. 545, that:

> The Crown is the owner of the land before as well as after surrender. ... the Indians have accepted to have their special and exclusive interest in the land "transformed", so to speak, into a sum or sums of money, the proceeds of a sale or lease. <u>The fiduciary obligation exists with respect to the land until the 'transformation' is</u>

He went on to conclude that losses stemming from transfers made by the Director of *The Veterans' Land Act* (DVLA) after August 9, 1949 were not barred by a 30-year limitation period imposed by the British Columbia *Limitation Act*.[83]

The Supreme Court might have used the *Blueberry River* case to explain how the Crown had become a fiduciary, an issue which the Court had not explored in any comprehensive way in *Guerin* and *Sparrow*. Far from clarifying the matter, in *Blueberry River* McLachlin J. manages to cloud the issue by failing to clearly distinguish between the existence of a fiduciary relationship, on the one hand, and the existence of specific fiduciary duties, on the other. This has led at least one writer to suggest that the decision "does not support a general fiduciary obligation in the Crown".[84] In this regard, it may be helpful to recall, from our discussion in Chapter two, that a fiduciary relationship can exist in situations where no specific obligation has yet arisen.[85] While it is true that McLachlin J. did question "whether on the particular facts of this case a fiduciary relationship was superimposed on the regime for alienation of Indian lands contemplated by the *Indian Act*", it would appear, based on her subsequent comments, that what she

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> complete; afterwards, it attaches to the proceeds. In my view such transformation occurs as soon as full payment for the land is obtained (emphasis added).

Based on Supreme Court's conclusions with respect to s. 64 of the *Indian Act*, it would seem that the failure to uphold a specific fiduciary duty - in this case the obligation to reserve out the mineral rights - can result in the Crown being seized with a duty to revoke a sale which will not necessarily terminate once full payment for the land has been received.

[83]*Blueberry River*, *supra* note 68 at 205.

[84]Griffiths, *supra* note 71 at 25.

[85]In this regard, see the discussion in relation to note 11 of Chapter two.

was really asking was whether the Crown was entrusted with the authority to decide whether or not a particular surrender should proceed. After determining that the Band had not "abnegated or entrusted its power of decision over the surrender of the reserve to the Crown", she concluded "that the evidence does not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band".[86] This is really tantamount to saying that a specific fiduciary duty had not yet arisen on the facts in this case and should not be interpreted in a way which would suggest that a fiduciary relationship does not exist prior to a surrender[87] - a conclusion which would have called into question "the well settled principle that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada".[88]

The Court in *Blueberry River* also declined the opportunity to attempt to clarify the nature of the Aboriginal title interest. Indeed, while Gonthier J. uses trust language to explain the Crown's obligations on surrender, he finds it necessary to add that, "my

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[86]*Blueberry River*, *supra* note 68 at 209-10.

[87]Rotman, in L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: Univ. of Toronto Press, 1996) at 120-21, argues that the "Supreme Court's reaffirmation of the trial judge's finding that the Crown owes no duty prior to surrender improperly adheres to the strict interpretation of Dickson J.'s judgment in *Guerin* and ignores the historical basis of the Crown's obligations to the aboriginal peoples".

[88]Iacobucci's conclusion in the *National Energy Board* case, *supra* note 58 at 147 (quoted in note 47 of Chapter four). In this regard, it may be helpful to recall that a majority of the FCA in *Apsassin*, *supra* note 68, was of the view that a fiduciary relationship could exist before the surrender of reserve lands. On this point, Marceau J.A. argued, at p.540, that *Guerin* should not be seen as "rejecting the view that a fiduciary relationship between the Crown and an Indian band" could exist in such circumstances, only that "the surrender gave rise 'to a *distinctive* fiduciary obligation'".

reasons should not be interpreted to equate a trust in Indian land with a common law trust. I am well aware that this issue was not resolved in *Guerin* ... and I do not wish to pronounce upon it in this case".[89] Both Gonthier and McLachlin JJ. preferred instead to characterize the Indian title interest with reference to its *sui generis* nature.[90] This approached may be traced to Dickson J.'s first utilization of that ambiguous designation in *Guerin*; a non-description which "has been repeated in subsequent cases as if its repetition will make it into a definition as opposed to an adamant refusal to essay a definition".[91]

It is unfortunate that neither judgment in the *Blueberry River* case addresses the conflict question in other than oblique terms.[92] This should not be considered surprising

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[89]*Blueberry River*, *supra* note 68 at 202. See also *Cardinal et al.* v. *Canada* (1996), 110 F.T.R. 241 [hereinafter *Cardinal*]. In *Cardinal*, the Prothonotary of the Federal Court of Canada, declined to grant the Crown's application to strike certain paragraphs of the plaintiff Indian Band's reply and joinder of issue. The Crown had argued, *inter alia*, that the paragraphs were in reference to the plaintiff's claim that the surrender of reserve lands gave rise to trust obligations on the part of the Crown with respect to the surrender proceeds - an assertion which it claimed had been rejected by the Supreme Court in *Guerin*. The prothonotary disagreed, noting Gonthier J.'s references to the "trust-like" obligations arising in relation to the surrender of reserve lands (p. 253 refers). He went on to conclude, at p. 268, that "in neither *Guerin* nor *Apsassin* did the Supreme Court of Canada define what it meant by a trust in Indian lands".

[90]In this regard, see Gonthier J.'s comments in *Blueberry River*, *supra* note 68 at 199 as well as those of McLachlin J., at p.219.

[91]W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning" (1990) 15 Queen's L. J. 217 at 221.

[92]Aside from the obvious inter-departmental conflicts which are evident on the facts in this case, Rotman, *supra* note 87 at 120, argues that "[i]t is unseemly that the Crown be involved in all aspects of the surrender negotiations, act as liaison between Indian bands and interested purchasers, negotiate on behalf of the bands, and draft the terms of the surrender, only to be burdened with the less-than-onerous chore of ensuring that the bands are not

however, for, having accepted an interpretation of s. 64 which allowed the Court to find that the DIA was seized with a fiduciary duty which extended beyond the date of sale, the conflict question was rendered moot. In both judgments, the DVLA is essentially cast in the role of a third party. For her part, McLachlin J. seems prepared to concede, for the sake of argument, that the Crown may appear to have been guilty of "self-dealing" inasmuch as it faced "conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other".[93] However, on the facts in *Blueberry River*, she seems equally prepared to conclude, in the absence of evidence adduced to the contrary, that the Crown had displaced any resulting burden by "demonstrating that its personal interest did not benefit from its fiduciary powers" through the sale of the land "at a fair value" following arm's length negotiations.[94] This latter conclusion has been criticized on the basis that it implies that the burden can be lifted merely by establishing that no direct economic benefit has been realized, without considering whether "the Crown gained a substantial political benefit from the bargain".[95] Perhaps, in the end result, McLachlin J. was persuaded by Marceau J.A.'s, earlier assertion that, "[v]ery exceptional circumstances would be required to place the Crown in a real

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exploited in the manner suggested by the Supreme Court in *Apsassin*".

[93]*Blueberry River*, *supra* note 68 at 214. Gonthier J. did not comment on the conflict of interest issue.

[94]*Ibid.* at 214-15.

[95]Griffiths, *supra* note 71 at 41.

conflict of interest, since the essence of the Crown is to serve the public and satisfy various public interests, not to acquire for itself ".[96]

One issue which appears to have been considered by the Supreme Court in *Blueberry River* is the question of whether the act of surrender to another federal entity will serve to make that third party a fiduciary. In this regard, it is important to appreciate that the Federal Court of Appeal had concluded, *per* Marceau J.A., that "[o]nly the Minister of Mines and Resources (now the Minister of Indian and Northern Affairs) is charged with the duty to see that the obligation is fulfilled, and only he is entitled to hold surrendered land, or the proceeds from its disposition, for the use and benefit of the Indians".[97] This approach would appear to have been implicity adopted by Gonthier J. in *Blueberry River*.[98] In rejecting the plaintiffs' assertion that "the 1948 transfer to the DVLA was not a transfer at all, but merely an administrative allocation within the bosom of the unified Crown" which served to transfer the responsibility for the discharge of the

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[96]*Apsassin, supra* note 68 at 542-3 (emphasis added).

[97]*Ibid.* at 545. There was no unanimity on this point. While Stone J.A. also concluded that the third party did not become a fiduciary, he seemed to base his conclusion on a finding that the third party had no apparent notice of the existence of the relationship. Isaac C.J. would have held the third party government agency to a fiduciary standard.

[98] Gonthier J. leaves little doubt that it was the DIA (Department of Indian Affairs) and the DIA alone which was in breach of its fiduciary duty. In this regard, he states that it was the DIA who was required, "by the terms of the surrender agreement", to act "in the best interests of the Band", it was the DIA "who had taken on the obligations of a trustee" in relation to the reserve", and it was the DIA who was provided with the discretion "to sell or lease". Moreover, it was the DIA, "acting through the Superintendent General" who had the authority under s. 64 of the *Indian Act.* to correct the erroneous transfer of the mineral rights (*Blueberry River, supra* note 68 at 203, 205).

Crown's fiduciary duties to the DVLA "for administrative purposes", McLachlin J. concludes that, "[a]lthough the transfer was from one Crown entity to another, it remained a transfer and an alienation of title".[99] She points out that "the transfer converted the Band's interest from a property interest into a sum of money suggesting alienation", then goes on to argue that:

> the continuing fiduciary duty proposed for the DVLA is problematic from a practical point of view. ... Each sale to a veteran would have required the DVLA to consider ... [the] sometimes conflicting matters under the *Indian Act*. This would have made the sale in 1948 pointless from the DVLA's point of view and have rendered it impossible to administer. Moreover, it is not clear that the DVLA had any knowledge of the fiduciary obligations which bound the DIA. In fact the DVLA and DIA acted at arms's length throughout, as was appropriate given the different interests they represented and the different mandates of their statutes.[100]

With the exception of the "suggestion" of alienation argument, which does not in itself appear particularly satisfying or persuasive, McLachlin J.'s comments reflect a pragmatist's appreciation of the difficulties encountered when attempting to employ a fiduciary analysis to a consideration of the Crown's varying roles and responsibilities. Moreover,

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[99]*Ibid.* at 231. McLachlin J.'s conclusion on this point is deemed to be in keeping with earlier Supreme Court pronouncements. In particular, see *Mitchell*, *supra* note 42 at 237, where La Forest J. argues that the term "Crown" should not necessarily be deemed to refer to both the federal and provincial governments simply because that interpretation would be in keeping with "the aboriginal perception of 'Her Majesty'". In this respect, he argues that it is no longer "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 on itself are simply internal to itself, such that the Crown might be considered what one might style an 'indivisible entity'". While Dickson C.J. took issue with La Forest J.'s analysis in *Mitchell*, it was La Forest J.'s approach which was adopted by six of the seven members of the Court in that case. La Forest J.'s arguments could be applied with equal force to divisions within the federal government.

[100]*Ibid.* at 231.

the notion of, in effect, assigning fiduciary duties to particular government entities is not without some practical attraction, inasmuch as it provides a means of avoiding a conflict of interest within the fiduciary relationship.

One might well conclude that dealings with reserve lands which raise specific fiduciary duties of the type under consideration in *Blueberry River* (the *Guerin* type), will only be owed by the federal ministry specifically charged with the exercise of the particular discretionary power under consideration - normally the Department of Indian and Northern Affairs. Conversely, where the preservation of a constitutionally protected Aboriginal or treaty right, of the type under consideration in *Sparrow*, is being considered, the more general nature of the duty involved suggests a wider governmental responsibility to ensure that the Crown's fiduciary responsibilities are upheld.

It may even be argued that this latter, general responsibility extends to the Crown in right of a province. In this regard, it has been suggested that, while the trust relationship "attaches primarily to the Federal government", it will also bind provincial governments in situations where they "have powers and rights enabling them to affect adversely Aboriginal interests protected by the relationship".[101]

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[101]B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 274. See as well Hutchins, *supra* note 43 at 117, where the authors observe that "[i]t should no longer be controversial to say that the fiduciary duty binds the provincial Crown insofar as its activities affect Aboriginal peoples".

x. *Regina* v. *Wolfe.*

The case of *Regina* v. *Wolfe*[102] represents a creative application of the principles articulated in *Sparrow* within the context of a criminal prosecution. The accused had been charged with various breaches of provincial fishing and wildlife regulations. The undercover operation which led to the laying of the charges had been launched by the Saskatchewan Department of Parks and Renewable Resources in an attempt to investigate allegations of illegal trafficking in wild meat on a local reserve. In the course of that operation, an undercover conservation officer provided alcohol to the accused in order to facilitate the collection of the evidence.

The Saskatchewan Court of Appeal ordered the proceedings stayed on the basis that the conduct of the conservation officer in bringing alcohol onto the reserve breached the Crown's "Treaty No. 6 promise to strictly enforce 'all present and future laws enacted for the purpose of protecting Indians from Alcohol'" and thereby "seriously affected" the "honour and integrity" of the Crown.[103] The Crown had argued that it had fulfilled its treaty obligations through the enactment of an *Indian Act* provision which allowed band councils to pass their own by-laws to prohibit the bringing of alcohol onto their reserves.[104] In rejecting that argument, the Court cited *Sparrow* for the proposition that,

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[102](1995), 101 C.C.C. (3d) 515 (Sask.C.A)[application for leave to appeal to the S.C.C. dismissed][hereinafter *Wolfe*].

[103]*Ibid.* at 530, 537. The conduct also contravened a band council by-law.

[104]*Indian Act*, R.S.C. 1985, c. I-5, s.85.1(1) [hereinafter *Indian Act*].

> [t]he 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 relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples.[105]

In this regard, Jackson J.A. stated that, "I know we are not dealing with aboriginal rights, as the term was used in *Sparrow*, but with 'treaty rights', but the underlying principle must be the same".[106]

The judgment is considered unique for a number of reasons. First, it advances the notion that the fiduciary's "general" duty of loyalty, good faith and avoidance of a conflict of duty or self-interest can be applied to evaluate the manner in which treaty obligations are upheld.[107] Second, it suggests that the conduct of the Crown is a relevant consideration within the context of the conduct of a criminal investigation.[108] Third, it serves as an example of the provincial Crown being held accountable for conduct which results in the

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[105]*Wolfe, supra* note 102 at 533.

[106]*Ibid.* at 533. Jackson J.A. does not indicate whether the conduct in this case undermines the Crown-Aboriginal relationship, the honour of the Crown, or both. In this regard, one might well criticize *Wolfe on* the basis that it perpetuates the blurring of the distinction between these concepts - a problem which has already been noted in Chapter four in connection with the *Sparrow* decision.

[107]The possibility that a failure by the Crown to discharge treaty obligations might constitute a breach of a fiduciary duty was first hinted at by the Supreme Court of Canada in *Ontario (A. G.)* v. *Bear Island Foundation*, [1991] 2 S.C.R. 570 at 575.

[108]As Jackson J.A. acknowledges at 534-35, the option of staying criminal proceeding for abuse of process is a common law power which is only to be used in the clearest of cases, in circumstances which are so unfair as to be "detrimental to the interests of justice". While he notes the requirement to consider the competing societal interest in favour of ensuring that "those charged with criminal acts are tried", and acknowledges that the accused had not acted in "complete good faith" in breaching their own by-laws, he evidently considered that the balance in this case should be struck in their favour.

breach of a treaty, notwithstanding the fact that the treaty in question had been negotiated between an Aboriginal group and the federal Crown. Inasmuch as obligations which derive from Indian treaties are normally considered to be matters of federal concern this latter conclusion appears suspect.[109]

xi. *Wewayakum Indian Band* v. *Canada and Wewayakai Indian Band.*

In *Wewayakum Indian Band* v. *Canada and Wewayakai Indian Band*, the Federal Court, Trial Division was called upon to determine which of two Indian bands was entitled to have possession and exclusive use of certain reserve lands located in the Campbell river area of British Columbia.[110] The case, which was ultimately decided on the basis of a limitation period, is illustrative of the odd situation within which the

[109]See *Mitchell*, *supra* note 42 at 220-21, 223 wherein La Forest J. concluded that the unqualified use of the term "Her Majesty" in the *Indian Act* referred solely to the federal Crown, pointing out that Indian treaties were matters of federal concern. He considered this interpretation to be consistent "with the tenor of the obligations that the Crown has historically assumed vis-a-vis the property of native peoples". See as well *Roberts* v. *Canada*, [1989] 1 S.C.R. 322 at 340 [hereinafter *Roberts*], wherein Wilson J.'s concluded, *inter alia*, that "the law of aboriginal title is federal common law" and that it is "the common law relating to aboriginal title which underlies the fiduciary nature of the Crown's obligations". *Roberts* is discussed in more detail in note 85 to Chapter four. In Hutchins, *supra*, note 43 at 116, the authors argue that "[i]n the light of the historical relationships between Aboriginal peoples and the Crown, to the extent that there exists a presumption of fiduciary obligation towards Aboriginal peoples, the burden sits first and foremost upon the broad shoulders of the Crown in right of Canada from sea to sea."

[110](1995), 99 F.T.R. 1 (F.C.T.D.) [hereinafter *Wewayakum*]. Litigation in relation to the dispute commenced with the filing of a statement of claim in 1985. Various motions involving the litigants resulted in a series of judgments pertaining to a number of preliminary matters concerning the case. Most notably, in 1989, the Supreme Court of Canada was asked to consider whether the Federal Court had the jurisdiction to issue a permanent injunction to restrain the plaintiffs from using and occupying the disputed reserve lands in *Roberts*, cited *Ibid*.

Crown, as a fiduciary, can find itself when the interests of two or more Aboriginal groups collide.

Both Aboriginal bands sought a declaration that the reserve lands were set aside for their benefit. Both claimed that the Crown, "in its conduct over the last century", had failed to act "in the best interests of each respective Indian Band" and had thereby "breached its fiduciary obligation to both bands".[111] In this regard, Teitelbaum J. was of the view that the Crown was under a duty "to balance and reconcile the interests" of the two bands and to "resolve" the conflict regarding the "use and occupation" of the reserve lands. The nature of the duty was explained in the following terms:

> In resolving this conflict, the Crown's duty would be not to favour the interests of one band over another. In my view, the Crown owes a duty to both bands. ... The Crown's duty in the case before me was to balance the interests of the two bands and avoid taking sides in their dispute. While the Crown was required to put the interests of the Indians ahead of its own interests, it could not put the interest [of] one band ahead of the other. [112]

In a striking departure from established fiduciary principles, the Court in *Wewayakum* seems to be suggesting that the Crown will be relieved of the fiduciary's duty to act solely in the best interests of the beneficiary, to the exclusion of all other parties,

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[111]*Ibid.* at 160.

[112]*Ibid.* at 162. Teitelbaum J. argues that "[t]he notion of balancing various interests in administering aboriginal rights" was "recognized" by the Supreme Court in *Sparrow*, and cites that case as authority for the proposition "that native rights and the Crown's fiduciary obligation are 'not absolute'. The Court also recognized that, in exercising its responsibilities to native people, the Crown must continuously balance native rights against the rights of other Canadians". Presumably, Teitelbaum J. is referring to Dickson C.J.'s observations concerning the "issue of justification" and the need to determine whether there is a "valid legislative objective" whenever there has been a *prima facia* interference with an existing Aboriginal right (see *Sparrow*, *supra* note 4 at 1113).

where the other party is another Aboriginal group. While the Crown is still precluded from putting its own interests first, it is told to balance one beneficiary's interest with the interests of the other beneficiary. In this respect, it no longer seems to matter that each Aboriginal beneficiary is essentially a third party vis-a-vis the other Aboriginal band. In the end, the Crown is essentially cast in the role of an arbitrator for the purpose of resolving a conflict of Aboriginal interests, notwithstanding that, on the facts in *Wewayakum*, both Aboriginal litigants were alleging misconduct on the part of the Crown.[113] The Court's flexible approach to the question of Crown duty may, in part, be an acknowledgement of the fact that the Crown could not avoid the conflict which was at the root of the dispute in *Wewayakum*. It remains, however, that the resulting duty is a highly diluted version of the duty which normally applies to the Crown whenever the Aboriginal title interest is being considered. To borrow from La Forest J.'s expectation analysis in *Lac Minerals*,[114] one might well ask how the modified statement of duty identified by the Court upholds the "reasonable expectations" of the Aboriginal beneficiaries concerning the Crown's duty of loyalty. One might also question whether the version of the fiduciary construct which emerges in *Wewayakum* is really of much assistance in these circumstances.

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[113]In concluding that the Crown had not breached its fiduciary duty, the Court seems to have been swayed by the fact that, in *Wewayakum*, "the Crown acted in good faith in responding to the inquiries of both bands" and that any misrepresentations were other than deliberate (*Ibid.* at 164-65).

[114]*Lac Minerals*, *supra* note 61 at 40, discussed in detail in Chapter two in relation to note 35.

xii. *Semiahmoo Indian Band* v. *Canada.*

The plaintiffs, in *Semiahmoo Indian Band* v. *Canada*,[115] argued that the Crown breached its fiduciary duty in encouraging band members to surrender a part of their reserve in order to accommodate the development of an expanded customs facility. The plaintiffs alleged that the Crown had not conducted a proper appraisal, that the amount subsequently paid the Band was below market value, that more land had been taken than was necessary, and that the Crown had not returned the land as it should have done when the expansion project did not go ahead as planned.

On the facts, the Federal Court, Trial Division, concluded that the plaintiffs had not proven that the price paid was below market value. Given the unconditional nature of the surrender, the Court was of the further view that there was no "express or implied reversionary term" requiring that the land be returned to the Band if not used for customs purposes.[116] Nevertheless, Reed J found that Crown had taken more land than was required. In this regard, he concluded that the Crown was under a "fiduciary duty to ensure that the plaintiffs' rights were impaired as little as possible, commensurate with the defendant's obligations to the broader public".[117] In Reed J.'s opinion, this meant that the Crown should have conditioned the taking "by a reversionary provision, or ensure by some other mechanism that the least possible impairment of the plaintiffs' rights

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[115](1995), 128 D.L.R. (4th) 543 (*sub nom. Charles et al* v. *The Queen in right of Canada*)(F.C.T.D.)[hereinafter *Semiahmoo*].

[116]*Ibid.* at 545-46.

[117]*Ibid.* at 546.

occurs".[118] Unfortunately for the plaintiffs this did not end the matter inasmuch as the Court went on to conclude that their claim was statute barred.

While the *Semiahmoo* case serves as an example of the Crown having not lived up to its fiduciary obligations through an act of omission, rather than commission, the case also speaks to the inherent conflict of interest which is implicit in any decision to expropriate Aboriginal land. In this regard, Reed J. noted that, in this case, the Crown was acquiring the reserve for its own purposes and "had the power to expropriate if the band did not 'voluntarily' surrender the land". He concluded that, while the Crown was a fiduciary insofar as the Band was concerned, it

> was in the position of owing a duty to the public at large, to make decisions in the public interest. This may mean that a decision to expropriate or require the surrender of parts of the plaintiffs' reserve lands was necessary.[119]

In short, Reed J. does not seem to consider that the fiduciary obligation owed Aboriginal peoples requires that the Crown act solely in their interests. Indeed, the Crown can act on its other "public" obligations, to the detriment of the Aboriginal interest concerned, so long as some attempt is made to mitigate the extent to which the Aboriginal interest is negatively impacted.[120]

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[118]*Ibid.* at 547.

[119]*Ibid.* at 546.

[120]One might ask how useful reversionary clauses really are in situations where the government continues to maintain, as it did here, that the land is still required for government purposes?

The solution proposed by Reed J. raises more questions than it answers. Is he meaning to suggest that an otherwise valid absolute surrender may be "undone" where all, or a portion, of the land has not been used for the intended purpose within a reasonable time? While he implies that this result will only appertain where the Crown is "acquiring the land for its own benefit", on the facts of the *Semiahmoo* case it was the Department of Public Works who was the ultimate recipient of the "benefit", not the Indian Affairs Branch. Yet Reed J. makes no attempt to distinguish between the roles played by the two federal departments concerned. Is he really meaning to say that a surrender can never be absolute where the Crown is the intended beneficiary?

The logic of Reed J's comments seem premised on the fact that the Crown possesses the expropriation power. One might well argue that the potential to expropriate Aboriginal lands always exists. Should it necessarily be a factor in the absence of any evidence tending to suggest that the Crown was prepared to use that power or had attempted to extract a surrender by threatening to do so, bearing in mind that no conflict of interest was alleged on the facts in *Semiahmoo*?

xiii. *R.* v. *Jack*; *R.* v. *Sampson*; and, *R.* v. *Little*.

On 20 December, 1995, the British Columbia Court of Appeal released its reasons for judgment in *R.* v. *Jack*; *R.* v. *Sampson*; and, *R.* v. *Little*.[121] The appellants in all three

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[121] *R.* v. *Jack* (1995), 103 C.C.C. (3d) 385; *R.* v. *Sampson* (1995), 103 C.C.C. (3d) 411; *R.* v. *Little* (1995), 103 C.C.C. (3d) 440.

cases had been summarily convicted of offenses under the *Fisheries Act*.[122] They argued that the conservation measures instituted by the Department of Fisheries and Oceans ("DFO") had interfered with Aboriginal fishing rights guaranteed under s. 35.[123] The appeals turned on the application of the principles articulated in *Sparrow* - particularly the second stage of the justification analysis which Dickson C.J. had formulated in that case.

In concluding that the infringement of the appellant's Aboriginal rights could not be justified on the grounds of conservation, the Court in *Jack* found that DFO's failure to discuss the closure of certain fishing areas, in respect of which the appellants had an Aboriginal right to fish for salmon, amounted to a failure to consult which "did not reflect the trust-like relationship with which the Crown was required to deal with the aboriginal people".[124] It may be noted that the Court did not find that "the consultation between the DFO and the band required that the DFO reach agreement with the band on all conservation measures", pointing out that "[t]o so interpret the consultation discussed in *Sparrow* would be to conclude that the band was entitled to veto any conservation measures which the DFO wished to implement".[125] In a similar vein, in *Sampson*, the

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[122]R.S.C. 1985, c. F-14. The charges in *Jack* and *Little* were laid pursuant to s. 79(1), whereas in *Sampson* a contravention of s. 61(1) was alleged.

[123]In both *Jack* and *Sampson* the appellants alleged a breach of their Aboriginal right to fish whereas in *Little* the appellant argued that there had been a *prima facie* infringement of a treaty right to fish. In *Little*, *supra* note 121 at 459, the Court stated that "there is no issue that the two-part *Sparrow* analysis also applies to cases in which unjustified infringement of treaty rights is asserted".

[124]*Jack*, *supra* note 121 at 411.

[125]*Ibid.* at 408.

Court found that "the requirement of consultation did not oblige the Crown to "establish 'informed consent' by an Indian band to whatever conservation measures are being implemented by the DFO". Having said that, the Court concluded that it was not enough for the Crown to merely discuss and attempt to fulfil Aboriginal requirements in order to satisfy the "requirement of consultation". Rather, the Court found that it was necessary for the Crown to both discuss and explain the rationale for any conservation measures being implemented where such measures would constitute an infringement of Aboriginal rights.[126] In light of the Court's judgment in *Little*, it would seem that this latter requirement would entail disclosing the steps being taken to arrive at any allocation scheme which would have that effect.[127]

xiv. *R.* v. *Badger.*

In *R.* v. *Badger*,[128] the Supreme Court of Canada was required to determine whether the licensing provisions of a provincial hunting regulation infringed upon hunting rights guaranteed the appellants' under Treaty No. 8. The licensing provisions had both general safety and conservation components. In a judgement which was concurred in by the majority of the Court, Cory J. expressed the view that, from the

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[126]*Sampson*, *supra* note 121 at 439, where the Court declined to accede to the suggestion that, "in order to satisfy the requirement of consultation the Crown must establish 'informed consent' by an Indian band to whatever conservation measures are being implemented by the DFO".

[127]*Little*, *supra* note 121 at 466.

[128][1996] 1 S.C.R. 771 [hereinafter *Badger*].

standpoint of public safety, "the requirement that all hunters take gun safety courses and pass hunting competency tests" did not constitute a *prima facie* interference with the Aboriginal hunting rights embodied in the treaty. Nevertheless, he went on to determine that "the conservation component appeared to present just such an infringement" and ordered a new trial to consider the issue of justification.[129] In so doing, Cory J. stated that the criteria pertaining to justification, as set out in *Sparrow*, "should in most cases apply equally to the infringement of treaty rights", notwithstanding the fact that "aboriginal and treaty rights differ in both origin and structure".[130]

In a sentiment which he would expand upon in more detail in *Nikal* v. *The Queen*,[131] Cory J. further argued "that it can properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test".[132] Sopinka J. appeared to agree to the extent that he asserted that "the constitutional right to hunt for food must be balanced against the right of the province to pass laws for the purpose of conservation and

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[129]*Ibid.* at 816-18.

[130]*Ibid.* at 812-13, where he went on to note that both Aboriginal and treaty rights "may be unilaterally abridged", that they possess "in common a unique *sui generis* nature", and that "[i]n each case, the honour of the Crown is engaged through its relationship with the native people".

[131][1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658 [hereinafter *Nikal* cited to D.L.R.]. The judgment in *Nikal* is discussed in detail later in this chapter.

[132]*Badger*, *supra* note 128 at 811.

that this balancing must be carried out on the basis of the principles set out in *R.* v. *Sparrow*".[133]

xv. *Nikal* v. *The Queen.*

In *Nikal*,[134] the Aboriginal appellant challenged his conviction for fishing without a licence by arguing that his band's reserve included the river on which he had been fishing, which meant that his fishing activities were governed by a band by-law, rather than the *Fisheries Act*.[135] The argument turned on whether or not the fishery could be said to form part of the reserve. Cory J., who penned the majority judgment in *Nikal*, rejected the appellant's argument on the basis that "the intention of the Crown was to guarantee full public access to the fisheries", rather than to "allot an exclusive fishery for the Moricetown Band".[136]

Cory J. then went on to consider whether the "mere requirement" of a licence constituted a *prima facie* infringement of the appellant's s. 35 Aboriginal rights. In concluding that "[t]he simple requirement of a licence is not in itself unreasonable" and that "the aboriginal right to fish must be balanced against the need to conserve the fishery stock", Cory J. determined that a "balanced approach to limitations on treaty rights" was

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[133]*Ibid.* at 779. Sopinka J. disagreed with Cory J. concerning the source of the right, arguing that Treaty No. 8 rights merged in the *Natural Resources Transfer Agreement, 1930* (*Constitution Act, 1930*, Schedule 2).

[134]*Nikal, supra* note 131.

[135]*Fisheries Act, supra* note 122.

[136]*Nikal, supra* note 131 at 670, 680.

"consistent with the approach to interpreting s. 35 rights as set out in *Sparrow*".[137] In this regard, Cory J. noted that "the rights of one individual or group are necessarily limited by the rights of another" and cited with approval the following passage from Blair J.A.'s decision in *R.* v. *Agawa*:

> 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 <u>the exercise of any right involves a balancing with the interests and values involved in the rights of others</u>. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* ... (emphasis added).[138]

Nevertheless, on the facts in *Nikal*, Cory J. found that the conditions printed on the type of fishing licence available to Aboriginal fishers in British Columbia constituted a *prima facie* infringement of the appellant's Aboriginal rights - an infringement which, on the evidence, the Crown had failed to justify.[139] In so doing, Cory J. incorporated the concept of reasonableness into the justification phase of the test established in *Sparrow*. He argued that,

> when considering whether there has been as little infringement as possible, the infringement must be looked at in the context of the situation presented. So long as the infringement was one which in the context of the circumstances presented

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[137]*Ibid.* at 688-91.

[138]*Ibid.* at 689, citing *R.* v. *Agawa* (1988), 53 D.L.R. (4th) 101 at 121, 65 O.R. (2d) 505 at 524 (C.A.). In this context, at p. 689-90, Cory J. also cites *Sparrow* as authority for the proposition that s. 35 "does not provide immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated".

[139]*Nikal*, *supra* note 131 at 695. McLachlin J. (L'Heureux-Dubé J. concurring) dissented on the basis that the appellant had been convicted of fishing without a licence rather than breaching the conditions on a licence which he did not possess. In her view, the latter issue was not properly before the Court (see pp. 697-700).

> could reasonably be considered to be as minimal as possible then it will meet the test. ... So too in the aspects of information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement. ... On occasion strict and expeditious conservation measures will have to be taken if potentially catastrophic situations are to be avoided.[140]

Cory J's approach in *Nikal*, and to a lesser extent *Badger*, may well impact upon the standard against which the conduct of the Crown, as a fiduciary, is to be assessed whenever the Crown is attempting to justify a *prima facie* infringement of the Aboriginal rights guaranteed by treaty or under s. 35(1). As we have seen in Chapter two, where the conduct of a fiduciary conflicts with the "interests to be served" the onus is on the fiduciary to rebut. In this regard, the motives of the fiduciary - however well meaning - will not provide a defence. Cory J.'s assertion that the obligations of the government are to be measured using a "reasonableness standard", having regard to other valid legislative concerns which may have little if anything to do with protecting Aboriginal rights, coupled with his support for a "balanced approach" to the interpretation of s.35 rights, would seem to suggest a departure from the strict fiduciary standard by which accountability in a fiduciary relationship has traditionally been maintained. While this result may well have been dictated by the unique and varied obligations with which the Crown is seized, one is left is some doubt as to whether or not the Supreme Court in *Nikal* fully appreciated the broader ramifications of Cory J.'s *dicta*.

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[140] *Ibid.* at 694-95.

xvi. *R.* v. *Lewis.*

On the same day as the Supreme Court provided reasons for its decision in *Nikal* it also delivered its judgment in *R.* v. *Lewis.*[141] The appellants in *Lewis* had been convicted of "net fishing", on a portion of the Squamish river adjacent to their reserve, in contravention of federal fishing regulations. As in *Nikal*, the appellants in *Lewis* argued that the portion of the river in which they had been fishing formed part of their reserve, and that fishing on the reserve was an activity which was authorized under a band by-law.

The appellants argued, *inter alia*, that the fishery had been included as part of the reserve to assure band members "physical access to a traditional fishery". In support of this contention, they alleged that the Crown had been under a fiduciary duty to include the river as part of their reserve "in order to secure the fishery for the Indians". To that end, they adopted the position that "the priority which *Sparrow* establishes" is insufficient inasmuch as mere rights of access offer no guarantee that the river could not be "alienated to other uses".[142]

Based on the evidence, Iacobucci J., who delivered the judgment of the Court, found that "it was never the intention of the Crown to provide the Bands with an exclusive fishery in waters adjacent to the reserves" and that there was "no evidence that such a grant had been made in this case".[143] He went on to conclude that,

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[141][1996] 1 S.C.R. 921; 133 D.L.R. (4th) 700 [hereinafter *Lewis* cited to S.C.R.].

[142]These arguments are summarized, *Ibid.* at 937, 947-48.

[143]*Ibid.* at 946-47.

> [e]ven if the process of reserve allotment in British Columbia was to protect the prior rights of Indian nations by the establishment of reserves, the Crown did not breach its fiduciary duty, assuming, without deciding, that one existed at the time of allotment. ... any fiduciary obligation on the part of the Crown to secure access to the fishery for the Squamish Indian Band was honoured by providing fishing stations for their use (emphasis added).[144]

Notwithstanding the fact that the Court rejected the appellant's argument, the *Lewis* case is deemed significant in that it provides guarded support for the notion that the Crown may be under a fiduciary duty to take limited action to facilitate the exercise of an Aboriginal right, such as by providing fishing stations to give an Aboriginal group secure access to the resource upon which the exercise of the right depends, rather than by simply ensuring that the regulatory scheme gives a priority to Aboriginal users. However, Iacobucci J.'s comments do not reflect any intention on the part of the Court to expand the extent of the Crown's duty so as to provide Aboriginal groups with exclusive proprietary rights to a particular resource. Nor did he choose to comment on the implicit assertion that the access based priority scheme which *Sparrow* established fails to provide sufficient long-term protection for the resources upon which the exercise of some Aboriginal rights are dependant.[145]

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[144] *Ibid.* at 948.

[145] The issue is an important one as it raises the concern that, in the absence of some recognized right of ownership or proprietary claim to the land on which a particular resource is located, Aboriginal rights of access and use will be rendered moot once the land on which the Aboriginal right is being exercised is developed or otherwise made unfit for the intended Aboriginal use.

xvii. *Chippewas of Nawash First Nation* v. *Canada (Minister of Indian and Northern Affairs).*

The 1996 decision of the Federal Court, Trial Division in *Chippewas of Nawash First Nation* v. *Canada (Minister of Indian and Northern Affairs)*[146] is illustrative of what might charitably be described as the "interpretive differences" which can arise when the Crown-Aboriginal relationship and associated obligations become the subject of litigation.

The facts of the case are somewhat unusual. Pursuant to s.44 of the *Access to Information Act*,[147] the applicant Band brought an application for a review of a decision of the Access Co-ordinator authorizing the disclosure of certain band council resolutions. The applicant argued, *inter alia*, that the resolution documents were not subject to disclosure on the grounds that they pertained to the manner in which title to the Band's reserve was held. In this regard, the applicant submitted that, inasmuch as the government had a fiduciary duty to protect Aboriginal lands, and given that the documents in question had fallen into the government's possession in its capacity as a fiduciary for the applicant Band's lands, the documents had to be protected "in the same way that any trustee must".[148] The applicant went on to argue that "the fiduciary duties of the Crown, as

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[146][1997] 1 C.N.L.R. 1 [hereinafter *Chippewas of Nawash*].

[147]R.S.C. 1985, c. A-1.

[148]*Chippewas of Nawash*, *supra* note 146 at 6. The applicant went on to cite *Lac Minerals*, *supra* note 61, for the proposition that, "[a] trustee/fiduciary cannot release property, including confidential information, belonging to the beneficiary without the express consent of the beneficiary".

protected and affirmed under the Constitution, have supremacy over all other legislation ... including the *Access to Information Act*".[149]

In dismissing the application, the Court determined, quite properly, that the fiduciary obligation referred to in *Sparrow*, "speaks to how the Crown deals with Aboriginal rights; such a process or requirement cannot itself be an Aboriginal right, since it has nothing to do with being Aboriginal. It is not an 'integral part' of the distinctive Aboriginal culture".[150] However, in arriving at this conclusion the trial judge made two startling assertions.

First, he determined that "the 'fiduciary relationship' between the Crown and First Nations stems from the unique nature of Indian title" and "is uniquely referable to the land which Indian bands occupy".[151] This particularly assertion, which was made without the benefit of Lamer C.J.'s judgment in *Van der Peet*, is not entirely surprising given the confusion over the nature and source of the undertaking which underlies the relationship. Based on *Van der Peet* we now know that Aboriginal title is but a "sub-category" of Aboriginal rights, albeit an important one. Moreover, the Crown-Aboriginal fiduciary relationship is based on more than just land.[152]

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[149]*Ibid.* at 6-7.

[150]*Ibid.* at 12.

[151]*Ibid.* at 10.

[152]In Chapter four, the author argues that the relationship derives from the Crown's "historic" undertaking to act on behalf of the Aboriginal peoples of Canada to protect their "practices, traditions and cultures" in dealings with third parties - a responsibility incurred in consequence of assuming sovereignty over both the Aboriginal peoples of Canada and the land upon which they lived at the time sovereignty was acquired.

The trial judge in the *Chippewas of Nawash* case goes on to assert that, "[w]hile the decision in *Kruger* alludes to the possibility that there may be a general fiduciary relationship between the Crown and a First Nation, subsequent decisions have limited its scope to surrendered lands".[153] This conclusion clearly runs counter to the leading cases - most notably *Sparrow* - and the plain language used by the Supreme Court of Canada in the *National Energy Board* case where, in delivering the judgment of the Court, Iacobucci J. stated that:

> It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada ... . None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation ... .[154]

Given the last portion of this particular passage, the trial judge in the *Chippewas of Nawash* case was correct in concluding that "*Guerin* does not stand for the proposition that the federal government has a fiduciary duty towards Aboriginal people in *all* circumstances". However, his follow-on finding, that "no fiduciary relationship exists between the Crown and the First Nation on the facts of this case", is clearly suspect.[155] The conclusion may, in part, be attributable to the unprincipled use of the terms "fiduciary relationship" and "fiduciary duty" and what was referred to at the outset of Chapter four as the failure to appreciate the oft-times subtle distinction between the general duty which the Crown

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[153]*Chippewas of Nawash*, *supra* note 146 at 10. Nadon J. does not offer support for this assertion other than to refer generally to *Canadian Pacific. Ltd.* v. *Paul*, [1989] 1 C.N.L.R. 47 (S.C.C.).

[154]*National Energy Board*, *supra* note 58 at 147.

[155]*Chippewas of Nawash*, *supra* note 146 at 10.

owes all Aboriginal peoples by virtue of its fiduciary status, on the one hand, and the more specific duties which may arise whenever the Crown purports to exercise a particular discretion in relation to specific Aboriginal interests held by individual Aboriginal groups, on the other.

Had the trial judge properly concluded that the Crown was a fiduciary, on the facts in the *Chippewas of Nawash* case it would still have been open to him to conclude that the *Access to Information Act* operated as an exception to the general rule that a fiduciary is prohibited from acting in a manner which is inconsistent with the subject matter and purposes of the relationship, on the basis that the legislation prevented the Crown from exercising its ordinary discretion to refuse to disclose the documents.[156] But what if the resolution documents had simply been released to a third party in a situation where recourse had not been made to the *Access to Information Act*? In such circumstances the Crown would, as a minimum, have been in breach of the general duty of loyalty which underscores the fiduciary relationship. That being the case, it can hardly be said that "the fiduciary relationship of the Crown to Aboriginal peoples bears no relationship to the disclosure of band council resolutions".[157]

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[156]The exception in discussed in note 10 to Chapter two.

[157]*Chippewas of Nawash*, *supra* note 146 at 10. Nadon J.'s narrow approach to the interpretation of the Crown's role and corresponding obligations vis-a-vis the Aboriginal applicants in this case contrasts sharply with the liberal stance taken elsewhere. See, for example, *Wewaikai Indian Band* v. *Canada*, [1992] F.C.J. No. 507 (F.C.T.D.)(QL), wherein Jerome A.C.J. ordered the Defendant to produce further and better particulars in relation to certain portions of its statement of defence, pointing out that, as a fiduciary, the federal Crown should not be seen "as attempting to impede or obstruct" the rights and interests of the plaintiff Band. The Court also commented unfavourably on the conduct of the Crown's

D. Van der Peet and Beyond:

i. *R.* v. *Gladstone.*

The appellants in *Gladstone*[158] had been charged under s. 61(1) of the *Fisheries Act* with attempting to sell herring spawn on kelp caught without a proper licence in contravention of the *Pacific Herring Fishery Regulations.*[159] In accepting the appellant's submission that the regulation created a *prima facie* violation of the Aboriginal rights they held as members of the Heiltsuk Band, a majority of the Supreme Court found that the "exchange of herring spawn on kelp for money or other goods was a central, significant and defining feature of the Heiltsuk prior to contact" and "that the exchange of herring spawn on kelp on a scale best characterized as commercial was an integral part of the distinctive culture of the Heiltsuk".[160] In this respect, *Gladstone* is unique. Of the *Van der Peet* trilogy of cases, it was the only case to reach the phase in the proceedings where a determination was required as to whether, *per Sparrow*, the government actions infringing Aboriginal rights could be justified.

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case in *R.* v. *Seward*, [1997] 1 C.N.L.R. 139 at 143. Crown counsel in that case had admitted nothing, not even that the Band of which the accused was a member had been an organized society during the relevant period, a strategy which the provincial court judge described as "egregious and opportunistic, and not in strict keeping with its obligation to take a trust-like approach as opposed to an adversarial approach".

[158] *Gladstone, supra* note 5.

[159] *Fisheries Act*, R.S.C. 1970, c. F-14, as am.; *Pacific Herring Fishery Regulations*, SOR/84-324, s. 20(3).

[160] *Gladstone, supra* note 5 at 660.

Given the lack of relevant evidence concerning the justifiability of the government's herring allocation scheme, the Court ended up allowing the appeal and directing a new trial on the issue of justification. However, inasmuch as the right to sell herring spawn on kelp differed significantly from the right to fish for food, social and ceremonial purposes - which was the right under consideration in *Sparrow* - Lamer C.J. found it necessary to comment on the justification test which had been established by the Court in *Sparrow* and "adapt" it "to the circumstances of this appeal".[161] It is this aspect of the *Gladstone* case, and particularly Lamer C.J.'s observations concerning the obligation on the Crown "to demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples", which interests us here.[162]

In this context, the focus of Lamer C.J.'s concern is the determination of the "correct order of priority" to be given to the Aboriginal right to sell herring spawn on kelp commercially. His concern is driven by the *Sparrow*-based requirement, on the part of the government, "to demonstrate that it has given the aboriginal fishery priority in a manner consistent with this Court's decision in *Jack* v. *The Queen*".[163] In concluding that "*Sparrow* should not be seen as the final word on the question of priority",[164] Lamer C.J. cites what he considers to be a critical difference between the Aboriginal right to fish for

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[161]*Ibid.* at 674.

[162]*Ibid.* at 673.

[163]*Ibid.* at 673, citing *Jack* v. *The Queen*, [1980] 1 S.C.R. 294 at 313, where the Supreme Court determined the correct order of priority in the fisheries to be "(i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing".

[164]*Gladstone*, *supra* note 5 at 576.

food, social and ceremonial needs, which was the right under consideration in *Sparrow*, and the Aboriginal right to sell herring spawn on kelp commercially. He characterizes the distinction in terms of whether or not the Aboriginal right is "internally limited". In this regard, Lamer C.J. observes that the Aboriginal right to fish for food, social and ceremonial needs, is "internally limited", in the sense that once Aboriginal needs have been satisfied "other users can be allowed to participate in the fishery". By contrast, he finds that the commercial sale of herring spawn on kelp has "no such internal limitation". Lamer C.J. goes on to conclude that the latter right would effectively become "an exclusive one", under a system which gave a priority to a commercial Aboriginal fishery, on the basis that "the commercial market can never be said to be satisfied while the resource is still available and the market is not sated".[165] In his view, an exclusive priority would effectively result in the extinguishment of the "common law right of public access to the fishery", a consequence "not contemplated by *Sparrow*".[166] He states that,

> [w]hile the elevation of common law aboriginal rights to constitutional status obviously has an impact on the public's common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s.35(1), those common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed.[167]

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[165]*Ibid.* at 675.

[166]*Ibid.* at 679, where Lamer C.J. points out that, "since the time of the *Magna Carta*, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation". The author traces the ancient origins of public water rights, as well the status of public resource rights in Canada, in J.C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1996) 7 J.E.L.P. 1 at 4-8, 15-23.

[167]*Gladstone*, *supra* note 5 at 679.

In paving the way for his solution, Lamer C.J. explains that, unless "the possibility" of "a limitation" on the "notion of exclusivity of priority" is recognized, "it is difficult to see how the government will be able to make decisions of resource allocation amongst the various parties holding prioritized rights to participate in the fishery". He illustrates the practical problems facing the government by pointing out that,

> governments must not only make decisions about how to allocate fish between aboriginal rights holders and those who do not enjoy such rights, but must also make decisions as to how to allocate fish both between different groups of aboriginal rights holders and between different aboriginal rights. The government must, for example, make decisions as to how to allocate fish between those aboriginal peoples with the aboriginal right to fish for food, social and ceremonial purposes, and those aboriginal peoples who have aboriginal rights to sell fish commercially; it must also decide, where more than one aboriginal group has a right to sell fish commercially, how much fish each group will have access to.[168]

But what is the solution?

Rather than impose a "blanket obligation" on the Crown, Lamer C.J. concludes that, in assigning a non-exclusive priority to Aboriginal rights which have no "internal limitation", <u>the government must simply ensure that its actions take the "existence and importance" of the Aboriginal right into account</u>.[169] While compensation and consultation will still be relevant considerations in determining whether the government's priority scheme is consistent with its fiduciary duty towards the Aboriginal group concerned, he suggests other "questions" which might also be relevant. Based on his subsequent comments, one might expect future courts to consider the "government's

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[168] *Ibid.* at 678.

[169] *Ibid.* at 677.

objectives in enacting a particular regulatory scheme", the priority given Aboriginal groups holding different forms of Aboriginal fishing rights, the criteria used to allocate commercial licences, any specific government measures taken to accommodate the exercise of the right, the extent of Aboriginal participation in the commercial fishery relative to their population base, and the relative importance of the exercise of the right to the overall well-being of the Aboriginal group concerned.[170]

From the standpoint of the Crown's fiduciary obligations, insofar as the Aboriginal rights recognized and affirmed under s. 35(1) are concerned, it is essential to appreciate the wider implications of what is effectively a highly-diluted version of the *Sparrow* test. Most significantly, Lamer C.J. concludes that, in furtherance of the need to reconcile Aboriginal rights with the sovereignty of the Crown, the government can set limitations on Aboriginal rights for reasons which may be unrelated to resource conservation, without necessarily breaching a fiduciary duty. In this regard, he argues that:

> Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to the community (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation (emphasis added).[171]

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[170] *Ibid.* at 677-78.

[171] *Ibid.* at 681-82.

While conservation is still seen to be the primary consideration, Lamer C.J. lists the "pursuit of economic and regional fairness" and the "recognition of the historical reliance upon and participation in, the fishery by non-aboriginal groups" as two examples of objectives which may, "*in the right circumstances*", constitute an acceptable limitation on Aboriginal rights, on the basis that "such objectives are in the interests of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment".[172]

What Lamer C.J. has in effect done is sanction a justification framework which invites the Crown to balance Aboriginal rights against other rights in determining resource allocation. In a move consistent with such an approach, the Court in *Gladstone* declined to define the content of the Aboriginal priority, arguing that it "must remain somewhat vague pending consideration of the government's actions in specific cases".[173] However, the use of analogous references to the minimal impairment branch of the *Oakes* test suggests that the Court is really moving towards a "reasonableness" standard.[174] Inasmuch as there is no constitutional equivalent to s.1 of the *Charter*, which would provide a court with a means of assessing the validity of a limitation on the Aboriginal

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[172]*Ibid.* at 682-83.

[173]*Ibid.* at 676.

[174]*Ibid.* at 677. In this context, Lamer notes that "where the government is balancing the interests of competing groups, the court does not scrutinize the government's actions so as to determine whether the government took the least rights-impairing action possible; instead the court considers the reasonableness of the government's actions" (see *R.* v. *Oakes*, [1996] 1 S.C.R. 103).

rights recognized and affirmed under s. 35(1), the Supreme Court in *Gladstone* seized and expanded upon the reconciliation theory which it devised in *Van der Peet*. While, in *Van der Peet*, s. 35(1) was heralded as the means chosen to reconcile the pre-existing Aboriginal "practices, traditions and cultures" with "the sovereignty of the Crown",[175] in *Gladstone* the Court concludes that Aboriginal rights are to be balanced with other "compelling and substantial" objectives in order to achieve "the reconciliation of aboriginal societies with the rest of Canadian society".[176] In its reconstituted form, Lamer C.J.'s reconciliation framework provides a rationale under which the Crown may be said to have the mandate to take non-Aboriginal interests into account - a rationale which seems to have been specifically designed to enable the government to manage its varied and oft-times conflicting responsibilities.

ii. *R.* v. *Adams.*

In *R.* v. *Adams*,[177] the Supreme Court was called upon to determine a number of issues pertaining to the appellant's claim to have an Aboriginal right to fish for food on a Quebec lake which constituted a complete defence to a charge of fishing without a licence contrary to s. 4(1) of the *Quebec Fisheries Regulations*.[178] The majority judgment

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[175] *Van der Peet*, *supra* note 5 at 303.

[176] *Gladstone*, *supra* note 5 at 682-83.

[177] *R.* v. *Adams*, [1996] 3 S.C.R. 101; 138 D.L.R. (4th) 657 [hereinafter *Adams* cited to D.L.R.].

[178] C.R.C. 1978, c.852, ss. 4(1) [rep. & sub. SOR/82-320, s.3]. The appellant, a Mohawk resident of the Akwesasne Reserve, had caught approximately 200 perch using a seine net.

in *Adams* was delivered by Lamer C.J..[179] From the perspective of the Crown-Aboriginal relationship, Lamer C.J.'s judgment serves as an example of the application of fiduciary principles at the justification phase of the *Sparrow* test, in the post *Van der Peet* trilogy era. More importantly, the judgment examines the Crown's obligation when discharging its regulatory function in the field of resource management. In this regard, the *Adams* case stands for the proposition that Parliament has an obligation to provide specific guidance to its departmental representatives to ensure that they are properly equipped to fulfil their fiduciary obligations in relation to those persons possessing Aboriginal rights over or in relation to any resource which Parliament seeks to regulate.

The first issue the Court had to determine in *Adams* was "whether a claim to an aboriginal right to fish must rest in a claim to aboriginal title to the area in which the fishing took place".[180] In light of the Court's conclusion in *Van der Peet*, that Aboriginal title is but "a sub-category of Aboriginal rights", the Court had little difficulty in concluding that,

> [w]here an aboriginal group has shown that a particular activity, custom or tradition taking place on the land was integral to the distinctive culture of that

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While the regulations would have allowed him to apply to the Minister, who could have exercised his discretion to grant Adams a food fishing licence, the appellant had chosen not to do so.

[179]L'Heureux-Dubé J. wrote a separate judgment in which she concurred generally with Lamer C.J.'s reasons but added her own comments, which were to the effect that Aboriginal rights "can be incidental to aboriginal title but need not be". She went on to reiterate her minority view in *Van der Peet* concerning the definition of Aboriginal rights (see *Adams*, *supra* note 177 at 680-82).

[180]*Ibid.* at 666.

> group then, *even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land*, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition.

In reaching this conclusion, Lamer C.J. points to the fact that many Aboriginal groups were nomadic, arguing that "s.35(1) should not be understood or defined in a manner which excludes some of those the provision was intended to protect".[181]

The Court determined that the appellant had demonstrated that fishing for food "in Lake St. Francis was 'an element of a tradition, custom, practice or law integral to the distinctive culture' of the Mohawks" which predated European contact, had continuity with "aboriginal communities today", and had not been extinguished by the Crown based on an expression of "clear and plain" intent. The Court went on to consider whether there had been an infringement of that Aboriginal right and, if so, whether the infringement was justifiable.[182]

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[181]*Ibid.* at 667. Lamer C.J. went on to emphasize, at p. 668, that:

> [t]he recognition that aboriginal title is simply one manifestation of the doctrine of aboriginal rights should not, however, create the impression that the fact that some aboriginal rights are linked to land use or occupation is unimportant. ... that right may well be site-specific, with the result that it can be exercised only upon [a] specific tract of land. A site specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question.

[182]*Ibid.* at 670-76. The time of European contact was determined to be Samuel de Champlain's 1603 arrival in the area (see p. 674). Of note, the respondent had argued that the appellant's Aboriginal rights had never been recognized under the French regime and that, as a result, there was no body of law which was capable of having been received into the English common law as of the 1763 "transition to British sovereignty". Lamer C.J. rejected the argument citing the reasons given by him in *R.* v. *Coté*, [1996] 3 S.C.R. 139 at 168-173 (S.C.C.) [hereinafter *Coté*]. The Supreme Court's treatment of the issue of the status of Aboriginal rights under the French colonial regime in *Coté* is discussed at note 75 of

On the question of justification, Lamer C.J. found that the federal regulation under consideration imposed an "undue hardship" which interfered with the exercise of the appellant's Aboriginal right to fish for food by subjecting the exercise of that right "to a pure act of Ministerial discretion", without establishing "criteria regarding how that discretion is to be exercised". He argued that,

> [i]n light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. ... In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties ... .[183]

In short, the regulation in *Adams* was considered to be so deficient that it would inevitably have led to a breach of the Crown's fiduciary obligations - presumably on the basis that it would have been impossible for Ministry officials to have determined what, if any, priority was to be given individual Aboriginal food fishing licence applicants.

In terms of the follow-on issue of justification, the Court concluded that the policy upon which the regulatory scheme was based tended to favour sport fishing - a policy objective which was neither "compelling" nor "substantial". Nor was the regulatory scheme found to be "consistent with the Crown's fiduciary obligation to aboriginal

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[183] *Adams*, *supra* note 177 at 677.

peoples" in that it did not provide the requisite priority to the Aboriginal right to fish for food.[184]

iii. *R.* v. *Coté.*

The 1996 decision of the Supreme Court in Canada in *Coté* [185] was released contemporaneously with that Court's decision in *Adams*. As in *Adams*, the majority judgment in *Coté* was penned by Lamer C.J.[186]

The appellants in *Coté* had been convicted of the provincial offence of entering a controlled harvest area without having paid the requisite motor vehicle entrance fee.[187] A single conviction in relation to the additional charge of "fishing without a licence", contrary to the same federal regulation which was under consideration in *Adams*, had also been registered against Mr. Coté.[188] The appellants in *Coté* challenged all convictions, arguing that both regulations were inoperative, on the basis that they constituted an

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[184]*Ibid.* at 678-79. Of note, Lamer C.J. cites *Gladstone* for the proposition that Aboriginal rights could be limited if the policy objective in question was of "overwhelming importance to Canadian society as a whole".

[185]*Coté, supra* note 182. An appeal from the Quebec Court of Appeal decision of the same name, reported at [1994] 3 C.N.L.R. 98.

[186]Lamer C.J.'s judgment was concurred in by Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. Separate concurring judgments were written by L'Heureux-Dubé and La Forest JJ.

[187]*Regulation respecting controlled zones*, R.R.Q. 1981, 370 (supp.), ss. 5.

[188]*Quebec Fisheries Regulations*, C.R.C. 1978, c.852 ss. 4(1). This was the same provision under consideration in *Adams*.

infringement of Aboriginal and treaty rights guaranteed under s. 35(1) of the *Constitution Act, 1982*. They claimed that the right derived from an Algonquin Aboriginal title claim.

The focus of much of the Court's analysis in *Coté* centred on the question of whether or not the appellants, who were members of the Algonquin people, enjoyed an Aboriginal or treaty right to fish in the controlled harvest zone and, if so, whether that right had been infringed.[189] Given his conclusion in *Adams*, which was to the effect that Aboriginal rights may exist "independently of aboriginal title", Lamer C.J. determined that it was unnecessary for him to decide whether the Aboriginal right in question was "incidental to a claim of aboriginal title".[190] Nor did he find it necessary to categorically address the respondent's argument that "no aboriginal right could have survived the assertion of French sovereignty over the territory of New France".[191] Instead, Lamer C.J. choose to simply observe, *obiter*, that even if the respondent's position was correct, it would still not be fatal to the appellants' claim on the basis that the *Van der Peet* analysis concerns itself with practices, customs and traditions which were integral to the distinctive Aboriginal society in question <u>prior</u> to European contact.[192] The rationale for this particular aspect of the *Van der Peet* analysis is explained in *Coté* in the following terms:

> The respondent's view, if adopted, would create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncrasies of colonization over particular regions of the country.

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[189]*Coté*, *supra* note 182 at 163.

[190]*Ibid.* at 165-66.

[191]*Ibid.* at 168.

[192]*Ibid.* at 175,177.

> In my respectful view, such a static and retrospective interpretation of s.35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*.[193]

This rationale, while consistent with the Court's "principled" approach to s.35(1), may well be criticized on the basis that it avoids dealing with a number of outstanding "historic" issues which must still be addressed before the legal status of a number of Aboriginal title claims within former French colonies can be resolved.[194]

Following the principles which he had adopted in *Van der Peet*, Lamer C.J. concluded that the appellants in *Coté* had established that the Algonquins frequented the area in question, fished for food in its lakes and rivers at the time contact was first made with the French explorer Samuel de Champlain, and that their activities had "continuity" with contemporary fishing practices.[195] In the absence of any evidence of extinguishment, he then went on to consider, *per Sparrow*, whether the appellants' Aboriginal rights had

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[193]*Ibid.* at 175.

[194]Lamer C.J.'s obiter comments on the status of Aboriginal rights, both before and after 1763, suggest that the Court may be inclined towards a liberal view of Aboriginal rights in what was once the French colony of Quebec. In this regard, Lamer C.J. points out, *Ibid.* at 174-75, that "the French Regime's failure to recognize legally a specific aboriginal practice, custom or tradition (and indeed the French Regime's tacit toleration of a specific practice, custom or tradition) clearly cannot be equated with a 'clear and plain' intention to extinguish such practices under the extinguishment test of s.35(1)". Furthermore, while he declined the opportunity to "wade" into "the murky historical waters surrounding the legal effect of the [Royal] Proclamation [of 1763]" Lamer C.J. does point out that "the common law recognizing aboriginal title was arguably a necessary incident of British sovereignty which displaced the pre-existing law governing New France" (pp. 166-67 and 173 refer). The status of Aboriginal title as a distinct species of federal common law is discussed in note 85 of Chapter four.

[195]*Ibid.* at 176-183.

been infringed. For the reasons given by the Court in *Adams*, Lamer C.J. found that the federal fishing regulation constituted an unjustified infringement of Mr. Coté's Aboriginal right to fish for food.[196] However, the Court reached the opposite conclusion with respect to the provincial offence pertaining to the failure to pay the motor vehicle entrance fee on entering the controlled harvest area. After citing *Badger* for the proposition that the *Sparrow* test will apply to a consideration of the alleged infringement of an Aboriginal right, by reason of the operation of both provincial and federal law,[197] Lamer C.J. concluded that the provincial regulation could not be said to "infringe or restrict" the appellants' treaty rights.[198] In this regard, he found that the fee in question in *Coté* served to facilitate rather than limit the exercise of the Aboriginal right in question, inasmuch as

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[196]see the discussion *Ibid.* at 186-87 and 189-90.

[197]*Ibid.* at 185. He explains the conclusion on the following basis: "[t]he text and purpose of s.35(1) do not distinguish between federal and provincial laws which restrict aboriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny".

[198]*Ibid.* at 190-93. Lamer C.J. choose to assume, without deciding, that the appellants enjoyed a right to fish which was protected by the Swegatchy treaty of 1760. Had he gone on to find that the provincial regulation infringed a right which was protected under that treaty it would have been open to him to conclude that the right enjoyed federal statutory protection based on the wording of s. 88 of the *Indian Act* and the doctrine of federal paramountcy. In this regard, Lamer C.J. suggests, at p. 191-92, that, "on the face of s. 88, treaty rights appear to enjoy a broader protection from contrary provincial law under the *Indian Act* than under the *Constitution Act, 1982*" inasmuch as "[t]he statutory provision does not expressly incorporate a justification requirement analogous to the justification stage included in the *Sparrow* framework". However, in the next breath, Lamer C.J. observes that no case "has authoritatively discounted the potential existence of an implicit justification stage under s. 88".

the revenue generated was "dedicated to the upkeep of the facilities and roads" and did not apply when any other means was used to enter the zone.[199]

iv. *Union of Nova Scotia Indians* v. *Canada (Minister of Fisheries and Oceans).*

In light of the recent decision of the Federal Court, Trial Division, in *Union of Nova Scotia Indians* v. *Canada (Minister of Fisheries and Oceans)*, a failure to consider the Crown's fiduciary obligations and responsibilities in relation to "recognized" Aboriginal interests may well constitute a failure to act with fairness insofar as the government's administrative decision-making process is concerned.[200]

The *Union of Nova Scotia Indians* case concerned an application for judicial review of decisions made on behalf of the Minister of Fisheries and Oceans and the Minister of the Environment. The decisions accepted as satisfactory an environmental screening report made under the *Canadian Environmental Assessment Act* (CEAA), authorized a dredging project in the Ocean waters adjacent to the Bras d'Or Lakes, Nova Scotia, and permitted the "at sea" disposal of the materials recovered during that dredging operation.[201] Prior to the decisions being taken, the applicants, which included the Union

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[199]*Ibid.* at 187.

[200]*Union of Nova Scotia Indians* v. *Canada (Minister of Fisheries and Oceans)*, [1996] F.C.J. No. 1373 (F.C.T.D.) (QL) [hereinafter *Union of Nova Scotia Indians*].

[201]R.S.C. 1985, c. C-15.2 (enacted S.C. 1992, c.37). The dredging project to increase the depth of a channel leading into the lakes was designed to maximize the load efficiency of ocean going vessels being used to transport gypsum and rock being mined by one of the respondents in the case - USG Canadian Mining Limited. The Ministers' acceptance was made subject to certain mitigation measures.

of Nova Scotia Indians and five Mi'kmaq Bands, had voiced concerns that the project would have a potentially adverse environmental impact and commissioned three studies to examine the project's potential effects. Funding for these studies was provided by the Department of Indian Affairs and Northern Development (DIAND). In this respect, it is important to note, as did the trial judge, that "the Mi'kmaq operate aquaculture facilities in the Bras d'Or Lakes, raising oysters and salmon" and that the Mi'kmaq in Cape Breton have an existing, unextinguished "aboriginal right to fish for food in the waters of the Bras d'Or Lakes and in the streams that empty into the lakes".[202]

Although some consultation did occur prior to the relevant decisions being taken, the decision to approve the screening report was made just prior to a meeting which had been arranged to discuss the study findings, and the applicant's concerns, with Department of Fisheries and Oceans scientists. The appellants argued, *inter alia*, that the decision-making process lacked the requisite level of procedural fairness having regard to the existence of the Aboriginal rights in question and the fiduciary duty owed by the Crown.

The trial judge agreed. In this respect, MacKay J. determined that, as a minimum, the Crown was under an obligation "not to permit unjustified adverse effects upon continuing aboriginal interests, here including the interests in fishing within the Bras d'Or Lakes for food".[203] He went on to find that the duty "continued throughout the assessment process and thereafter" and concluded that, "by their failure to consider the

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[202] *Union of Nova Scotia Indians*, *supra* note 200 at para 6.

[203] *Ibid.* at para 48.

fiduciary duty here owed by the applicants, when the decision was made by the Ministers, those acting on behalf of the Ministers did breach that duty".[204] In the result, MacKay J. was of the view that the failure to consider the Crown's fiduciary obligations and attendant responsibilities in relation to the "recognized" Aboriginal interest concerned, constituted "a failure by those acting on behalf of the respondent Ministers to act with fairness towards the applicants in the environmental assessment process". In view of the justificatory approach set out in *Sparrow* he termed this "an error of law".[205]

The *Union of Nova Scotia Indians* case also speaks to the issue of who is responsible to discharge the Crown's fiduciary duties. In this respect, after noting the perception, within the public service, "that the sole responsibility for discharge of that duty was that of DIAND", MacKay J. concluded that the duty in this case could only be discharged by the authority whose responsibility it was to ensure that the environmental assessment was satisfactorily completed. In other words, the sole responsibility rested with officials within the Department of Fisheries and Oceans to the extent that that department had undertaken the role of "lead responsible party" under the CEAA.[206] This view appears consistent with the approach taken by DIAND who had,

> declined to be a party formally involved in the acceptance of, or consultations about, the screening assessment, and ... [had] affirmed that the applicant should be dealt with directly by DFO. By inference, DIAND's position is said to have been

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[204]*Ibid.* at para 54.

[205]*Ibid.* at paras 53 and 73. MacKay J. went on to order that the relevant decisions be set aside, and the matter referred for reconsideration and further consultation with the applicants.

[206]*Ibid.* at paras 10, 52-53.

> that the lead responsible authority under CEAA, here DFO, assumes responsibility for discharge of the Crown's fiduciary duty.[207]

The problem in this case was that no one involved in the assessment process within the Department of Fisheries and Oceans acknowledged any responsibility to discharge the Crown's fiduciary obligations - which may well explain why the screening report failed to even make mention of the Aboriginal fishery in the Bras d'Or Lakes region.[208] Indeed, to the extent that the fiduciary obligations in this case appear to have "fallen between the cracks", the case would strongly suggest the need for a higher level of understanding and awareness of the Crown-Aboriginal relationship and attendant responsibilities within the federal government.[209]

In a situation where more than one federal agency is involved, there is a certain attraction in having one Department act as the central or "lead" party responsible for discharging the Crown's fiduciary responsibilities. However, it seems odd in this case that DIAND - which was the only Department which appears to have been fully cognizant of the Crown's obligations - was essentially allowed to assume the role of bystander. The difficulty, of course, is that the other Departments concerned are primarily responsible for advancing priorities and agendas which may well conflict with the Crown's fiduciary obligations. Can it really be said that they are in the best position to discharge such

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[207] *Ibid.* at para 52.

[208] *Ibid.* at paras 46 and 52.

[209] In this respect, the trial judge noted, *Ibid.* at para 52, a certain level of "uncertainty about responsibility for the Crown's fiduciary duty to the applicants in this case".

obligations? Should there not be some internal procedural safeguards established to ensure that accountability is maintained? In this respect, there is little in the *Union of Nova Scotia Indians* case to suggest that the government may not fall into the same trap again at some future date, beyond the knowledge that the courts are now prepared to consider the Crown's fiduciary obligations when reviewing administrative decisions which may adversely impact on specific Aboriginal interests which the Crown has undertaken to protect.

v. *Perry* v. *Ontario*.

The decision of the Ontario Court of Appeal in *Perry* v. *Ontario* addresses the important question of whether or not s.35(1) of the *Constitution Act, 1982*, obliges governments to negotiate with Aboriginal peoples with a view to determining the nature and extent of their Aboriginal rights and developing wildlife enforcement measures.[210]

The respondent Perry had originally been charged with hunting without a licence, contrary to regulations made pursuant to the federal *Migratory Birds Convention Act*, and with fishing without a licence, contrary to the provincial *Game and Fish Act*.[211] Mr. Perry was a non-status Indian and a member of the Ardoch Algonquin First Nation and Allies (AAFNA) - a First Nation without status as a registered Band. He claimed an Aboriginal right to fish and hunt in the area in which the offenses were alleged to have occurred and

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[210]*Perry* v. *Ontario*, [1997] O.J. No. 2314 (C.A.) (QL) [hereinafter *Perry*].

[211]*Migratory Birds Convention Act*, R.S.C. 1985, c-M-7; *Game and Fish Act*, R.S.O. 1990, c.G.1, s.7(7).

brought an application to stay the charges on the basis that the provincial government's "Interim Enforcement Policy" (IEP) discriminated against him as a non-status Indian.

That latter policy provided, *inter alia*, that enforcement measures would not be taken against status Indian people including "registrable" non-status Indians who were "harvesting wildlife or fish for personal consumption or social or ceremonial purposes" in "traditional harvesting areas".[212] The province subsequently concluded that the accused was "registrable" and advised him that the charges would be withdrawn. At the same time it undertook a review of its "Interim Enforcement Policy", which it ultimately rescinded.

In ruling on the main application, Cosgrove J., of the Ontario Court (General Division), concluded that the government had breached s.35(1) in not consulting with Aboriginal groups before unilaterally rescinding its enforcement policy. He ordered that the policy be reinstated and amended to replace the term "status Indian" with the term "aboriginal person" and "further ordered that the IEP not be withdrawn without further negotiations in good faith with all aboriginal people".[213] In this latter regard, Cosgrove J. directed Ontario and the Ardoch Algonquin First Nation to immediately enter into negotiations with a view to reaching agreement on "the identification of AAFNA members and their territory; harvesting limits; habitat protection and land-use

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[212] *Perry*, *supra* note 210 at para 2.

[213] *Ibid*. at para 33.

management; conservation measures; and monitoring and enforcement of limits and conservation measures".[214] The Crown appealed.

The Court of Appeal characterized Cosgrove's J.'s judgements and orders as "intrusive" and "heavy-handed". In this respect, the three member Court stated that, "[i]n his rush to judgment, he had purported to solve, with the stroke of his pen, matters that have been the subject of tripartite negotiations since 1991. The result has been turmoil."[215] Although the Court allowed the appeal, on the basis that the province had been denied procedural fairness, it also chose to comment on a number of the other substantive issues raised in the case. In this regard, the Court found that the provincial enforcement policy was "not a law or an exercise of legislative policy" which determined legal rights, rather it was in the nature of "much needed advice to those responsible for law enforcement on the existence of some aboriginal rights to the extent that they had been determined as of that date".[216] The Court termed "nonsensical" any suggestion that the province could not rescind that policy.[217]

For our purposes, what is more important is that the Court of Appeal rejected any suggestion that the obligation on the Crown to act in a fiduciary capacity with respect to Aboriginal peoples placed the province under an "affirmative obligation" to "negotiate with the aboriginal peoples of this province to determine and identify the extent of their

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[214]*Ibid.* at para 43.

[215]*Ibid.* at para 60. The appeal was heard by Finlayson, Labrosse and Laskin JJ.A.

[216]*Ibid.* at paras 61-62.

[217]*Ibid.* at para 64.

aboriginal rights".[218] In this respect, the Court observed, *per Van der Peet*, that "the onus of proving a s.35(1) right lies with the aboriginal claimant",[219] and went on to state that:

> [i]n our view, *Sparrow* suggests and *Adams* confirms that s. 35(1), including the government's fiduciary obligation implicit therein, is intended as a shield and not a sword. It is a restraint against regulation improperly affecting aboriginal rights, not an affirmative obligation to initiate negotiations with a view to such regulation. A law or regulation which infringes s. 35(1), and cannot be justified by the Crown, will not be enforceable in the circumstances. However, there is no positive duty on the government to negotiate with aboriginal communities for the purpose of reaching agreement upon a set of game and fish enforcement measures. (emphasis added)[220]

In reaching this conclusion, the Court may well have been swayed by the practical difficulties associated with attempting to measure fiduciary liability based on a consideration of whether or not the beneficiary's interests have in fact been served. As the Court in *Perry* noted, "[t]he scope of aboriginal rights is unknown, and for now, unknowable".[221]

E. Conclusions:

i. The Circumstances under which Fiduciary Duties will be Owed.

Since the 1984 decision of the Supreme Court of Canada in *Guerin*, there has been an almost constant expansion to the list of circumstances under which the Crown can be

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[218] *Ibid.* at para 71.

[219] *Ibid.* at para 80, citing *Van der Peet*, *supra* note 5 at 289.

[220] *Ibid.* at para 92.

[221] *Ibid.* at para 94. In this regard, see the discussion of the inherent limitations of fiduciary doctrine in Chapter six.

said to have fiduciary duties requiring that it act or refrain from acting in a certain manner. In terms of the central question of conflict management, this development is considered important from the standpoint of appreciating the extent and nature of the circumstances under which it can be said that the Crown-Aboriginal fiduciary relationship will impose responsibilities on the Crown.

At first blush, it may seem that there is little to define the courts' approach in this area. The impression is misleading. While the list of circumstances under which fiduciary duties owed Aboriginal peoples has undergone a marked expansion, a number of common themes may be ascertained in our courts' approach on the question of duty.

Given the parallel developments noted in Chapter two, it is not too surprising to find that, where the circumstances suggest a breach of the fiduciary's "general" duty of loyalty, the focus of the courts' concern has been on the extent to which the Crown's high standard of honourable dealings has been upheld. Having said that, it must also be acknowledged that there is still a certain reluctance in some circles to acknowledge that the Crown-Aboriginal fiduciary relationship is all-embracing.[222] The pervasiveness of this latter view may also explain why most successful breach of fiduciary duty claims are founded on a failure to uphold a "specific" treaty, agreement or surrender term - a failure typically alleged in connection with the exercise of a particular discretion or power to act in relation to the interests of individual Aboriginal group members.

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[222]See for example the *Chippewas of Nawash* case, discussed *supra*. McLachlin J. may have unwittingly contributed to the confusion in this area, by not clearly distinguishing between the existence of a fiduciary relationship and the specific fiduciary duties which may or may not always follow, in penning her judgment in *Blueberry River*.

Specific fiduciary duties have been found to be owed in a wide variety of circumstances pertaining to the Aboriginal title interest as well as the other existing Aboriginal and treaty rights recognized and affirmed under s.35(1) of the *Constitution Act, 1982*.[223] However, while the courts seem inclined to grant redress to Aboriginal litigants who articulate their claims in terms of breaches of specific duties, this is not to say that an argument advanced on the basis of a breach of a particular fiduciary duty will not be resolved by the courts having regard to the Crown's overarching, general duty of loyalty. Given that the latter standard is less onerous, the results in such cases have tended to favour the Crown.

Arguably, the Crown's "general" obligation to act in a fiduciary capacity and "uphold a high standard of honourable dealings" may well also have relevance in terms of the manner in which the Crown conducts civil litigation. While the case law is still evolving in this area, the Crown has already been brought to task when, as a party to an action, it has conducted itself in a manner which unnecessarily impedes or obstructs Aboriginal litigants, or, where Crown counsel adopts an overtly adversarial stance.[224] Based on the decision in *Wolfe*, it can also be said that the conduct of the Crown may, in

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[223]The courts have so far declined to treat the *Nowegijick* principle as derivative of the Crown-Aboriginal relationship for the purpose of interpreting comprehensive agreements. However, as the Federal Court of Appeal Court decision in the *Eastmain Band* case illustrates, the courts do expect that both parties will approach the obligations assumed under such agreements with good faith and reasonableness, having regard to the fiduciary character of their relationship.

[224]See, for example, *Wewaikai Indian Band* v. *Canada* and *R.* v. *Seward*, discussed *supra* at note 157.

certain circumstances, be a relevant consideration insofar as the conduct of a criminal investigation is concerned.

As we saw in Chapter four, *Guerin* stands as authority for the proposition that, whenever Aboriginal title is surrendered, a specific obligation on the part of the Crown to exercise its discretion in the best interests of the particular band concerned, will take hold. The specific type of duty under consideration in *Guerin* has now been considered in a large number of cases and a number of principles have emerged. For example, based on the Supreme Court's decision in *Blueberry River*, we know that the Crown must respect a band's decision to surrender its land on the basis that the law treats Aboriginal peoples as autonomous actors. Having said that, the Court in that case did affirm that the Crown was under a duty to prevent "exploitative bargains". *Blueberry River* also stands for the proposition that the duty to act in the best interests of band members on surrender applies equally to surface and sub-surface rights, and that a breach of the Crown's duties in this regard may give rise to the further duty to revoke any subsequent lease or purchase agreement - provided the Crown has the means at its disposal to do so.

Given Strayer J.'s *obiter* comments in the *Alexander Band* case, it would seem that the Crown could, in certain circumstances, be obligated to exercise its law-making power to discharge a specific fiduciary obligation arising in consequence of the surrender of Aboriginal title where that could "reasonably and lawfully" be done. Based on Strayer J.'s earlier comments in that case, which were to the effect that the Crown was acting in a private rather than public capacity when it was discharging a fiduciary duty of the type dealt with in *Guerin*, it would seem that what is contemplated here is a sort of private

rather than public enactment. It might be suggested, by analogy, that the Crown is doing just that whenever it passes an Order-in-Council to give effect to an Aboriginal land title surrender. Indeed, in the *Lower Kootenay* case, a failure to obtain such an Order-in-Council formed the basis for a finding that the Crown had breached its fiduciary duty in not acting to perfect a surrender and in failing to advise the Aboriginal Band that it had not done so. While the same argument was advanced in the *Gitanmaax* case, in disposing of the plaintiff band's action on other grounds, the British Columbia Supreme Court choose not to address this particular argument on its merits.

In light of judgments such as that of Dubé J. in the *Lower Kootenay* case, it is now clear that the specific fiduciary duty which arises on surrender will continue to exist for the duration of any lease which may subsequently be entered into. As the *St. Mary's Band* case illustrates, the creation of a reversionary interest qualifies the surrender in a manner which will perpetuate the attendant duty on the Crown. Based on the *dicta* in *Semiahmoo*, there may well now be a fiduciary duty to condition any "taking" of Aboriginal land through the use of such reversionary provisions.

The obligation to deal with the Aboriginal title interest for the benefit of the Aboriginal group concerned also raises a specific fiduciary obligation to ensure that proper compensation is paid whenever that interest is transferred, regardless of the means used to effect the transfer. In this respect, the *Guerin* principle may be said to transcend the surrender context. However, as *Kruger* suggests, in assessing the extent to which such an obligation has been discharged, the courts will not look behind the exercise of the

Crown's discretion where the Crown has acted "honestly" and "prudently" for the benefit of the Aboriginal title holder.

We have seen how, following on the heels of the *Sparrow* decision, courts at all levels have demanded justification of government regulations which infringe upon the Aboriginal rights recognized and affirmed by s.35(1) of the *Constitution Act, 1982*. Given Cory J.'s judgment in *Badger*, it can now be said that the justification test will apply equally to the infringement of treaty rights. As the *Chippewas of Nawash* case indicates, the *Sparrow* justificatory scheme is not itself an Aboriginal right.

Examples of cases where provincial or federal regulations have been found to infringe upon Aboriginal or treaty rights in a manner which could not be justified, having regard to the government's responsibility to act in a fiduciary capacity, include the *McPherson*, *Jack*, *Sampson*, *Little*, *Badger*, *Nikal*, *Gladstone* and *Adams* cases, to name but a few. For the most part, these cases have dealt with Aboriginal hunting and fishing rights where the practice is being carried out for social, ceremonial or sustenance purposes. However, in light of the Supreme Court's decision in *Gladstone*, it is equally apparent that an Aboriginal right can also have a commercial aspect.

In establishing the correct order of priority to be given to Aboriginal rights which have a commercial aspect, the government will be allowed to take into account the fact that such Aboriginal rights are not "internally limited". In this regard, the Court in *Gladstone* rejected the notion of exclusivity of priority, suggesting instead that the Court will only inquire whether the government has taken the "existence and importance" of such rights into account in a manner which is consistent with its fiduciary obligations.

While the requirements of conservation may constitute a justifiable limitation on Aboriginal rights, as the decisions in *Adams* and *Coté* indicate, it is incumbent upon Parliament to provide specific regulatory guidance to its Departmental officials to ensure that they are properly equipped to discharge their functions in a manner which is consistent with the Crown's fiduciary duties. As the *Jack* case illustrates, the Crown is also under an obligation to consult with Aboriginal groups before regulating resource use in any way which could constitute a *prima facie* infringement of Aboriginal rights. However, such consultations will only reflect the fiduciary nature of the Crown-Aboriginal relationship where it is done meaningfully. Having said that it now seems equally apparent that Aboriginal groups do not have a veto on any particular conservation measure being proposed. Furthermore, in light of the Ontario Court of Appeal decision in *Perry*, it would seem that there is no "affirmative obligation" on governments to reach agreement with Aboriginal groups concerning the nature and extent of any alleged Aboriginal right before establishing wildlife enforcement policies.

To the extent that the decision of the British Columbia Court of Appeal in *Delgamuukw* may be considered authoritative, the fiduciary relationship would seem to preclude the Crown from arguing that Aboriginal title has been extinguished in the absence of evidence of a "clear and plain" intention to do so. If otherwise valid, this proposition should also apply equally to the alleged extinguishment of any other Aboriginal right, in consequence of the Supreme Court's decision in the *Van der Peet* case. As noted by Lamer C.J. in *Adams*, the concept of Aboriginal rights articulated in *Van der Peet* includes the Aboriginal title interest. While the rationale for Macfarlane J.A.'s

conclusion on this point, in *Delgamuukw*, is somewhat unclear, it may be presumed, based on his related observations, that the proposition derives from the Crown's obligation to act in "the best interests" of Aboriginal title holders - the obligation which may be said to take hold whenever the Aboriginal interest in reserve lands is to be disposed of by surrender or expropriation. Taking Macfarlane J.A.'s conclusion a step further, it might even be possible to argue that there is now a presumption against extinguishment which can only be displaced by evidence of a "clear and plain" intention.

The Crown would be in breach of a fiduciary duty where it places arbitrary limitations on the Aboriginal use of vacant Crown land in a manner which prevents members of an Aboriginal group from exercising their Aboriginal rights. However, in light of Cory J.'s conclusions in *Nikal*, we now know that the mere requirement of a licence is not in itself unreasonable. Moreover, regulations which impose motor vehicle access fees, of the nature under consideration in *Coté*, cannot be said to infringe Aboriginal rights where they do not prevent users from obtaining access by other means. Indeed, the Court in *Coté* was of the view that such fees may actually facilitate the exercise of Aboriginal rights where they serve to generate revenues which are dedicated to the upkeep of roads relied upon by Aboriginal rights holders.

While the courts have suggested that the failure to take Aboriginal concerns into account in dedicating vacant Crown lands to specific uses reflects poorly on the honour of the Crown, they have so far been unwilling to subject the process by which vacant Crown land is dedicated to other purposes, to fiduciary analysis. The *Gitludahl* case is representative of this reluctance. In this regard, it seems logical to assume that resource

based Aboriginal or treaty rights will be rendered meaningless once the lands on which the resource is located are dedicated to another purpose or otherwise rendered unfit for the intended Aboriginal use. However, to date, the courts have declined to accede to the argument that a failure on the part of the Crown to transfer exclusive title to public lands on which an Aboriginal right is practised, to Aboriginal right holders, would place the Crown in breach of a fiduciary duty. On a more positive note, it may be observed that, in *Lewis*, Iacobucci J. left the door open to a finding that the Crown has a duty to facilitate the exercise of Aboriginal rights by ensuring that Aboriginal users are given physical access to such areas. Similarly, in light of the judgment in the *Union of Nova Scotia Indians* case, we now know that the failure of a government administrative decision-making body to consider the Crown's fiduciary obligations and responsibilities, in relation to a "recognized" Aboriginal interest, can constitute a failure to act with fairness and an "error of law" which will give rise to a successful application for judicial review.

ii. Upholding the Crown-Aboriginal Relationship - Whose Responsibility is it?

In addressing alleged breaches of fiduciary duty arising out of the Crown-Aboriginal relationship, our courts have oft-times been confronted with the need to determine by whom the duty is owed. This should hardly be surprising given the pervasive influence of government on almost every segment of society and the likelihood that government action in one area - such as resource management - will impact on Aboriginal rights in ways which may not have been anticipated. The determination is considered to be of central importance in assessing the extent to which the Crown is both

willing and able to live up to its obligations to the Aboriginal peoples of Canada, and may well determine whether or not the fiduciary construct will achieve the equitable results which were initially predicted on the basis of Dickson J.'s landmark judgment in *Guerin*.

What seems unclear, however, is whether the courts are using predictable criteria to assign responsibility and the extent to which such criteria are being applied uniformly. While some criteria appear to be emerging, there has to date been a disturbing lack of uniformity demonstrated in the approach taken by the courts. This should hardly be surprising given the fact that relatively little in the way of principled guidance has been provided by the Supreme Court on the subject. Moreover, those criteria which do seem to be emerging appear to have been based on or influenced by the pragmatic considerations associated with *ad hoc* decision-making.

As the facts in *Kruger* demonstrate, difficulties can arise when the Crown's other interests or duties conflict with the Crown's fiduciary duties or offend the Aboriginal "interest to be served".[225] In that case, conflicting national defence, transportation and Aboriginal interests appeared to result in an inter-departmental clash of wills concerning the expropriation of reserve lands. Writing for the majority, Urie J. argued that, in such cases of conflict, the ultimate responsibility for the discharge of the Crown's fiduciary obligations resides in the Governor in Council.

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[225]In this context, while it may be normal to think in terms of conflicting government policies, the rule could also have application where the duties owed two separate Aboriginal groups are in conflict, such as on the facts in *Wewayakum*, discussed *supra*.

More often than not, the courts have responded to the challenges posed by assigning the responsibility to discharge certain specific fiduciary duties to the federal Department of Indian Affairs. While not entirely free from doubt, the results in the *Blueberry River* case suggest that this will typically be the case where the specific duty pertains to the Aboriginal title interest. The finding in that case seems to have been premised on the existence of those provisions of the *Indian Act* which assign defined duties to that Department whenever reserve lands are alienated. As the *St. Mary's Indian Band* case suggests, such a result will ordinarily follow where the fiduciary duty in question arises in consequence of the surrender of Aboriginal title in circumstances where there is a continuing obligation on the Crown to deal with the land on the Aboriginal Band's behalf - notwithstanding the fact that that Department may have transferred title to another federal department. From a pragmatist's perspective, this particular approach is not without its attractions in that it allows other departments and governments to pursue their particular mandates, at arms-length, free of the burden of discharging fiduciary obligations which, practically speaking, they may have little knowledge of.[226] Indeed, as we saw in the *Union of Nova Scotia Indians* case, other Departments may be unaware of or reluctant to assume that they owe such duties - even in situations where they possess the exclusive authority to make administrative decisions which have the potential to infringe existing, unextinguished Aboriginal interests. As the result in that case

[226]See Waters, *supra* note 11 at 419-420, where a detailed analysis of this issue was undertaken in connection with the decision in *Kruger*. Waters points out that, even if some "acceptable Departmental practice" can be established, "we are still left with the position of the Governor-in-Council where ultimate responsibilities meet".

demonstrates, it would be unwise to assume that DIAND will necessarily always be the Department which is in the best position to uphold specific fiduciary obligations.

Where the duty is of a "general" type, in the sense of pertaining to the Crown's overarching responsibility to act in a fiduciary capacity - rather than a specific treaty, agreement or statutorily-based obligation - the broad-based nature of the duty suggests a greater latitude for the courts to hold other Crown entities responsible for their actions than might otherwise be the case. In holding a provincial ministry responsible for the conduct of a criminal investigator, whose actions did not uphold the fiduciary's general duty of loyalty, the Saskatchewan Court of Appeal may be said to have taken this approach in *Wolfe*. Nevertheless, as the *McPherson* case illustrates, some trial judges are reticent to find for Aboriginal appellants in situations where the government has hitherto not received any direction from the court concerning the nature and extent of the right in question. Furthermore, as the *Gitludahl* case suggests, there is also some reluctance to assign responsibility to provincial governmental departments, in situations where doing so would have a retrospective impact on government decision-making, unless the duty in question is of a highly specific nature.

In some cases, it is the actions of Crown agencies which have been the subject of judicial scrutiny. Such cases are ordinarily disposed of on an *ad hoc* basis, having regard to the unique nature of the Crown entity concerned. For example, in the *Gitanmaax* case, a provincial public utility was held to be sufficiently separate from the Crown, such that it could not be held liable for a breach of fiduciary duty arising from a surrender of Aboriginal lands, notwithstanding the fact that it had subsequently benefited from the

surrender as the ultimate grantee. Similarly, in the *National Energy Board* case the Supreme Court found that a federal government agency could not be said to stand in a fiduciary relationship vis-a-vis the Aboriginal parties appearing before it inasmuch as it was discharging a quasi-judicial function.

The question of responsibility may ultimately turn on whether or not the Crown entity involved is in a position to adversely affect the Aboriginal interest protected by the relationship. For example, in the *Union of Nova Scotia Indians* case, the exercise of a Ministerial discretion to accept as satisfactory an environmental screening report, and allow a dredging project to proceed, was deemed sufficient to give rise a fiduciary obligation on the part of the decision maker to consider the possible adverse effects of that decision on an existing, unextinguished Aboriginal right to fish for food in the region in question. Notwithstanding the fact that officials within DIAND were aware of the report, and the Aboriginal applicant's objections to it, the obligation was deemed to be owed by the Department of Fisheries and Oceans as the "lead responsible party" under the Act in question. Similarly, while Indian treaties are primarily a matter of federal concern and oft-times raise "specific" fiduciary duties, it may still be possible to hold a provincial Crown entity to a fiduciary standard where it actions unilaterally infringe Aboriginal or treaty rights.[227]

Indeed, we have already seen how, following on the heels of the *Sparrow* decision, courts at all levels have demanded justification of government regulations which infringe

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[227]On the question of treaty rights, note La Forest's comments in *Mitchell* discussed *supra* note 109.

upon the Aboriginal rights recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*. Of note, in his 1996 judgment in *Coté*, Lamer C.J. cited *Badger* as authority for the proposition that the *Sparrow* test has application to both federal and provincial laws which infringe upon Aboriginal and treaty rights. In this regard, he observed that s.35(1) does not distinguish between federal and provincial laws, pointing out that the standard of "constitutional scrutiny" should be uniformly applied to regulations passed by both levels of government.[228] Examples of cases where provincial regulations have been found to infringe upon Aboriginal or treaty rights in a manner which could not be justified having regard to the government's responsibility to act in a fiduciary capacity include *McPherson*, *Wolfe*, and *Badger*.

iii. Judicial Approaches to Conflict of Interest in the Crown-Aboriginal Relationship.

As we have seen in Chapter two, a fiduciary is precluded from using his position to his, or a third parties advantage, and is prohibited from entering into transactions with third parties which would be inconsistent with the subject matter and purpose of the fiduciary's relationship with the beneficiary. These proscriptions are typically embraced by the so-called "no-conflict" rule. From the standpoint of an Aboriginal plaintiff, there are obvious benefits to basing a claim for breach of fiduciary duty on a *prima facie* case of conflict of interest.[229] Simply put, a fiduciary who is found to be in a conflict of interest

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[228]*Badger*, *supra* note 128 at 185.

[229]Where the Crown, as a fiduciary, is found to be in a conflict of interest, the onus will be on the Crown to show that it acted in the best interests of the Aboriginal beneficiaries.

will be held to a higher standard of accountability than one who is not. Not surprisingly, the Crown has traditionally resisted any suggestion that it can ever truly be in a conflict of interest.

Prior to 1995, there was an almost total lack of guidance from the Supreme Court concerning the application of the "no-conflict" rule within the context of the Crown-Aboriginal relationship. As a result, lower court judges were forced to confront the conflict of interest issue largely on their own terms. Their reluctance to do was almost palpable. To the extent that they did tackle the issue, they did so largely on an *ad hoc* basis, which may in part explain the largely unfettered regard accorded pragmatic considerations.

Urie J.'s judgment in *Kruger* provided an early indication that the Federal Court of Appeal was not inclined to view the fiduciary's duty of loyalty in exclusive terms when it was the Crown who was cast in the role of fiduciary. Moreover, he was the first to suggest that fiduciary duties arising out of the Crown-Aboriginal relationship could be assessed and discharged by the Crown having regard to other competing interests and

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In such cases it will be necessary for the Crown to establish that it achieved the best possible outcome for the plaintiff such as, for example, by establishing that it obtained the highest possible return on assets it was investing. Where no conflict of interest is alleged, a breach of fiduciary duty can only be established where the plaintiff is able to prove that the Crown did not act in its best interests in exercising a particular discretion. However, the Crown, will be able to mount a successful defence merely by leading evidence to show, on a balance of probabilities, that it acted honestly, prudently and for the benefit of the Aboriginal plaintiff. Both standards are discussed by Dubé J. in the *Lower Kootenay* case, discussed *supra*.

obligations. This pragmatic "balancing of interests" approach would later be adopted by other courts.[230]

Other judges have instead chosen to "read down" a particular duty in a way which allows them to assess the Crown's alleged misconduct against the fiduciary's "general" duty of loyalty, rather than the more onerous standards which ordinarily appertain where a specific fiduciary duty is involved. The *Eastmain Band* case is representative of this approach. In considering the obligations on the Crown as a party to a comprehensive agreement, the Court in that case seemed to go out of its way to avoid characterizing the Crown's role in terms which would have suggested that the Crown-Aboriginal fiduciary relationship gave rise to any specific duty, other than the obligation on both parties to act with reasonableness and good faith. This made it very easy to conclude that it had been proper for the Crown to represent non-Aboriginal interests in the negotiations leading up to the *James Bay and Northern Quebec Agreement*.

The courts are also quick to emphasize that not every aspect of a fiduciary relationship takes the form of a fiduciary obligation in circumstance where the very mandate of the Crown entity requires that it resolve conflicting interests. This tendency

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[230]Bryant suggests that "whenever the Crown balances the interests of aboriginals with other government parties or interests, the Crown is in a conflict" (see M.J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 U.B.C. L. Rev. 19 at 43). If he is correct, how can this be considered an acceptable approach for a court to adopt? The question is discussed in detail in the next chapter.

is evident in the Supreme Court's handling of the *National Energy Board* case, as well a number of subsequently considered lower court decisions.[231]

On the other hand, the need to address the conflict issue may be avoided entirely where the facts are interpreted in a manner which negates the possibility of conflict. A similar result is achieved where a judge simply concludes, without deciding the issue, that even if a conflict of interest may have occurred, the Crown has met the necessary burden by proving that it did not realize a personal economic benefit - a "safe" conclusion given that government's primary role is to serve the public interest. Both approaches are represented in the judgments of Gonthier and McLachlin JJ. in the *Blueberry River* case.

As the curious result in the *McPherson* case aptly illustrates, even the identification of a highly specific Aboriginal right - such as the right to hunt moose for subsistence purposes - may not be sufficient to overcome the courts' reluctance to take any action which could undermine a government's efforts to advance broad-based social objectives. The same tendency seems to underscore the "co-existence" approach which Macfarlane J.A. advocated in the *Delgamuukw* case. In his view, it was essential that the rights of Aboriginal peoples be considered, having regard to other conflicting interests, in order to achieve a "proper balancing" of all interests, through a process which promotes consultation and reconciliation. The "co-existence" approach which he advocates seeks to minimize the role of law and strict adherence to legal rights.

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[231]For example, see the *Chippewas of Nawash* case discussed *supra*.

As noted in Chapter two, as an exception to the general proscription against acting in a manner which is inconsistent with the subject matter and purposes of the fiduciary relationship, a fiduciary's conduct will not be considered offensive if it is "otherwise authorized by law". To date, the courts have not applied this exception when considering the options open to the Crown where its fiduciary obligations appear to conflict with another legal requirement. For example, when faced with an apparent conflict between the Crown's general duty of loyalty to a particular Aboriginal group and its obligations under the *Access to Information Act*, the Court in the *Chippewas of Nawash* case might have invoked this exclusionary rule to excuse the conduct of the respondent rather than simply deny that the Crown was a fiduciary. It may be that the courts are uncertain whether the exception should be applied within the context of the Crown-Aboriginal relationship in view of the fact that the Crown is uniquely placed to change laws which cause hardship, where it is deemed appropriate to do so having regard to the public interest. This may, for example, explain why, in the *St. Mary's Band* case, the British Columbia Supreme Court seemed to suggest that, when faced with such a conflict, the Crown should weigh the public policy considerations in favour of protecting the particular Aboriginal right against those which underscore the conflicting legal rule. However, while the notion that the Crown should act as a conciliator and harmonize conflicting interests appears consistent with its political role, the approach hardly seems appropriate when viewed from a fiduciary law perspective.[232]

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[232]As noted in Chapter two in relation to note 62, in a classical sense there is, of course, nothing to prevent a fiduciary from owing a duty to more than one beneficiary, provided that

As the *Wewayakum* case illustrates, Aboriginal interests can also conflict with other Aboriginal interests in situations which would seem to place the Crown in an untenable position as a fiduciary. In choosing to cast the Crown in the role of arbitrator the trial judge in that case effectively relieved the Crown of its duty to act in the best interests of either party. While the solution solved an immediate problem, from an Aboriginal plaintiff's standpoint, the approach taken would seem to call into question the overall benefit and utility of the fiduciary model.

One might have expected that fiduciary duty would have been raised as a bar to the expropriation of reserve land for government purposes on the basis of the "no conflict" rule. This has not been the case. To the extent that *Semiahmoo* is representative, the courts seem to accept that such "takings" may well be necessary having regard to the duties owed the public at large.[233] Indeed, to the extent that the expropriation power has been discussed at all in a fiduciary context, the courts' concern has simply been directed towards ensuring that Aboriginal interests were impaired "as little as possible".

Based on the foregoing cases, one might well conclude that the judicial response on the "conflict" issue has not always been consistent or principled. However, if recent *dicta* proves indicative of the approach to the issue which the Supreme Court intends to

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in so doing his conduct does not conflict with "the duties to be performed" or offend the "interests to be served".

[233]A view reflected in McLachlin J.'s recent dissent in *Opetchesaht Indian Band*, *supra* note 16, where it was observed, *obiter*, that "[w]here the greater public good so requires, interests in reserve land may be expropriated".

take in the future, a "relaxed" approach to the no-conflict rule may well be emerging insofar as the interpretation of Aboriginal and treaty rights are concerned.

In this regard, Cory J.'s 1996 judgment in *Badger* is noteworthy. In light of his comments in that case, and his subsequent comments in *Nikal*, "reasonableness" may now be said to form an integral part of the *Sparrow* justification test. In this regard, courts are now required to consider the reasonableness of the government's actions when determining whether a *prima facie* infringement of Aboriginal rights is justifiable. To the extent that this standard is a flexible one, it will no doubt provide some measure of comfort for judges faced with the need to apply the justification test in the face of a *prima facie* infringement of Aboriginal or treaty rights.

Lamer C.J. penned his judgment in *Gladstone* on the heels of Cory J.'s judgments in *Badger* and *Nikal*. In *Gladstone*, Lamer C.J. provides a means of determining whether a limitation on Aboriginal rights will be considered reasonable. In this regard, Lamer C.J. indicates that it is permissible for governments to impose limitations on Aboriginal rights in order to pursue objectives of "compelling" and "substantial" importance to all Canadians. Drawing on the reconciliation theory which he had developed in *Van der Peet*, in *Gladstone* Lamer C.J. concludes that Aboriginal rights are to be balanced with other "compelling and substantial" objectives in order to reconcile Aboriginal societies with the rest of Canadian society. Indeed, what Lamer C.J. seems to be suggesting is that the Crown is <u>expected</u> to evaluate the rights recognized and affirmed under s. 35(1) having regard to the interests and rights of other individuals or groups. In light of Lamer C.J.'s subsequent judgment in *Adams*, we now know that the "compelling and substantial

importance" test will have application whenever a court is called upon to determine, *per Sparrow*, whether a particular government priority scheme accords the proper level of priority to any Aboriginal right. In other words, it would be a mistake to conclude that the latter test applies only to Aboriginal rights which have no internal limitation, such as the Aboriginal right under consideration in *Gladstone*.

To date, the Supreme Court has not explained how its relaxed approach to the no-conflict rule serves to uphold the rationale of accountability which is so central to both the classic and modern views of the fiduciary construct. Therefore, while one might well argue that the "flexible" approach which the Supreme Court has recently applied to the interpretation of s.35(1) has the potential to redefine the role of the Crown and the nature of the Crown-Aboriginal relationship, it is difficult to predict the impact which this development is likely to have.[234] Of note, the Supreme Court so far has only chosen to adopt this approach when considering Aboriginal or treaty rights. It remains to be seen whether the same logic will be invoked when considering the central issue of conflict in relation to the Aboriginal title interest.

In the next chapter we will consider the appropriateness of any deviation from the "no-conflict" rule from the standpoint of both parties to the Crown-Aboriginal relationship within the context of a general assessment of the continued viability of this particular variant of the fiduciary construct.

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[234]The implications of these trends will be examined in greater detail in Chapter six.

Chapter 6 - Conflict and the Future of the Crown-Aboriginal Fiduciary Relationship: Where do we go from here?

A. Introduction:

As we saw in the previous chapter, the courts are currently engaged in the process of attempting to find workable solutions to the practical problems posed by the need to apply fiduciary standards and principles - including the so called "no-conflict" rule - to the Crown-Aboriginal relationship. While, for the most part, the courts have succeeded in explaining when specific fiduciary duties will be owed by the Crown, they have largely failed to define or give meaning to the Crown's general duty of loyalty beyond the vague assertion that the "honour of the Crown" must be upheld. Moreover, there has been a disturbing lack of uniformity demonstrated in the methodology and criteria being used by the courts to determine who they are prepared to hold primarily responsible for discharging the Crown's duties - a situation which may in part reflect the pragmatic considerations associated with the *ad hoc* approach which has tended to predominate judicial decision-making in this field. Similarly, the courts' response on the "conflict" issue has not always been consistent or principled. Although the recent emergence of the so-called "relaxed" approach to the no-conflict rule is considered noteworthy, the courts have so far failed to explain how it upholds the rationale of accountability.

In keeping with the focus of this thesis, the overarching theme in this chapter is the pervasiveness of the conflict of interest which is at the heart of the Crown-Aboriginal fiduciary relationship, and the need to acknowledge the extent of the conflict problem and

the implications it has for the future role and viability of the Crown-Aboriginal fiduciary relationship. In this respect, while fiduciary law may indeed offer the "most compelling and effective means within existing law to achieve justice in the area of aboriginal rights",[1] questions remain as to whether the fiduciary standard is really appropriate in these circumstances - particularly in view of the no-conflict proscription which features so prominently in fiduciary doctrine and the myriad of other duties, obligations and responsibilities owed by the Crown.

At the outset of this chapter, we will take up where we left off in Chapter three by continuing to explore the sources of conflict which underscore the Crown-Aboriginal relationship. That inquiry will necessarily involve a discussion of the systemic sources of conflict within the Crown-Aboriginal relationship and conflict's legacy. Following our discussion of the sources of conflict, we will examine government and Aboriginal perspectives on the Crown-Aboriginal fiduciary relationship with a view to broadening our understanding of the concerns and expectations which both parties bring to the relationship. It is intended that this discussion illustrate the need for a process of renewal which is fully cognizant of the depth and implications of conflict, including its impact on the Crown's ability to discharge its fiduciary obligations to the Aboriginal peoples of Canada. In understanding the full extent of the challenge implicit in that requirement, it may be helpful for the reader to have regard to the paradigm situations presented in the

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[1]M.J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 U.B.C. L. Rev. 19 at 20.

introductory chapter as well as the issues with which the courts were confronted in the cases discussed in Chapters four and five.

In keeping with the conflict theme, a number of specific recommendations will be presented in the latter half of this chapter with a view to facilitating the process of renewal which the *Report of the Royal Commission on Aboriginal Peoples* now urges be undertaken.[2] These recommendations are discussed within the framework of what are considered to be five fundamental requirements which must be addressed before the principles of renewal can be applied to the Crown-Aboriginal fiduciary relationship in any meaningful way. In this regard, it is considered essential that the following requirements inform the process of restructuring the Crown-Aboriginal relationship:

> 1) All parties must approach the question of fiduciary duty having regard to a rational, principled consideration of what the fiduciary construct is and what it can and cannot be expected to achieve.
> 2) The courts must work diligently to clear up the confusion surrounding the fundamental question of when a fiduciary relationship may be said to arise outside of the traditional fiduciary classifications and address the implications of that choice in terms of the Crown-Aboriginal relationship and the application of the no-conflict rule.
> 3) If the fiduciary doctrine is to have meaning in the Crown-Aboriginal context, then the no-conflict rule must be enforced where it would be appropriate to do so.
> 4) The courts must respond to the need to give greater meaning to the relationship and the responsibilities of each party by explaining how the Crown-Aboriginal relationship is *sui generis*.
> 5) Government must work to restore confidence in its ability to uphold the Crown-Aboriginal relationship by ensuring that those whose responsibility it is to discharge the Crown's lawful fiduciary obligations are shielded from obvious sources of conflict. To the extent practicable it must also work to eliminate longstanding sources of irritation in the Crown-Aboriginal relationship.

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[2]Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Queen's Printer, October 1996) [hereinafter *Royal Commission Report*].

Until these fundamental requirements have been addressed many will continue to question whether the role of fiduciary, which presupposes a strong measure of loyalty and good faith, is demonstrably unsuited to the Crown which must "balance the interests of the state with the prominent status accorded aboriginal rights under the law",[3] and indeed, whether a fiduciary model for the Crown-Aboriginal relationship is capable of living up to its potential. These fundamental requirements should also be borne in mind when considering the discussion of the sources of conflict in the Crown-Aboriginal relationship and the perspectives on the relationship which are presented in the first two portions of this chapter.

B. Sources of Conflict in the Crown Aboriginal Relationship:

In Chapter three we examined the roots and sources of the historic Crown-Aboriginal relationship. We saw how the Crown's sovereignty or power over the Aboriginal peoples of Canada was exerted piecemeal over an extended period of time. For their part, Aboriginal groups were encouraged to place reliance on the Crown, the guarantees enshrined in the treaties they entered into, as well as in the provisions of the *Royal Proclamation* of 1763.[4] The Crown-Aboriginal relationship evolved to the point where, by the late eighteenth century, a coherent common law "doctrine of Aboriginal rights" had emerged out of a number of legal principles "suggested by the actual

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[3]Bryant, *supra* note 1 at 42.

[4]*Royal Proclamation, 1763*, R.S.C. 1985, App. II, No.1 [hereinafter *Royal Proclamation*].

circumstances of life in North America, the attitudes and practices of Indian societies, broad rules of equity and convenience, and imperial policy".[5] However, as has been previously noted, the *Royal Proclamation* of 1763 did not end the abusive practices it was designed to halt and the promise of protection inherent in the terms of that document went largely unrealized. As the *Report of the Royal Commission on Aboriginal Peoples* notes,

> [b]y the late 1700s and early 1800s, we came to a fork in the road. While Aboriginal peoples by and large wanted to continue with the terms of the original relationship, non-Aboriginal society and its governments took a different course .... This was a course that involved incursions on Aboriginal lands, lack of respect for Aboriginal autonomy, and commitments to the idea of European superiority and the need to assimilate Aboriginal peoples to those norms, through coercive measures if necessary.[6]

Nor did the situation improve following Confederation. The transition from "tribal nation" to "legal incompetent" under the bilateral federal/provincial system became complete when the first *Indian Act* was passed in 1876. Under that Act, "the individual Indian [was] recast as a dependant ward - in effect, the child of the state. Protection no longer meant maintaining a more or less permanent line between Indian

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[5]B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 [hereinafter Slattery, "U.A.R."] at 736-37.

[6]Canada, Royal Commission on Aboriginal Peoples, *Report: Looking Forward, Looking Back*, vol. 1 (Ottawa: Queen's Printer, October 1996) [hereinafter *Royal Commission Report*, vol. 1] at 236.

lands and the settler society; it meant the very opposite".[7] Moreover, the Act allowed the government to expropriate reserve lands, without any requirement for a surrender.[8]

As the events at Kanesatake (Oka), Gustafsen Lake, and Ipperwash suggest, problems continue to cloud the relationship between the Crown and the Aboriginal peoples of Canada. Notwithstanding the best of intentions of some government politicians and bureaucrats, the institutions of government simply seem unable to provide the requisite, promised level of protection for Aboriginal interests. This has left Aboriginal Canadians frustrated. As the *Royal Commission* has observed, in the minds of many,

> [v]iolations of solemn promises in the treaties, inhumane conditions in residential schools, the uprooting of whole communities, the denial of rights and respect to patriotic Aboriginal veterans of two world wars, and the great injustices and small indignities inflicted by administration of the *Indian Act* - all take on mythic power to symbolize present experiences of unrelenting injustice[9]

But what is it that has seemingly stymied all attempts by a succession of Canadian governments to build strong relationships with the Aboriginal peoples of Canada?

The Crown-Aboriginal relationship is a very complex relationship which reflects the multi-faceted nature of Aboriginal societies, the vagaries of history and the idiosyncrasies of the many individuals whose efforts have influenced the course of the relationship, for better or worse, over successive generations. Without oversimplifying

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[7] *Ibid.* at 277.

[8] *Ibid.* at 283.

[9] *Ibid.* at 7.

or minimizing the intricacies of that relationship, one is inexorably drawn to the conclusion that there are forces at play which have served to undermine the effective implementation of the basic principles which were meant to define and give the relationship meaning. While various explanations may be advanced for the longstanding inability of the Crown to uphold the obligations of the Crown-Aboriginal relationship, in this chapter it is argued that a root source of the problem is and has always been one of conflict of interest.

In this respect, few would dispute the conclusion that the Aboriginal peoples of Canada have been traditionally and uniquely vulnerable to the exercise of the Crown's power, particularly where Aboriginal interests have come into conflict with non-Aboriginal interests. Moreover, it may be argued that the problem of conflict - a problem which has traditionally centred on, but is by no means limited to, the Aboriginal title interest - is the one constant variable in what has otherwise been an evolving relationship. Arguably, conflict has also been the most destabilizing element in that relationship. The problem is pervasive in the sense that it is imbedded in the very philosophy of government as well as in the institutional process by which policy is formulated and implemented. Moreover, the legacy of conflict continues to undermine the treaty relationship and the process for resolving outstanding Aboriginal claims. We will begin our discussion of the sources of conflict in the Crown-Aboriginal relationship with a brief discussion of the salient features of what, for want of a better description, may simply be referred to as the philosophy of the role of government in Canadian society.

i. The Philosophy of the Role of Government in Canadian Society.

The premise that "Government is a trust under which power can only be exercised for the good of the people" is a Western philosophic notion. The concept embodies the view that there is a social contract between the members of a democratic society and their elected representatives who, in the tradition of seventeenth century English philosopher John Locke, act as a "Fiduciary Power" to "govern by promulgated establish'd Laws, not to be varied in particular Cases, but to have one Rule for Rich and Poor, for the Favorite at Court, and the Country Man at Plough. ... designed for no other end ultimately but the good of the People".[10] This traditional view gives prominence to individual rights and responsibilities and is considered to be at odds with a collective view of rights wherein duties are defined and obligations assigned by reference to one's group identification.[11] As Ponting and Gibbons observe,

> [i]n Western liberal democracies such as Canada, persons are usually incorporated into the polity on an individual basis. All persons have equal rights in law as individuals, and their membership in one or another racial or political group is irrelevant to their voting rights, civil rights, and eligibility to receive government benefits, services, and protections. Group rights per se do not exist. ... The very

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[10]J. Locke, *Two Treatises of Government* (P. Laslett (ed.), 1965) at 413, as quoted in B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 [hereinafter Slattery, "F.N.C."] at 266-67.

[11]C. Massey, "American Fiduciary Duty in an Age of Narcissism" (1990) 54 Sask. L. Rev. 101 at 118, where Massey describes the "struggle" between these "two competing views of social organization" within the context of his discussion of the law of fiduciary obligation.

> concept of special rights for another racial or political group is abhorrent to the small-l liberal ideology ... .[12]

Based on the preceding description of the traditional Western democratic view of the role of government, some might well argue that the federal government is obliged to justify its actions using a majoritarian standard whenever it purports to exercise its power in relation to "Indians, and lands reserved for the Indians". Indeed, the pervasiveness of this political ideology may, in part, explain the longevity of the assimilationist movement.[13] Simply put, if Aboriginal Canadians could be persuaded to surrender their rights, they could become enfranchised - which is to say that they could be treated equally under the law.[14] Conversely, demands for recognition of the rights of Aboriginal people are considered problematic "because they call for the administration of services, programs,

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[12]J.R. Ponting and R. Gibbins, "Thorns in the Bed of Roses: A Socio-political View of the Problems of Indian Government" in L. Little Bear, M. Boldt and J.A. Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: Univ. of Toronto Press, 1984) 122 at 132-33.

[13]The prevalence of this view may go a long way towards explaining the almost universal rejection of the Meech Lake Accord and the notion of "distinct society" status for those who reside in the Province of Quebec. Of note, Slattery, "F.N.C." *supra* note 10 at 271, suggests that "the Constitution incorporates a particular fiduciary relationship with the Province of Quebec".

[14]By means of "civilizing and assimilating measures", it was also hoped to enfranchise Indians and remove the protected status which prevented Indian lands from becoming "part of the provincial land regime" (see *Royal Commission Report*, vol 1 *supra* note 6 at 277). The policy of assimilation has been widely criticized as "a clear betrayal of the spirit and intent of the treaties" (Chief John Snow, "Identification and Definition of Our Treaty and Aboriginal Rights" in M. Boldt and J.A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: Univ. of Toronto Press, 1985) 41 at 43).

and laws on the basis of special status, collective rights, and cultural uniqueness" in ways which appear to contradict liberal-democratic ideals.[15]

Closely related to the political trust notion is the widely held view that the legislature is obliged to enact legislation with the objective of achieving "the greatest good for the greatest number". The challenge inherent in this approach, which may be attributed to the utilitarian views of social theorist Jeremy Bentham, is not to undervalue minority rights in a way which "leads very quickly to a tyranny of the majority".[16] In this context, the process of constitutional reform, which resulted in the recognition and affirmation of existing Aboriginal and treaty rights, serves as a positive reminder of what is, after all, an ongoing challenge. However, the government, and in particular the federal government, stands accused by many of being guilty of pursuing Aboriginal policies which serve the interests of the majority of Canadians to the detriment of the Aboriginal peoples of Canada.[17] Given the traditional view of the role of government in Canada, the accusation may not be without some foundation in reality. The view may also help to explain why "Canadian governments often have little political and moral legitimacy

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[15]S. Weaver, "Federal Difficulties with Aboriginal Rights Demands" in M. Boldt and J.A. Long, eds., *supra* note 14, 139 at 142.

[16]W.B. Henderson, "Canadian Legal and Judicial Philosophies on the Doctrine of Aboriginal Rights" in M. Boldt and J.A. Long, eds., *supra* note 14, 221 at 227.

[17]*Ibid.* at 227. Where it is argued that, "[u]tilitarianism has found its way from social theory into legal theory in this country and has had negative consequences for the treatment of aboriginal rights: the 1969 White Paper was a classic treatise of utilitarian thought". In this vein, see the trend referred to at note 151, *infra*.

among Aboriginal peoples",[18] particularly when considered in conjunction with the principle of parliamentary supremacy.

The principle of parliamentary supremacy has been widely criticized by some Aboriginal leaders as emblematic of Aboriginal vulnerability. Reflections of that principle, which in its most liberal form suggests that "Parliament can do anything, however unfair or oppressive",[19] are embodied in the expropriation power which is still to be found in the current *Indian Act*[20] as well as in the legal conclusion that Aboriginal rights could be "extinguished" where Parliament has evidenced its will to do so through the manifestation of a "clear and plain intention". As the product of a legislative system which embodies that principle, the continued existence of the *Indian Act* is considered offensive to many Aboriginal Canadians. As Mercredi and Turpel have explained,

> [i]t may make a lot of sense for non-Indians, but when parliamentary supremacy is applied to us - when Canada's political will is imposed on us through its laws - it becomes oppressive. Our voices do not matter; they outnumber us, so they decide what is best for us. We have never agreed to be ruled by a non-Native parliament. We will never subject ourselves to the idea that peoples other than ourselves have the exclusive power to make decisions on who we are, where we live, how we live and what our future holds.[21]

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[18]Canada, Royal Commission on Aboriginal Peoples, *Report: Restructuring The Relationship*, vol. 2 (Ottawa: Queen's Printer, October 1996) [hereinafter *Royal Commission Report*, vol. 2] at 243.

[19]Henderson, *supra* note 16 at 225.

[20]*Indian Act*, R.S.C. 1985, c.I-5, s.35.

[21]O. Mercredi and M. Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking, 1993) at 127.

Inasmuch as the predominant philosophy of government is supportive of individual rather than collective rights, and is predisposed to advance interests and positions which benefit the greatest number of its citizens, it would appear that Aboriginal groups face a distinct disadvantage whenever they attempt to advance collective interests which run counter to the interests of the majority of Canadians or the express will of Parliament. In this respect, it may be argued that the predominant view of the role of government in Canada is in fundamental conflict with Aboriginal aspirations.

ii. Sources of Conflict in the Policy Making Process.

As we saw in Chapter three, the tone of Britain's early relations with the Aboriginal peoples of North America was largely dictated by her own strategic requirements. While British imperial policy was capable of being managed in conflict situations by balancing Aboriginal and non-Aboriginal interests, the outcome would invariably favour those interests which most closely served imperial goals. Has the situation really changed under a succession of Canadian governments? Whose interests does government serve? One might well conclude that, just as imperial interests dictated the tone of Britain's early relations with the Aboriginal peoples of North America in the colonial period, Canada's national interest dominates the agenda and process through which Aboriginal policy is formulated today.[22] As Menno Boldt observes, "in the snarl

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[22]Rotman, in L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: Univ. of Toronto Press, 1996) at 264-5, describes the Crown's advancement of the national interest as an obligation, arguing that the Crown "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'".

of competing concerns and interests out of which Canadian government decisions emerge, Indian policy is always shaped by the political, economic, and social imperatives of the evolving 'national interest'".[23]

To the extent that the legislative function reflects traditional philosophic notions of the role of government in society, one would expect policy to be formulated having regard to what will ultimately have the greatest benefit for the greatest number of Canadians.[24] While to some extent this assumption may be correct, what eventually emerges as government policy in the area of Aboriginal affairs, "is and always has been a collage of policies rather than a consistent policy framework with guiding principles or goals".[25] The explanation for this apparent contradiction probably has more to do with pragmatism than philosophy. As a recent federal interdepartmental working group report emphasizes, "[t]he business of government involves conflicts and trade-offs among a variety of competing interests and objectives".[26]

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[23]M. Boldt, *Surviving as Indians* (Toronto: Univ. of Toronto Press, 1993) at 75. Boldt argues, at 69, that "'Indian policy' has always been, and is today a design for sacrificing Indian interests for the general 'Canadian good,' that is the 'national interest'" and that "[n]owhere is the 'national interest' written more explicitly and unambiguously than in Indian policy".

[24]As the *Royal Commission Report* notes, federal Indian policy has traditionally been "developed unilaterally by federal authorities". That policy has tended to establish "preconditions for negotiations" and "constrain possible outcomes based on the preferences of the Crown" (*Royal Commission Report*, vol. 2 *supra* note 18 at 570).

[25]Weaver, *supra* note 15 at 139.

[26]Canada, Report of an Interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs, *Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues, A Guide for Managers* (Ottawa, October 1995) [hereinafter Interdepartmental Working Group Report] at 23.

While pragmatic decision-making may be accepted by some as "a vital element of good government in Canada",[27] others argue that the process leads to policies which are at best "short-sighted".[28] As the federal Working Group report notes, "[f]requently, aboriginal concerns may not coincide, or may be in direct conflict, with other interests or government objectives".[29] The concern is that, in the absence of a clearly articulated, coordinated approach to Aboriginal issues, the process of policy formulation is rendered vulnerable to those "other" interests as well as the overriding demands of political expediency. Even where this process works to the benefit of a particular Aboriginal group, there is always the risk that any gains achieved on such a tenuous basis may well have a short life span, given the very real possibility that, "what expedience can create, expedience can negate".[30]

In this regard, it must be appreciated that "the federal government is not a monolithic corporate entity whose component parts think and act in concert. Rather, its organizational complexity and scale inevitably leads to internal conflict among its various departments and agencies and to contradictory philosophies and policies". The problem

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[27]Bruce Rawson, "Federal Perspectives on Indian-Provincial Relations" in J.A. Long and M. Boldt, eds., *Government in Conflict?* (Toronto: Univ. of Toronto Press, 1988) 23 at 30.

[28]O. Lyons, "Spirituality, Equality, and Natural Law" in L. Little Bear, M. Boldt and J.A. Long, eds., *supra* note 12, 5 at 7. Lyons argues that, "most of the decisions that are being made today by governments in Western societies have as their point of reference the life-span of a man or, worse still, the term of office of the decision makers. The result is some very short-sighted policies."

[29]Interdepartmental Working Group Report, *supra* note 26 at 23.

[30]Boldt, *supra* note 23 at 37.

may appropriately be labelled "policy confusion".[31] Some would suggest that this particular problem has always undermined the government's efforts to formulate principled Aboriginal policy. Proponents of this view argue that, "[f]rom the outset the federal government's native policy has been characterized by a series of unplanned, uncoordinated, ad hoc policy initiatives, motivated in part by a humanitarian concern for the Métis and non-status Indians and in part by political expediency".[32] If this perception is indeed accurate, then there may well be greater cause for concern now that government priorities have shifted "away from a social justice emphasis to one of economic concern".[33] In this context, it may also be significant to observe that the department responsible for Indian affairs "occupies one of the lowest rungs in the government hierarchy".[34] While "individual ministers can be and have been sympathetic to native demands, they have neither the time nor, often, the skill or influence to translate native demands into policy forms acceptable to cabinet".[35] As a result, "DIAND has been seen as having insufficient

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[31]Weaver, *supra* note 15 at 141.

[32]*Ibid.* at 139. The lasting image is one of confusion, an impression compounded by some rather obvious regional differences. In this regard, it may be relevant to note that,

> [t]he Indian Act applied differently to the northern territories, where there were no reserves. Provincial reversionary rights to reserve lands, while of very limited importance in most of the country, varied regionally. Hunting rights varied according to treaties and the regional constitutional provisions in the Natural Resources Transfer Agreements. Half the country was covered by treaties and half was not (Douglas Sanders, "The Constitution, the Provinces, and Aboriginal People" in J.A. Long and M. Boldt, eds., *supra* note 27, 151 at 173).

[33]Weaver, *supra* note 15 at 143.

[34]Boldt, *supra* note 23 at 75.

[35]Weaver, *supra* note 15 at 143.

capacity to bring its own policy initiatives to fruition through the cabinet decision process".[36]

Central agencies do exist to "referee disagreements" between Departments. However, these agencies have often had little success in preparing "an overall native policy strategy acceptable to cabinet".[37] This may, in part, explain the increased level of "uncertainty and apprehension within government" - a condition which in turn "fosters a general reluctance" to seek meaningful solutions to long-standing problems. In consequence, "instead of addressing substance or content of policies, the government stresses the process of policies and resorts to evasions and tactical manoeuvres in dealing with native demands".[38] The initial government reaction, or rather the lack thereof, to the *Report of the Royal Commission on Aboriginal Peoples* seems indicative of this approach. Moreover, this tendency may also provide a rationale to explain why disputes in high profile cases, such as the one which is at the heart of the litigation in *Delgamuukw* v. *British Columbia*,[39] seem to defy all attempts to reach out of court settlements. Indeed,

> [i]n the highly sensitive political environment of competing interests that now surrounds Indian assertions and aspirations ... the courts are likely increasingly to find themselves called upon to replace the hesitations of a faltering political process

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[36]*Royal Commission Report*, vol. 2 *supra* note 18 at 355.

[37]Weaver, *supra* note 15 at 145. See also the *Royal Commission Report*, vol. 2 *supra* note 18 at 355, wherein the Commissioners observe that "[t]he absence of any effective oversight mechanism, aside from the courts, has been a matter of concern".

[38]Weaver, *supra* note 15 at 145.

[39]*Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470, 5 W.W.R. 97 [leave to appeal & cross-appeal to S.C.C. granted 109 D.L.R. vi][hereinafter *Delgamuukw* cited to W.W.R.].

> and therefore to solve the disputes between these contending interests as well as determine the obligations of Canadian taxpayers, through the instrumentality of the federal government, to the Indian people.[40]

iii. A Legacy of Conflict.

In view of the foregoing, it should not be surprising to discover that many government policy initiatives have been greeted with a certain measure of scepticism on the part of the intended Aboriginal beneficiaries. The cynicism felt by many Aboriginal groups was clearly evident in the initial response accorded the 1995 federal policy on self-government.[41] In this regard, the Assembly of First Nations reacted to that policy by observing that, "as we all know, the federal government has never accepted the First Nation understanding [of the spirit and intent of the treaties] and has never honoured their commitments nor respected the relationship".[42] Indeed, while "[t]he potential for conflict on the part of the Crown is replicated in a number of areas",[43] the Crown's role in negotiating and administering its treaty obligations has been a longstanding source of animosity between the Crown and treaty nations.

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[40]D.W.M. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 411 at 421.

[41]Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995)[hereinafter Aboriginal Self-Government Policy].

[42]Assembly of First Nations, release, "White Paper on Negotiating Self-Government: Commentary on the Draft Federal Policy" (1995) at 10.

[43]Rotman, *supra* note 22 at 265.

Treaty agreements have been characterized as an important "mechanism for affirming collective rights and obligations on both sides, for sharing the land and its resources, and for agreeing to live in harmony and partnership".[44] Moreover, as the courts have affirmed, treaties exist as an "independent" source of rights.[45] Indeed, many Aboriginal Canadians adhere to the belief that, "[i]f it was not for these treaty agreements - the written documents and the associated oral promises and agreements - we might have lost all of our rights as aboriginal people".[46] While the extent to which one considers that the Crown has upheld its treaty obligations may well vary depending on the interpretation accorded individual treaty provisions, it is generally acknowledged that, when it negotiated treaties with Aboriginal peoples, "the Crown owed conflicting duties to the treaty nations and to Canadians generally".[47] Nor is the conflict of interest limited

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[44]*Royal Commission Report*, vol. 1, *supra* note 6 at 611. There are, of course many different types of treaties. As noted in Chapter three, some treaties provided for the cession of traditional Aboriginal lands, others guaranteed access to resources and still others have been described as treaties of friendship which in some cases terminated hostilities and extended the protection of the Crown to the "treaty nation" concerned. The treaty process has both historic and modern aspects as evidenced by the process which culminated in the controversial James Bay and Northern Quebec Agreement. The differences of opinion concerning the individual provisions of these treaties and agreements are considered to be beyond the scope of this thesis and will therefore not be addressed here.

[45]See especially *Simon* v. *the Queen*, [1985] 2 S.C.R. 387, 1 C.N.L.R. 153 (S.C.C.). Also note *R.* v. *Sioui*, [1990] 1 S.C.R 1025 at 1044 wherein Lamer J. stated that, "what characterizes a treaty is the intention to create obligations, presence of mutually binding obligations and a certain measure of solemnity".

[46]Snow, *supra* note 14 at 41.

[47]*Royal Commission Report*, vol. 2 *supra* note 18 at 75. In this respect, it may be argued that the possibility of unilateral extinguishment "must colour any analysis of the position of the parties as equal in bargaining power" insofar as treaties entered into prior to 1982

solely to historic treaties, rather it stems from the fact that "Aboriginal and non-Aboriginal people have conflicting interests in the control and use of property" and the fact that the Crown owes duties to both segments of society.[48]

The same conflicting forces would serve to frustrate the process of implementation. For example, while Parliament was required to allocate sufficient funds for treaty implementation, "[i]f the federal Cabinet or senior civil servants did not recommend that sufficient monies be voted by Parliament to implement the treaties, then it simply did not happen".[49] The *Constitution Act, 1867*, did not help matters. While that Act served to empower the federal legislature with the authority to pass laws in relation to "Indians, and Lands reserved for the Indians",[50] it also served to transfer the "ownership and control" of Crown (public) land to the provinces, "leaving the Dominion singularly ill-equipped to set aside reserve lands for the Indians and fulfil the terms of treaties which it had the exclusive right and power to negotiate".[51] Although the "myth of a 'unified Crown', with

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are concerned (P.W. Hutchins and D. Schulze, "When do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Sask. L. Rev. 97 at 132).

[48]J. Borrows, "Negotiating Treaties and Land Claims: The Impact of Diversity Within First Nations Property Interests" (1992) 12 Windsor Y.B. Access Just. 179 at 180.

[49]R.T. Price, *Legacy: Indian Treaty Relationships* (Edmonton: Plains Publishing Inc., 1991) at 65.

[50]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3 [hereinafter *Constitution Act, 1867*], s.91(24).

[51]N.D. Bankes, "Indian Resource Rights and Constitutional Enactments in Western Canada, 1870-1930" in L.A. Knafla, ed., *Law & Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 129 at 161-62, where Banks goes on to observe that,

> while the Dominion could sign treaties and accept a surrender of Indian title, once

both levels of government loyally serving the same Queen", persists today, the reality of the situation is that where the federal Crown desires to obtain additional lands for Aboriginal use it must still effect a purchase of the public lands before they will be released from provincial control.[52]

The record would seem to support the contention that, as a matter of policy, "[t]he federal government has historically taken a minimalist approach to such [treaty] rights, acting only when pressed to react when its own interests are at stake".[53] Moreover, while the federal government has indicated that it recognizes that the "[e]xisting treaties are fundamental to the special relationship between treaty First Nations and the Crown", it has repeatedly emphasized that it "does not propose to re-open, change or displace" them in negotiating self-government agreements.[54] This policy is considered unacceptable by many Aboriginal Canadians who argue that, "[t]he federal failure to implement existing

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> it had done so it could not dispose of those lands itself or set aside Indian reserves out of those lands. The logic of section 109 of the Act was that upon surrender the lands vested in the Crown in right of the province. Furthermore, despite the fact that the province was the main beneficiary of the surrender, it was under no legal or constitutional obligation to transfer land to the Dominion for reserves or contribute to the extinguishment of the Indian title. Similarly, once reserves were surrendered the full beneficial title vested once again in the province.

[52]R. White-Harvey, "Reservation Geography and the Restoration of Native Self-Government" (1995) 17 Dalhousie L.J. 587 at 602.

[53]Assembly of First Nations "White Paper", *supra* note 42 at 10.

[54]Aboriginal Self-Government Policy, *supra* note 41 at 9.

treaties is a fundamental cause of many of the problems that First Nations face today"[55] and that, as a result, some existing historic treaties must be "renewed".[56]

The processes established by the federal government to resolve outstanding Aboriginal claims appear emblematic of the conflict of interest which is at the heart of federal policy making. As the *Royal Commission Report* notes, the current policy "establishes preconditions for negotiations and constrains possible outcomes based on the preferences of the Crown".[57] In this respect, it has been argued that "the goal of the federal policy is to minimize the costs of settlement, to entice or force already desperate people to sign minimal agreements because they have been waiting for a settlement for so long".[58] Given this objective, it may be significant to observe, as Rotman does, that, "[i]n both the Specific and Comprehensive Claims processes, the federal Crown, through its Department of Justice and Department of Indian Affairs, is both the appraiser of a claim's merit as well as its arbiter of fact".[59]

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[55]Assembly of First Nations "White Paper", *supra* note 42 at 4.

[56]The term "renewal" is used by the Royal Commission "to emphasize the need to revitalize, in contemporary form, the treaty relationship established so long ago" in order to "effect a just and reasonable resolution of areas in dispute". Among other things, this would "involve negotiations to give effect to the spirit and intent of treaties" (*Royal Commission Report*, vol. 2 *supra* note 18 at 52-53).

[57]*Ibid.* at 570.

[58]Mercredi and Turpel, *supra* note 21 at 137.

[59]Rotman, *supra* note 22 at 265. He goes on, at p. 266-67, to ask how it is "possible that these departments may impartially decide on the merits of a particular Indian claim which seeks to reclaim revenue-gathering lands from the federal Crown whose best interests the departments both represent and seek to protect? Quite simply, it is not possible."

The federal government's complex strategy for resolving land claims highlights the conflict of interest with which it is faced. In order to pass clear title to the province and thereby create opportunities for economic growth, while simultaneously reducing its own operating expenditures, the federal government has traditionally pursued a strategy of "gaining certainty over and subordination of Indian title". At the same time, it must "protect and advance the Indians' interest".[60]

The process of determining what is best for any one Aboriginal group is itself problematic. As Borrows notes, in his case study of one particular land claim, because "contrary" interests are often held by various segments of the Aboriginal population, the government may have to assess competing visions in determining how best to discharge its own duty to a particular Aboriginal group.[61]

While "multiple interests create room for negotiation insofar as some of the interests on each side are aligned", they also have a tendency to "cause conflicting interests to be sacrificed in order to pursue goals that are mutually acceptable".[62] Oft-times,

> the federal government is in a position where a move in either direction would place it in conflict with one of its goals. As a result of this situation, it can easily be seen that the federal government has little incentive but to do as little as possible until one of its policy goals became stronger than the other, or the situation changed so drastically that it could justify taking one position over the other.[63]

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[60]Borrows, *supra* note 48 at 219-20.

[61]*Ibid.* at 206.

[62]*Ibid.* at 213.

[63]*Ibid.* at 219-220.

While a strategy of "side-stepping" a conflict may provide a tempting short-term solution, such an approach may create bigger headaches for government to the extent that the resulting uncertainty may become a further source of conflict. Moreover, even where a particular Aboriginal claim is resolved, the federal government may well be accused of using its "superior bargaining power" to ensure an outcome favourable to its own objectives.[64] Others have complained that the process is itself fundamentally flawed since no branch of government can be "relied upon" to resolve claims with "consistency and continuity" inasmuch as "the point of reference" is likely to be influenced by "contemporary", "short-lived policy objectives rather than principles of abstract justice".[65]

The Crown is also in conflict whenever it is required to decide issues which could impact on the rights of Aboriginal peoples, including those rights which are recognized and affirmed by s.35(1) of the Constitution.[66] Indeed, as we have seen from the case summaries contained in Chapter five, the justification standard developed in *R.* v.

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[64]S. Grammond, "Aboriginal Treaties and Canadian Law" (1994) 20 Queen's L.J. 57 at 87.

[65]R.C. Daniel, *A History of Native Claims Processes in Canada 1867-1979* (Ottawa: Research Branch, Department of Indian & Northern Affairs, February 1980) at 236-37.

[66]Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Constitution Act, 1982*], s. 35(1). In this respect, Rotman, *supra* note 22 at 264, argues that "[t]he Crown would, prima facie, appear to be in breach of its duty to the Native peoples where it has either extinguished or continues to regulate aboriginal and treaty rights through actions designed to facilitate or provide for the national interest".

Sparrow[67] and *R.* v. *Van der Peet*[68] forces Parliament to choose "between the interests of Aboriginal peoples and what Parliament sees as the interests of the Canadian population as a whole".[69] That standard highlights, in graphic terms, the divergence between fiduciary principles and the application of those principles within the confines of the Crown-Aboriginal relationship, bearing in mind that, in ordinary cases, "the fiduciary must not only refrain from profiting at his beneficiary's expense, but actually avoid being in a conflict situation".[70] The difficulty in most, if not all of these situations, is that "the Crown cannot avoid the conflict; it can only lessen the ambiguity of its position".[71] In this respect, it seems appropriate to ask whether the fiduciary characterization represents an improvement on the Crown-Aboriginal relationship?

C. Verdicts on a Characterization:

i. Contemporary Government Perspectives on the Relationship.

In the wake of Dickson J.'s judgment in *Guerin et al.* v. *The Queen*[72] there was "a considerable amount of uncertainty with regard to the nature and extent of the obligations

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[67][1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

[68][1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [hereinafter *Van der Peet* cited to D.L.R.].

[69]W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning" (1990) 15 Queen's L.J. 217 at 220.

[70]Waters, *supra* note 40 at 419.

[71]*Ibid.* at 419.

[72][1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to S.C.R.].

of the federal Crown in its management of Indian assets". The concern centred on the Crown's responsibilities, as a fiduciary, when discharging its managerial duties in circumstances where it receives, what it considers to be, improvident instructions from a Band.[73] In this regard, there was perceived to be precious little guidance to be found in the *sui generis* label used to qualify the fiduciary aspects of the relationship. The problem was compounded by the ambiguous nature of the fiduciary principle itself. In this regard, as Waters has correctly observed:

> A major feature of the law relating to both fiduciary and confidential relationships is that there are no objective or even semi-objective standards to predict when a court will intervene. There are only the rough tests provided by such indicia as loyalty, vulnerability, trust and confidence. All these are of course provided after the event with the benefit of hindsight.[74]

After the decision of the Supreme Court in *Sparrow*, anxiety deepened as the Crown's representatives were faced with the prospect of determining how far they must go, in considering the rights of Aboriginal peoples relative to the public interest, when exercising the regulatory functions of government.[75] In this respect, it has been observed

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[73]W.R. McMurtry and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" [1996] 3 C.N.L.R. 19 at 39. In a similar vein, Waters, *supra* note 40 at 420, states that "[i]t has been widely surmised as a result of the *Guerin* decision that the departments of the federal government, and in particular Indian Affairs, are in a state of indecision as to how to proceed in future in all their dealings with the Indian peoples".

[74]J.L. McDougall, "The Relationship of Confidence" in D.M.W. Waters, ed., *Equity, Fiduciaries and Trusts, 1993* (Toronto: Carswell, 1993) 157 at 171.

[75]Michael Hudson, "The Fiduciary Obligations of the Crown Towards Aboriginal Peoples" in Cassidy, Frank., ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 44 at 46.

that the overtly general nature of the justification standard made it extremely difficult for government legal advisors to inform their client departments concerning the requisite level of justification required in individual cases.[76]

As we saw in Chapter five, until 1995 there was an almost total lack of guidance from the Supreme Court concerning the application of the no-conflict rule within the context of the Crown-Aboriginal relationship. What little guidance was available prior to that date does not appear, in retrospect, to reflect a coordinated effort to bring fiduciary principles to bear on the relationship in anything approaching consistency. Cory J.'s 1996 judgments in *R.* v. *Badger* and *Nikal* v. *The Queen* suggests that the Crown may now justify a *prima facie* infringement of Aboriginal and treaty rights by demonstrating that it acted reasonably.[77] Having said that, it may also be argued that the move to what is, after all, an inherently "flexible" reasonableness standard does little to enhance certainty. True, governments may take some comfort in the Supreme Court's decision in *R.* v. *Gladstone* - a decision which allows the Crown to balance Aboriginal rights against other "compelling and substantial" objectives in a way which reconciles Aboriginal societies with the rest of Canadian society.[78] However, one might well ask, if the Crown-Aboriginal relationship "is indeed to be developed according to its 'spirit and intent', how

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[76]Binnie, *supra* note 69 at 232.

[77][1996] 1 S.C.R. 771 [hereinafter Badger]; [1996] 1 S.C.R. 1013 [hereinafter Nikal].

[78][1996] 2 S.C.R. 723 [hereinafter *Gladstone*].

do we attempt to avoid the protracted ambiguities, silences and inconsistencies in case law so damaging to society that otherwise lie ahead"?[79]

The federal government's strategies for managing the Crown-Aboriginal relationship reflect the uncertainty of its role as both a governing body and a fiduciary. One strategy, which it has employed with some success in litigation, is to distinguish and distance "the existence of a fiduciary relationship from its obligations or duties" by emphasizing, *per* the *Lac Minerals* and *National Energy Board* cases, that not every aspect of a fiduciary relationship takes the form of a fiduciary obligation.[80] The approach is explained in a 1995 interdepartmental working group report on the Crown-Aboriginal fiduciary relationship in the following terms:

> [t]he nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. Therefore, not every dealing by the Crown with Aboriginal people will be imbued with a legal obligation. From the federal government's point of view this means that fiduciary duties or obligations would only arise when expressly derived from treaties, constitutional provisions, statutes, common law or express undertakings. ...
>
> On this basis, certain activities of the Crown that affect Aboriginal people will come within the broad fiduciary relationship, but will not give rise to legally enforceable fiduciary obligations. As such they would fall within the political aspects of the relationship and not be enforceable in the courts.[81]

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[79]Waters, *supra* note 40 at 425.

[80]*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 [hereinafter *Lac Minerals* cited to D.L.R.]; *Quebec (Attorney General)* v. *Canada (National Energy Board)* (1994), 112 D.L.R. (4th) 129 [hereinafter *National Energy Board*] at 147 (S.C.C.).

[81]Interdepartmental Working Group Report, *supra* note 26 at 6.

Of note, this particular approach is hardly supportive of the widely held view, referred to above, that "the fiduciary relationship implies a general duty of the federal government to act in the interests of Aboriginal peoples in all matters affecting them", a view which the federal government expressly rejects.[82]

It has been suggested that, in the face of uncertainty, the government's instinct when faced with a difficult decision "is to do nothing rather than make what proves to be a wrong move".[83] This approach encourages litigation, in the hope that the courts will establish the parameters of the Crown's obligations, but does little to assuage the longstanding Aboriginal suspicion that governments will only uphold their duties when they are forced to do so.[84] Furthermore, if the odd result in *R.* v. *McPherson*[85] and the flawed *dicta* in the *Chippewas of Nawash First Nation*[86] case are indicative of the courts' response to the requirement to apply fiduciary standards to the Crown-Aboriginal

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[82]*Ibid.* at 6.

[83]Waters, *supra* note 40 at 420. Waters refers to this as the "holding pattern of administration".

[84]See F. Plain, "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America" in M. Boldt and J.A. Long, eds., *supra* note 14, 31 at 38, where the sentiment is summed up in the following passage:

> [t]he Honourable Jean Chrétien had these words to say about aboriginal and treaty rights: 'We will honour our lawful obligations to the aboriginal people.' Precisely what did he mean? He meant that Canada has obligations to native people only if such obligations will stand the test of the law. If the law decrees that certain obligations must be met, and if those obligations are defined in such a manner that the government can accept the definition, then they will be honoured.

[85][1994] 2 W.W.R. 761.

[86]*Chippewas of Nawash First Nation* v. *Canada (Minister of Indian and Northern Affairs)*, [1997] 1 C.N.L.R. 1 (F.C.T.D.) [hereinafter *Chippewas of Nawash*].

relationship, it may be that any increased reliance upon the courts, to the exclusion of other means of resolving such difficulties, "will strain judicial competence".[87] Indeed, to the extent that "the case law seems to be giving less and less content to the duty even as it acknowledges the existence of the fiduciary relationship",[88] we may already be reaching the limits of what we can reasonably expect the courts to do in this area.

Another government strategy, which is becoming more apparent as the government responds to demands for Aboriginal self-government, features the attempt to, in effect, contract out of the Crown's fiduciary responsibilities through the formulation of policies designed to transfer the current managerial discretion which it now exercises over some Aboriginal interests to self-governing Aboriginal bodies. While the federal government is careful to point out that the "historic relationship" between the Crown and Aboriginal peoples will "evolve" rather than "disappear", its 1995 policy on the subject of self-government clearly indicates that "Crown responsibilities will lessen". Moreover, the policy proclaims that,

> [t]here is no justifiable basis for the government to retain fiduciary obligations in relation to subject matters over which it has relinquished its control and over which an Aboriginal government or institution has, correspondingly, assumed control.[89]

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[87]K. Roach, "Remedies for Violations of Aboriginal Rights" (1992) Man. L.J. 498 at 526. Roach argues that the concern is largely unfounded - except where courts are called upon "to judge the sufficiency of the balance of interests that is struck" whenever Aboriginal and non-Aboriginal interests conflict - which is, of course, the primary issue under consideration here.

[88]Hutchins and Schulze, *supra* note 47 at 98.

[89]Aboriginal Self-Government Policy, *supra* note 41 at 12.

In this regard, it would seem that it is the federal government's objective to make Aboriginal governments and institutions "fully accountable to their members or clients for all decisions made and actions taken in the exercise of their jurisdiction or authority" in a manner which is suggestive of fiduciary standards of accountability.[90]

ii. Contemporary Aboriginal Perspectives on the Relationship.

As the case summaries presented in Chapter five suggest, in recent years there has been an explosion of litigation involving allegations that the Crown has breached fiduciary duties owed particular Aboriginal plaintiffs, defendants or applicants. Both the volume and diversity of the growing case law in this field would seem to suggest that Aboriginal support for a fiduciary characterization of the Crown-Aboriginal relationship is strong. Notwithstanding the appearance of support, it must be remembered that within the context of litigation particular arguments are advanced for a wide variety of reasons. In this respect, it would probably be a mistake to attempt to draw any inferences from the wide recourse being made to fiduciary doctrine in the Aboriginal law context. Indeed, while it may be that some Aboriginal successes having encouraged others to seek judicial redress, the trend might just as easily be the result of Aboriginal frustration with the "holding pattern of administration" noted earlier in connection with the government's fear of making what might later prove to be "the wrong move". Similarly, the courts' failure to clearly define the nature of the Crown's obligations may have raised the level of Aboriginal expectations in a way which encourages this sort of litigation - particularly

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[90]*Ibid.* at 12.

in light of the "positivist" view of fiduciary duty which currently appears to be enjoying a certain measure of support in some Aboriginal circles.[91] The seeming popularity of the fiduciary doctrine among Aboriginal litigants appears even more surprising given the reluctance among some Aboriginal groups to put their trust entirely in the courts and the adversarial process.[92] In this respect, it may well be significant to observe that litigation has traditionally been viewed as a costly, risk-filled option which is only to be pursued as a last resort.[93]

While some Aboriginal Canadians may well view the fiduciary construct as a defining feature of their relationship with the Crown, the opinion is by no means uniformly held. Indeed, there are some who see the doctrine as a regressive creation of

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[91]Discussed in detail, *infra* in relation to the section of this chapter entitled "Recognition of the Limitations of the Fiduciary Doctrine".

[92]Henderson, *supra* note 16 at 228, explains this reluctance by observing that, "[t]here are many other areas in which Canadian law does not supply any kind of satisfactory answer to the injustices experienced by native people. There is little hope that law, left to its own devices, is going to solve these deficiencies in future." At p. 225-26, he argues that the principle of parliamentary supremacy clouds the courts' perception of government action in relation to Aboriginal interests. Boldt is less charitable in opining, *supra* note 23 at 31, that "seasoned and career-minded judges will never allow unique points of law or any personal sense of moral justice to supersede accumulated legal structures and precedents unless there is a compelling 'national interest' to do so".

[93]Views expressed my Boldt and Long in the context of their comments on Aboriginal self-government (see M. Boldt and J.A. Long, "Native Indian Self-Government: Instrument of Autonomy or Assimilation" in J.A. Long and M. Boldt, eds., *supra* note 27, 38 at 56). The reluctance to litigate significant claims is captured in the observation that "the half dozen important cases represent a fragile structure, subject to erosion in future cases, particularly in the absence of courageous legal theorists such as former Chief Justice Dickson" (see A. Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" (1992) 2 N.J.C.L. 163 at 194).

the dominant society. In this respect, it is evident that the fiduciary construct "relies on the discretion of first the Crown and later the judiciary to order remedies" that deal with Aboriginal interests in ways which benefit First Nations.[94] However, the concern would appear to centre on more than just the discretion inherent in the roles the doctrine ascribes to the Crown and the courts. Menno Boldt, for one, argues that "the fiduciary relationship emphasized in *Sparrow* reinforces the historical relationship of Canadian paternalism over Indians, a relationship that is totally inconsistent with the Indian conception of their nationhood".[95] Boldt is not alone. Macklem has levied a similar criticism in arguing that the notion of fiduciary duty is based on a hierarchical relationship in which Aboriginal peoples are cast in the role of dependant, secondary players.[96]

Pratt offers a plausible explanation for the prevalence of this latter view. He suggests that, because of its "trust-like" nature, some "assume that the aboriginal beneficiaries of this duty are analogous to the beneficiaries of a trust ... they are somehow incompetent to handle their own affairs; and less than fully mature".[97] While this sentiment may be understandable, as we saw in Chapter two, La Forest J.'s 1994 judgment in *Hodgkinson* ushered in a test for the existence of fiduciary duty which built on the

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[94]Roach, *supra* note 87 at 526.

[95]Boldt, *supra* note 23 at 36.

[96]See P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 at 448-49.

[97]Pratt, *supra* note 93 at 183.

"expectation" analysis which he had developed in *Lac Minerals*.[98] That test relegated vulnerability to the status of an evidentiary factor. According to La Forest J., the key to determining whether a relationship is fiduciary is the existence of "a mutual understanding that one party had relinquished its own self-interest and agreed to act solely on behalf of the other party", such that that other party could reasonably expect the fiduciary to act in his "best interests with respect to the subject matter at issue".[99] Furthermore, while vulnerability may well be present in the relationship, vulnerability in the fiduciary sense need not amount to "an objective disability", such as inequality, but rather refers to "the vulnerability inherent in the particular relationship" - in this case the fact that "Aboriginal peoples gave up some aspects of their external sovereignty in return for the Crown's promise of protection".[100]

However, many Aboriginal Canadians dispute the conclusion, which is at the heart of this so-called mutual understanding, that they ever surrendered their sovereignty and are not prepared to accept any legal doctrine which is based on such notions.[101] Pratt

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[98]*Hodgkinson* v. *Simms*, [1994] 3 S.C.R. 377 (S.C.C.) [hereinafter *Hodgkinson*]; *Lac Minerals*, *supra* note 80.

[99]*Hodgkinson*, *supra* note 98 at 409-10.

[100]Hutchins and Schulze, *supra* note 47 at 113-114. As Rotman, *supra* note 22 at 168 observes, "[a]lthough 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".

[101]Boldt, for one, argues that, "[i]n Sparrow, the Supreme Court unambiguously and mechanically subordinated aboriginal rights to the standards of Crown sovereignty, Crown title, parliamentary supremacy, the national interest, and even to considerations of cost to the federal treasury" (see Boldt, *supra* note 23 at 36).

accurately sums up the conflict which fiduciary doctrine poses "for contemporary aboriginal theorists" in the following terms:

> the fiduciary doctrine obviously has practical advantages to aboriginal peoples ... but it also requires acceptance of the Crown's primary sovereignty and ultimate title to the soil and the natural resources of Canada. Without the Crown's assertion of both power and discretion, both self-declared, the foundation of the fiduciary duty, as currently described by the Court, would disappear.[102]

Hence the attraction of Slattery's "autonomous nations" hypothesis - an hypothesis which reconciles the principle of Crown sovereignty, upon which the fiduciary characterization is based, with the demand for Aboriginal self-government. While Slattery acknowledges that the Crown gained "suzerainty" over the Aboriginal peoples of Canada, he does not consider this fact to be inconsistent with the inherent right of self-government. Indeed, he rather convincingly argues that "Aboriginal peoples became autonomous nations living under the Crown's protection, exercising powers of self-government within a larger constitutional structure".[103] The view also fits neatly with traditional Aboriginal perspectives.[104] Insofar as the Crown-Aboriginal relationship is concerned, Slattery

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[102]Pratt, *supra* note 93 at 192.

[103]Slattery, "F.N.C." *supra* note 10 at 279. On this view Aboriginal rights merged in the common law. As previously noted, there is considered to be legal support for this proposition (see in particular the discussion in relation to notes 84 and 85 of Chapter four).

[104]As William Erasmus of the Dene Nation, explains:

> The only thing we did was that we acknowledged that other people were coming on to our land, so we had our hands open and said, 'Yes, we have lots of land; come on our land.' We didn't say, however, that we were going to give up our right to make our own decisions over our own lives, to have our institutions so that we can continue to survive as a unique people (Quoted in G. York, *The Dispossessed: Life and Death in Native Canada* (London: Vintage U.K., 1990) at

theorizes that:

> [t]his fiduciary relationship was a variation on the normal duty owed by the Crown to its subjects. It arose from the tacit arrangement whereby First Nations relinquished the right to defend themselves militarily in return for Crown protection, while remaining quasi-autonomous political entities.[105]

As the product of a Western European legal system, the fiduciary construct may well arouse suspicions among those who appear to adhere to the "autonomous nations" hypothesis.[106] Nevertheless, there is also grudging recognition of the potential utility of the doctrine as "the 'blunt tool' which can police and discipline the Crown, and provide remedies when the Crown has acted dishonourably ... a body of law which concentrates upon the obligations of the Crown to protect aboriginal peoples from intrusion".[107]

Cautious support for the fiduciary construct is evident in the Aboriginal reaction to the federal policy on self-government. For example, the Chiefs of Ontario registered their objections to that policy by observing that:

> [s]imply put this would appear to be a way for the federal government to attempt to rid itself of its fiduciary obligations and may be the entire basis or rationale for

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[105]Slattery, "F.N.C." *supra* note 10 at 290.

[106]In this vein, Pratt, *supra* note 93 at 180, argues that:

> [i]t cannot be forgotten that this law is the product of the European legal and political tradition of Canada. It is not the product of the aboriginal world view. Therefore while it can and does respect the existence and vitality of aboriginal legal and political orders within Canada, it is alien to those traditions and cannot directly define the rights and obligations within those aboriginal orders.

[107]*Ibid.* at 180-81. However, Pratt goes on to argue, at p. 183, that "[t]he fiduciary duty is only *indirectly* about the rights of aboriginal nations themselves. It is really about the responsibility assumed by the Crown in its acts of domination, or imposed upon the Crown as a consequence of those acts."

> the policy. This is simply unacceptable. Unless and until the federal government pays for its past misuse of our lands and resources and enters into future arrangements for ongoing access to our lands and resources the fiduciary obligation must and will continue.[108]

For its part, the Assembly of First Nations responded to the government's policy by asserting that, "while the devolution of certain programs, services or certain jurisdictional matters may entail some diminution of specific fiduciary obligations, subject to outstanding claims against the Crown, the general fiduciary obligation of the Crown with respect to Constitutionally protected inherent, aboriginal and treaty rights can never be diminished".[109] This approach is deemed consistent with the positivist view of fiduciary responsibility noted earlier in this chapter. It is also considered to be in keeping with the belief that, "[t]he protection of a fiduciary relationship must be assured as long as the aboriginal peoples believe they require it" on the basis that "decolonization" can "not be forced on aboriginal peoples at the expense of their legal protections".[110]

Nevertheless, doubts continue to be expressed as to whether the fiduciary doctrine is in fact capable of living up to its potential. In this respect, it is important to recognize that the fiduciary construct acts as a default scheme of regulation; the courts will only

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[108]Chiefs of Ontario, release, "Analysis of Federal Policy Framework for the Implementation of the Inherent Right and the Negotiation of Self-Government" (11 August 1995) at 5.

[109]Assembly of First Nations "White Paper", *supra* note 42 at 11. In this latter regard, it should be noted that, at p.2, the Assembly of First Nations insisted "upon the explicit recognition that the Government of Canada has a positive duty to protect inherent, aboriginal and treaty rights" and remarked that the policy "does not appear to acknowledge any general duty (see Sparrow)".

[110]Pratt, *supra* note 93 at 195.

become involved in circumstances where the relationship has reached an impasse. Moreover, on a traditional view of fiduciary law, the very existence of equitable remedies should ordinarily be enough to ensure that the fiduciary's discretion is exercised appropriately. In this respect, a marked increase in the level of litigation in any one fiduciary relationship may well signal that the relationship is in trouble - that the beneficiary no longer has confidence in the fiduciary.

As noted previously, there are many possible reasons which might explain the increase in litigation involving allegations that the Crown has breached fiduciary duties owed Aboriginal peoples. However, it may not be entirely coincidental that, at the same time, the complaint is often heard that governments either cannot be trusted or are hopelessly preoccupied with other interests.[111] As Turpel points out, Aboriginal people are "justifiably concerned about the extent to which the Federal Government and

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[111]Given the systemic limitations noted earlier in connection with the manner in which Aboriginal policy is formulated, the observation that, "[u]nless confronted with an 'Indian crisis', the time of Parliament and of Cabinet is deemed too valuable to take up for a concentrated examination of Indian interests, rights, needs, and aspirations", appears understandable (see Boldt, *supra* note 23 at 72). The sentiment provides a convenient explanation for the federal government's decision to convene a Commission of Inquiry with the mandate to, among other things, "investigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Métis), the Canadian government, and Canadian society as a whole", rather than attempt to tackle the issues itself (see *Royal Commission Report*, vol. 1 *supra* note 6 at 2). It may also explain why the Government has been so slow to respond, in any comprehensive fashion, to its findings and recommendations. Indeed, while the Report was released in October 96, the government only recently announced that it would be preparing a formal response which would be made available by November 1997 (J. Aubrey, "We'll Act on Reforms by Fall, New Minister tells Chiefs" *Ottawa Citizen* (1 August 1997) A1.).

provincial governments can be trusted to act honourably in any future dealings".[112] Based on the conflicting nature of many of the roles governments are expected to play, it cannot be said that this distrust is entirely misplaced. However, if this lack of trust were present in any other type of fiduciary relationship one would expect that the parties would long ago have decided to terminate the relationship and go their separate ways. The seeming inability to do so in this case provides us with a further example of the uniqueness of the Crown-Aboriginal relationship. It may also explain why the federal Crown has embarked on a self-government policy which would, in effect, allow it to "contract-out" of liability generating responsibilities. To the extent that the *Royal Commission Report* proffers a "restructured" Crown-Aboriginal relationship, it is easy to understand why the Commissioners' recommendations have met with such a positive response from many within the Aboriginal community.

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[112]M. Turpel, "Reviewing the Honour of the Crown" (1991) 3 Human Rights Forum 2 at 4. As an example, see A. Tanner and S. Henderson, "Aboriginal Land Claims in the Atlantic Provinces" in K. Coates, ed., *Aboriginal Land Claims in Canada: A Regional Perspective* (Toronto: Copp Clark Pitman Ltd., 1992) 131 at 154-55, who, in commenting on the status of Mi'kmaq land claims, assert that "[t]he federal government is not concerned about protecting its constitutional obligation". In support, they cite what are characterized as biases "disclosed in the Department of Justice's invocation of technical defences against Mi'kmaq claims, as well as in its overt concern for third parties (immigrants)".

D. The Challenge for the Future: Renewal & The Crown-Aboriginal Relationship:

In its report, the Royal Commission on Aboriginal Peoples presents a vision of a *renewed* relationship between Canada and its Aboriginal peoples - a relationship "to be based on four principles: mutual recognition, mutual respect, sharing and mutual responsibility".[113] This is not to say that the Royal Commission is advocating a complete break with the past. Indeed, while the Commissioners conclude that "the history of the relationship has been largely a story of oppression and neglect", they also point to the "more positive elements in the relationship" which were evident in the "early contact period". In this vein, it may be relevant to recall, from our conclusions to Chapter three, that while the official response to Aboriginal concerns might, at times, have appeared cruelly indifferent, it was also punctuated by "periodic bouts" of "fairness and justice". Nevertheless, the Commissioners emphasize that,

> [e]ven when a coercive, intrusive and assimilative relationship was being imposed, Aboriginal peoples continued to struggle for restoration of a better relationship. Indeed, at one level, the semblance of a nation-to-nation treaty relationship obtained. Thus we have the precedent, the seeds of an alternative relationship. For this reason we speak of a *renewed* relationship, rather than implying that the past should be put entirely behind us.[114]

In light of our earlier discussions we know that policy in the colonial era was primarily motivated and directed towards the furtherance of Britain's national interest. While imperial policy was capable of being managed in conflict situations by balancing

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[113]*Royal Commission Report*, vol. 1 *supra* note 6 at 677.

[114]*Ibid.* at 608.

Aboriginal and non-Aboriginal interests, the outcome would invariably favour those interests which most closely served imperial goals. This is not to say that Aboriginal concerns were never addressed, only that the chances of obtaining a mutually beneficial outcome often depended on the extent to which British and Aboriginal aims coincided. Arguably, little has changed under a succession of Canadian governments. If anything, the sources of potential conflict have increased in proportion to public perceptions of the role of government in a modern society. Moreover, the national interest has moved well beyond the prosecution of the fur trade and the security of settlements.

While the Crown-Aboriginal relationship needs to be *renewed*, it must be done in a way which does not ignore or gloss-over the systemic sources of conflict which have always served to undermine efforts to uphold the principles upon which the Crown-Aboriginal relationship is based. These sources of conflict must also be borne in mind in considering the future of the fiduciary characterization which has been applied to that relationship. Arguably, the first step lies in recognizing the depth of the conflict problem. Beyond that, there is no one solution; rather there are, in all likelihood, a number of measures which must be taken in order to renew the Crown-Aboriginal relationship. In this respect, it is submitted that there are at least five fundamental requirements which must be addressed before the principles of renewal can be applied to the Crown-Aboriginal fiduciary relationship.

First, all parties must approach the question of fiduciary duty having regard to a rational, principled consideration of what the fiduciary construct is and what it can and cannot be expected to achieve. Second, the courts need to clear up the confusion

surrounding the fundamental question of when a fiduciary relationship may be said to arise outside of the traditional fiduciary classifications and address the implications of that choice in terms of the Crown-Aboriginal relationship and the application of the no-conflict rule. Third, if the fiduciary doctrine is to have meaning in the Crown-Aboriginal context, then the no-conflict rule must be enforced where it would be appropriate to do so. Fourth, the courts must respond to the need to give greater meaning to the relationship and the responsibilities of each party by explaining how the Crown-Aboriginal relationship is *sui generis*. Fifth, confidence must be restored in the ability of government to uphold the Crown-Aboriginal relationship by ensuring that those whose responsibility it is to discharge the Crown's lawful fiduciary obligations are shielded from obvious sources of conflict and by eliminating longstanding sources of irritation in the Crown-Aboriginal relationship. Each of these fundamental requirements will now be discussed, in turn.

i. Recognition of the Limitations of the Fiduciary Doctrine.

There must be a rational consideration of what the fiduciary construct can and cannot do. The fiduciary characterization is not a panacea for every ill. In this respect, it must be emphasized that the fiduciary construct is merely a default scheme of regulation to be applied when the fiduciary's loyalty is called into question rather than an independent source of rights.

As we have seen in Chapter two, the public policy rationale for a finding of fiduciary duty was traditionally linked to the need to "maintain the integrity and the

utility of those relationships in which the ... role of one party is perceived to be the service of the interests of the other".[115] While the term "interests" could include both personal and economic interests, the "duty to act solely for the benefit of the other" was, and is, a qualified one; it relates only to those interests which the fiduciary undertook to safeguard.[116] In order to discharge this role the fiduciary is given certain discretionary powers in relation to those interests, which in turn explains why a fiduciary is precluded from exercising his discretionary powers to serve a contrary interest. In this respect, it would be correct to conclude that a fiduciary who exercises his discretion, over such of the beneficiary's interests as have been entrusted to him for safekeeping, in a manner which advances his own or a third party's interests, would be in a conflict of interest which would entitle the beneficiary to seek certain remedies.[117]

What is critical to appreciate, and what appears to have been lost on many observers, is that in assessing the extent to which the fiduciary duty has been upheld, the question to be asked is whether the fiduciary acted contrary to the beneficiary's interests rather than whether the beneficiary's interests have been suitably advanced. In other words,

> fiduciary law no longer appears to be premised on a relationship in which one party is obliged to act in the interests of another. Instead, modern fiduciary law

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[115]P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *supra* note 40, 1 at 27.

[116]As noted in Chapters two and four, besides this so-called "general duty of loyalty", more "specific" duties may also be owed depending on the unique circumstances of each relationship.

[117]These principles are discussed in more detail in Chapter two.

> appears to have evolved to the point where the obligation arising out of the fiduciary relationship may be more properly cast in the negative. The fiduciary is now obliged not to act in a manner which is contrary to the interests of the *cestui que trust*. (emphasis added)[118]

The issue is one of disloyalty.[119] In this regard, it has been suggested that, "[i]f 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".[120] On this view, it seems apparent that the fiduciary construct is "not, of itself, an independent source of positive obligations which go beyond the exaction of loyalty in relationships";[121] rather it is more appropriate to characterize the fiduciary principle as "a default scheme of regulation" to be applied when the fiduciary's loyalty is called into question.[122] This view is not uniformly held. For example, Rotman argues

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[118]McDougall, *supra* note 74 at 158.

[119]As Finn, *supra* note 115 at 28, explains,

> it is not the case that the pure negligence of a lawyer, an agent's excess of authority, a partner's breach of the partnership contract or a trustee's improvident investment is, as such, a breach of fiduciary duty, no matter how harmful to the interests of the client, the principal etc. If no issue of disloyalty is involved, such matters will be actionable through those primary bodies of law which constitute or govern the ordinary incidents of the relationship in question - negligence, breach of contract or breach of trust.

[120]*Ibid.* at 28.

[121]*Ibid.* at 28. In this respect, it is important to recognize that many of the specific duties which may be said to be owed within the context of the Crown-Aboriginal relationship derive from various identifiable sources such as the *Royal Proclamation*, treaties, agreements, and statutes. However, because the Crown is a fiduciary it is obliged to adhere to the fiduciary's standard of loyalty in discharging these specific obligations. As a result, they are clothed with a fiduciary aspect.

[122]R. Flannigan, "Fiduciary Obligation in the Supreme Court" (1990) 54 Sask. L. Rev. 45 at 45.

that there is an obligation on government "to actively and purposively promote or further the rights protected within s.35(1)".[123] Rotman's error appears to derive, in part, from a misunderstanding of the source of the fiduciary duty described in *Sparrow*. In this respect, he argues that, "[w]hereas the Crown's fiduciary obligation to native peoples in *Guerin* was ultimately based on the historical relationship between the group and the Crown's undertakings to protect Native interests, the *Sparrow* duty is rooted in Section 35(1) of the Constitution Act, 1982".[124] Based on the Supreme Court's decision in *Van der Peet*, we now know that this is not entirely correct.

In *Van der Peet*, Lamer C.J. tells us that the term "Aboriginal rights" includes the Aboriginal title interest. Moreover, he affirms that Aboriginal rights "arise from the prior occupation of land" as well as the "prior social organization and distinctive cultures of aboriginal peoples on that land".[125] Based largely on the admittedly sparse judicial pronouncements of the Supreme Court in *Guerin*, *Sparrow* and the *Van der Peet* trilogy, we were able to conclude, in Chapter four, that the Crown's "general" responsibility to act in a fiduciary capacity with respect to the Aboriginal peoples of Canada most likely derives from the Crown's "historic" undertaking to protect Aboriginal lands, practices, traditions and cultures in dealings with third parties. Moreover, it seems logical to presume that the Crown incurred this responsibility in consequence of assuming

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[123]Rotman, *supra* note 22 at 253.

[124]*Ibid.* at 128.

[125]*Van der Peet*, *supra* note 68 at 320.

sovereignty over both the land mass of what is now Canada and the Aboriginal people who reside there.[126] On this view, s.35(1) is not, nor can it be the source of the Crown's duties. Rather, s.35(1) merely provides "the constitutional framework" through which traditional Aboriginal practices, traditions and cultures are "reconciled with the sovereignty of the Crown".[127] True, the *Sparrow - Van der Peet* justification framework reconciles federal power with federal duty by demanding justification of any government action which infringes upon existing Aboriginal and treaty rights. However, both the rights and the Crown's undertaking are *pre-existing*. Moreover, to the extent that the justification framework obliges the courts to determine, after the fact, whether the Crown has acted disloyalty, the Crown's obligations are cast in the negative. The justificatory framework is therefore proscriptive rather than prescriptive.[128]

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[126]By which is meant that the Crown either: extended its protection to them, and their lands, in return for relinquishing any claim to independent sovereign status, or, unilaterally took up "the mantle of protector" by simply exercising the powers of governance over them, or both.

[127]*Van der Peet*, *supra* note 68 at 320.

[128]See *contra* Rotman, *supra* note 22 at 253. In support of his contention that the Constitution raises an obligation on government "to actively and purposively promote or further the rights protected within s. 35(1)", at p. 129 Rotman cites the following passage from Dickson C.J.'s judgment in *Sparrow*:

> [t]he 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 (*Sparrow*, *supra* note 67 at 1106).

While Rotman concedes, at p. 260, that the Supreme Court did not "explain what this finding means in practical terms", he nonetheless goes on to conclude, at p. 263, that it requires that "the Crown's fiduciary duty to aboriginal peoples should be purposively applied", which he in turn equates to the "prescriptive" view of fiduciary doctrine (see p. 262). As we have seen, that view of fiduciary duty, which focuses the court's attention on

In fiduciary terms, the undertaking which is presumed to lie at the heart of the Crown-Aboriginal relationship is very wide indeed. However, what must be borne in mind is that the duty of loyalty will only have application where the Crown has a discretion or power to be exercised in relation to the interests it undertook to protect. The rationale for this latter conclusion lies in the fact that the fiduciary relationship, in and of itself, does not give rise to a duty to advance Aboriginal interests; rather the duty of loyalty requires that the Crown not use any of the discretionary powers it possesses in relation to Aboriginal interests to advance conflicting objectives. This explains why the Supreme Court has affirmed that not all the Crown's dealings with Aboriginal peoples will be impressed with fiduciary obligations.[129] The difficulty, of course, is that the

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"whether or not the beneficiary's interests had in fact been served", was expressly rejected by Finn as raising an impossible standard.

In *Van Der Peet*, *supra* note 68 at 301-02, Lamer C.J. explains what is meant by the term "purposive" in language which makes it clear that what is being referring to is the approach which courts must adopt when determining whether a particular right is deserving of s.35(1) protection. Under a "purposive" approach a court is required to give a generous and liberal interpretation to s.35(1) and resolve any doubts or ambiguities in favour of Aboriginal peoples. While such an approach is considered to be in keeping with the fiduciary relationship and the honour of the Crown, it does not alter the nature of the interests which the Crown undertook to protect; rather it is merely an interpretative guide to be applied when attempting to identify the nature and scope of those interests. Indeed, as we saw in Chapter five, the Supreme Court appeared to expressly reject the positivist or prescriptive view of Aboriginal rights in *Nikal*, *supra* note 77, and *R.* v. *Lewis*, [1996] 1 S.C.R. 921, by refusing to accede to the Aboriginal appellants' argument that the Crown was under a positive obligation to "secure the fishery for the Indians" in order to advance their Aboriginal fishing rights. See also *Perry* v. *Ontario*, [1997] O.J. No. 2314 (C.A.) (QL), where the Ontario Court of Appeal concluded that, there is no positive fiduciary duty on the Crown to negotiate with Aboriginal groups for the purpose of reaching consensus concerning proposed game and fish enforcement measures.

[129]See *National Energy Board*, *supra* note 80 at 147 citing *Lac Minerals*, *supra* note 80, as well as the discussion of this issue in relation to notes 61 and 154 of Chapter five. As

Supreme Court has failed to categorically identify the undertaking which is at the heart of the Crown-Aboriginal relationship. To the extent that the role of government is pervasive in our society it very difficult to predict when the exercise of government power will have a fiduciary consequence.

The uncertainty surrounding the composition and scope of the presumed undertaking, coupled with what can only be described as a misunderstanding of the fiduciary principle, may in part explain the high level of confusion concerning the nature and extent of the Crown's fiduciary responsibilities. In this regard, some now contend that the Crown is under "a positive duty ... to act in the best interests of First Nation peoples", which duty obliges the Crown to act in "a positive role, as an advocate" for "the protection of "inherent, aboriginal and treaty rights".[130] Indeed, the Royal Commission appears to have fallen into the same trap in suggesting that "the fiduciary duty to Aboriginal peoples involves both positive and negative obligations" and that, in addition to those duties which have been upheld in the courts, the federal government "has a positive obligation to take steps necessary to the full realization of existing Aboriginal rights".[131] The positive fiduciary obligations articulated include, reversing the state of

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Flannigan correctly observes, *supra* note 122 at 51, "[a] relationship is fiduciary only in its 'fiduciary' aspects. A person will have fiduciary obligations in the same way he or she has 'contractual' obligations."

[130]Assembly of First Nations "White Paper", *supra* note 42 at 1-2, 10.

[131]Canada, Royal Commission on Aboriginal Peoples, *Report: Perspectives and Realities*, vol. 4 (Ottawa: Queen's Printer, October 1996) [hereinafter *Royal Commission Report*, vol. 4] at 296.

Aboriginal "dependence and underdevelopment" and "foster[ing] self-reliance and self-sufficiency among the treaty nations",[132] enacting legislation "to give Aboriginal peoples access to a remedy in Canadian courts for breach of Canada's international commitments to them,[133] and "actively promot[ing] Aboriginal involvement in provincial forest management and planning".[134]

While few would now take issue with the position that the Crown owes duties to the Aboriginal peoples of Canada, some uncertainty remains as to whether the fiduciary construct offers the best or only means of ensuring that those duties are upheld. In this regard, it is submitted that, in assessing the potential impact of the fiduciary characterization of the Crown-Aboriginal relationship, we must be mindful of the fact that the fiduciary construct has inherent limitations. Since it acts as a default scheme of regulation, the fiduciary principle should not be viewed as an independent source of rights. Nor will it cure all the ills which have traditionally plagued the Crown-Aboriginal relationship. Having said that, it must be appreciated that, in theory, the very existence of the fiduciary doctrine should serve to ensure that the Crown does not act in a manner which conflicts with the interests to be served. In this respect, the challenge for those who would uphold the Crown-Aboriginal relationship lies in ensuring that the fiduciary construct operates as it was intended. In view of the fact that the Crown, as a

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[132]*Royal Commission Report*, vol. 2 *supra* note 18 at 44.

[133]*Ibid.* at 174, Recommendation 2.3.1.(b).

[134]*Ibid.* at 641.

government, has many other unavoidable obligations and responsibilities, this is considered to be an onerous task indeed.

ii. The Need for A Doctrinal Certainty.

If current academic discourse on the subject is reflective of a wider disenchantment with the fiduciary characterization of the Crown-Aboriginal relationship, then a consensus would seem to be emerging to support the conclusion that "the potential for the fiduciary obligation to regulate the Crown-Aboriginal relationship had not been realized".[135] In this respect, it may be time to give serious consideration to the charge that, in expanding the fiduciary principle beyond the confines of its traditional preserve, the courts have seriously compromised the doctrine to the point of ineffectiveness.

As previously observed, in recent years our courts have looked to the fiduciary construct in an attempt to apply the "rationale of accountability" to an expanding list of relationships which had not previously been defined in equitable terms.[136] Some writers

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[135]O.B. Griffiths, "Case Comment on *Blueberry River*: Is the Crown Fiduciary Obligation in the Currents of Change?" [1996] 3 C.N.L.R. 25 at 26.

[136]McDougall, *supra* note 74 at 170, ascribes this trend to the proactive role thrust upon the Canadian judiciary by the *Charter of Rights and Freedoms*. As Finn observes, *supra* note 115 at 2, some have even gone so far as to argue that "society is evolving into one based predominantly on fiduciary relations". In keeping with this view, it has been suggested that the Crown may be a "fiduciary for the people of Canada" to protect public lands from environmental degradation (see D.W.M. Waters, "The Role of the Trust in Environmental Protection Law" in D.M.W. Waters, ed., *supra* note 74, 383 at 385); whereas Slattery, *supra* note 10 at 270, contends that "the division of powers between the Federal Government and the Provinces constitutes a fiduciary structure under which regional communities are guaranteed a large degree of autonomy over their own affairs, without the possibility of outside interference". Rotman, *supra* note 22 at 176, argues *contra* that "[n]ot all relationships in society are fiduciary relationships" and that "relations

suggest that our judges are guilty of "stretching the fiduciary concept into shapes that were never originally intended".[137] Others argue that recent developments "have pushed the law into an uncertain state"[138] and ask "how far the principle will be permitted to degrade?"[139] La Forest J. has himself acknowledged that "the creative application of the fiduciary concept in areas of the law heretofore unfamiliar to the fiduciary principle" has raised a "number of problems [which] will require further working out".[140]

One particular focus of concern pertains to the efforts of the Supreme Court "to define in abstract terms the criteria which characterize a fiduciary relationship"[141] - a development discussed in general terms in Chapter two. As Rotman succinctly observes, "[i]t is not enough to describe a relationship as fiduciary if the ramifications of such a description are not readily evident or forthcoming".[142] In this respect, the Court has yet to clear up the confusion surrounding the fundamental question of when a fiduciary

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which are not fiduciary in nature should not be labelled as fiduciary merely to enable the application of a remedy to a wronged party". See Chapter two, in particular the discussion in relation to the portions entitled "The Modern View - A Canadian Perspective" and "Trends and Tendencies - The Future of the Fiduciary Principle".

[137]J.R.M. Gautreau "Demystifying the Fiduciary Mystique" (1989) 68 Can. Bar Rev. 1 at 5. Also see Finn, *supra* note 115 at 2.

[138]Flannigan, *supra* note 122 at 52.

[139]McDougall, *supra* note 74 at 171.

[140]G.V. La Forest J., "Overview of Fiduciary Duties" (The 1993 Isaac Pitblado Lectures) 1 at 20.

[141]Flannigan, *supra* note 122 at 52.

[142]L.I. Rotman, "Preface" in Rotman, *supra* note 22 at ix.

relationship may be said to arise outside of the traditional fiduciary classifications.[143] The outcome may well impact on our view of the Crown-Aboriginal relationship.

As noted in Chapter four, there is considered to be some doctrinal support for the proposition that the Crown-Aboriginal relationship should be assessed according to fiduciary principles. However, doubts remain as to whether such a finding is consistent with the test laid down in *Hodgkinson* - if that is indeed the requisite standard. To the extent that La Forest J.'s judgments in *Lac Minerals* and *Hodgkinson* may be said to be indicative of the Court's current thinking on the issue, then perhaps we need to critically examine whether, based on the historic record, it can reasonably be said that the Crown ever agreed to relinquish its own self-interest and act "solely" on behalf of the Aboriginal peoples of Canada, and if so, whether it did so in relation to all or only some Aboriginal interests. In this latter regard, it is submitted that the presence of what amounts to a long-standing, systemic conflict of interest must be taken into account in determining what is "reasonable".

In this vein, the Supreme Court's apparent move to a "reasonableness" standard may well be significant, to the extent that it suggests that the Court is not prepared to hold the Crown to a strict fiduciary standard in relation to all Aboriginal interests. Is the Court meaning to say that the Crown's undertaking was a qualified one, that "reasonable"

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[143]The problem is explained by Rotman, *Ibid.* at 160, in the following terms:

> [t]he failure of the judiciary to engage in serious analysis of fiduciary theory has prevented it from recognizing the limits of the application of fiduciary doctrine. The judiciaries use of fiduciary doctrine in inappropriate scenarios has, in turn, produced a multitude of decisions which only further confuse the issue of the proper scope of the application of fiduciary law.

limits must be read into that undertaking given this particular fiduciary's governing role? If so, it may be relevant to observe that, the Court's adoption of the "reasonableness" approach has been most evident insofar as the Aboriginal and treaty rights recognized and affirmed under s.35(1) of the *Constitution Act, 1982*, are concerned. In de-emphasising the no-conflict rule in this context is the Court signalling its intent to abandon the fiduciary construct in favour of subjecting s.35(1) rights to the same sorts of considerations which apply to the rights and freedoms contained in the *Charter of Rights and Freedoms*?[144] Is the Court, moving to make the fiduciary doctrine all but irrelevant in these circumstances?[145] At this point, there are no apparent answers to these questions - questions which highlight the need for our courts to clearly define the criteria which render a relationship "fiduciary" in a way which lends certainty to the relationships and obligations which bear the fiduciary label. Clearly, further guidance is required if the potential of the Crown-Aboriginal relationship is to be realized.

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[144]If the standards of analysis which currently appertain in *Charter* cases are to be applied to breaches of s.35(1), then what does this say about the utility and future of the fiduciary construct in this context? Is it superfluous?

[145]Rotman, *supra* note 22 at 149, suggests that fiduciary law is "misapplied" in situations "where heads of obligation exist independently of the fiducial relation". He does not venture an opinion on whether s. 35(1) constitutes an independent source of obligations or whether fiduciary law has been misapplied in this context.

iii The Future of the No-Conflict Rule.

A related concern pertains to "the apparent relaxation of the strictness of fiduciary responsibility by some judges".[146] This tendency is particularly apparent in relation to the approach being taken to the no-conflict rule within the context of the Crown-Aboriginal fiduciary relationship. For example, we have observed how, in a number of the cases assessed in Chapter five, the courts have elected to decide issues in ways which deny or minimize the existence of conflict. In some instances, judges have effectively read down specific duties by focusing on the more general duties which the Crown has by virtue of its status as a fiduciary. However, enforcing the Crown's general responsibility to act in a fiduciary capacity which, as we saw in Chapter four, really means acting with "utmost loyalty" by upholding the Crown's "high standard of honourable dealing", has itself proven problematic.[147] Moreover, a "relaxed" view of the proscription against a fiduciary having other duties which may conflict with the interest to be served, appears to be emerging through an acknowledgment that the Crown may balance competing interests in assessing and discharging its duties.

This latter tendency first surfaced in the judgment of Urie J., in *Kruger* v. *The Queen*, in connection with the sufficiency of compensation paid in consequence of the

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[146]Flannigan, *supra* note 122 at 52.

[147]As noted in Chapter five, aside from a handful of cases which have commented on the manner in which the Crown has conducted itself in relation to litigation, the courts have been reluctant to recognize and give meaning to the general obligation.

expropriation of reserve lands.[148] Moreover, the notion that "reasonable" limitations on Aboriginal and treaty rights may constitute an acceptable means of pursuing objectives of "compelling and substantial" importance to all Canadians appears to have gained the support of the Supreme Court in recent years.[149] In light of this particular development, it would seem that the test is not whether the Crown is in a conflict, but whether it unreasonably placed itself in conflict.[150]

Hutchins and Schulze offer an underlying explanation for the "watering down" of the fiduciary doctrine in the Aboriginal context which is suggestive of a fundamental attitudinal shift. In this respect, they observe that,

> [f]or some reason, the Crown is now beginning to be perceived as the defender of the public interest, or 'the public as a whole', against a perceived Aboriginal onslaught. This encourages a tendency towards a minimalist approach to the questions of when fiduciary obligations arise and where those obligations attach. This is unfortunate. It neither does honour to, nor will it heal, our body politic.[151]

While it is presumed that the Supreme Court acted on the grounds of necessity, having regard to the Crown's unique status, to date it has not explained how its relaxed approach to the no-conflict rule serves to uphold the rationale of accountability.[152] As a result, one

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[148](1985), 17 D.L.R. (4th) 591, [1986] 1 F.C. 385 [hereinafter *Kruger* cited to D.L.R.] (F.C.A.).

[149]See in particular *Badger*, *supra* note 77; *Nikal*, *supra* note 77; and, *Gladstone*, *supra* note 77. These cases are discussed in detail in Chapter five.

[150]Bryant, *supra* note 1 at 44.

[151]Hutchins and Schulze, *supra* note 47 at 137.

[152]In this regard, a number of writers, including Bryant, *supra* note 1 at 44, have argued that while the justification framework represents "an unusual qualification to the conflicts rule given its strict interpretation in fiduciary law ... such a flexible approach may be

is left in some doubt as to the future of the no-conflict rule, and by implication, the future viability of the fiduciary doctrine in the Crown-Aboriginal context. Indeed, it is difficult to see how the rationale of accountability is maintained under a justification framework which allows the Crown to infringe Aboriginal rights based on a consideration of what may reasonably be required to advance other "compelling and substantial" objectives.

In this vein, it is important to recall that a fiduciary's loyalty is ordinarily focused on one beneficiary and that that loyalty "precludes equally faithful service to another beneficiary with conflicting interests".[153] The rationale for the no-conflict rule is decidedly practical in nature:

> fiduciary norms lose their bite when they are imposed on behalf of beneficiaries whose interests systematically conflict. If fiduciary norms are overextended, that vitiates their force and their undergirding of commitments to act loyally, leaving a residue of empty, albeit emphatic, rhetoric.[154]

It might well be asked whether we have now reached this point in the evolution of the Crown-Aboriginal relationship given that, "more often than not, the Crown and aboriginals are adversaries, suggesting the opposite of a fiduciary relationship, where the existence of a conflict between fiduciary and principal is a *prima facie* breach of the duty"?[155]

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necessary, since the Crown often cannot avoid putting itself into conflict".

[153]D.A. DeMott, "Fiduciary Obligation Under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal" (1992) Osgoode Hall L.J. 471 at 479, where the author goes on to point out that unlike an altruist, "a fiduciary gets one dog in each fight".

[154]*Ibid.* at 497.

[155]Bryant, *supra* note 1 at 23.

Judicial acceptance for the proposition that the Crown can have regard to other competing interests and obligations may well reflect the reality of the Crown's position but makes a mockery of the fiduciary principle. In this respect, any suggestion that "the particular fiduciary obligation to avoid a conflict of duties cannot functionally be applicable to the Crown",[156] calls into question the efficacy of the fiduciary construct in this context, and the rationale for continuing to use that model to qualify the Crown-Aboriginal relationship and all derivative duties. Indeed, one might well ask what value the fiduciary construct has, as a "guiding principle", without the ability to enforce the duty of loyalty in conflict situations?[157]

While it is apparent that the courts have yet to come to terms with the application of the no-conflict rule in the Crown-Aboriginal context, given its fundamental nature, the wholesale abandonment of the no-conflict rule hardly seems likely.[158] It is therefore assumed that the courts will be required to enter into a critical examination of the Crown-Aboriginal relationship, with a view to assessing whether the rationale of

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[156]Waters, *supra* note 40 at 420.

[157]Rotman, *supra* note 22 at 270, balks at any suggestion that the rule against conflict of interest be removed "from Crown-Native fiduciary relations altogether" arguing that this would be "outright dangerous to the interests of aboriginal peoples as the rule provides them with much needed protection against the actions of the Crown".

[158]Bryant, *supra* note 1 at 43-44, canvasses the possibility of "admitting the functional inapplicability of the rule to the Crown-aboriginal relationship". He concludes that, while the existence of a conflict with other Crown interests is "unavoidable", the rule is "too fundamental to fiduciary obligations to risk its removal".

accountability should be used to assess the Crown's conduct in relation to all, or only some, Aboriginal interests.

Based on the case summaries presented in Chapters four and five, the fiduciary doctrine would appear to be most effective in those situations where the Crown has an obvious, clearly defined, discretion to be exercised in relation to the specific interests of a particular Aboriginal beneficiary. For example, in consequence of the proposition of inalienability, it may be said that the Crown has certain defined obligations in relation to the Aboriginal title interest whenever a surrender occurs. In this regard, it is submitted that if the fiduciary doctrine is to have meaning in the Crown-Aboriginal context then the no-conflict rule must, as a minimum, be enforced in relation to those interests in respect of which it may reasonably be said that the Crown owes exclusive, specific duties. To the extent that it is considered that a modified approach to the no-conflict rule is appropriate in other contexts, then our judges must validate that approach having regard to the basic tenets of fiduciary law.[159]

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[159]Bryant, *Ibid.* at 49, argues that "[l]awyers and jurists must engage in a 'cut and paste' job which highlights components of fiduciary law unsuited to the Crown-aboriginal context, altering and removing rules that unavoidably conflict or are otherwise inappropriate". While Bryant correctly identifies a critical need, it is presumed that he is not advocating the abandonment of those features of the fiduciary construct which serve to maintain the rationale of accountability. In this respect, Rotman, *supra* note 22 at 270, emphasizes that "[t]he permissible range of exceptions under any justificatory test must be consistent with the theoretical basis of the conflict-of-interest rule's general prohibition of fiduciaries' actions which contravene their beneficiaries' interests".

iv. Unique In What Sense?

The *sui generis* label, which Dickson J. first choose to affix to the Crown-Aboriginal fiduciary relationship in *Guerin*, and which has since been used to describe Aboriginal rights, including the Aboriginal title interest, has been the subject of no little debate in recent years. As Binnie points out, the term is really a "non-description", which "has been repeated in subsequent cases as if repetition will make it into a definition as opposed to an adamant refusal to essay a definition".[160]

Perhaps the label is simply too convenient? While it has allowed courts the flexibility to develop their interpretation of the relationship in accordance with its "spirit and intent", it has also been blamed for the "protracted ambiguities, silences and inconsistencies" in the case law.[161] Indeed, as we have seen in Chapter five, without necessarily acknowledging that they are doing so, courts in the post-*Guerin* era "have interpreted Crown obligations in a manner which has lessened the fiduciary aspects of the relationship and increased its *sui generis* nature".[162] In this respect, the *sui generis* label has little to commend itself in a relationship which is already suffering from a lack of doctrinal certainty.

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[160]Binnie, *supra* note 69 at 221-22.

[161]Waters, *supra* note 40 at 425. Salembier artfully describes it as "a black hole in the universe of Native law, a mysterious object of irresistible attraction to Native law theorists and practitioners alike" (J.P. Salembier, "Crown Fiduciary Duty, Indian Title and the Lost Treasure of I.R. 172: The Legacy of *Apsassin* v. *The Queen*" [1996] 3 C.N.L.R. 1 at 17).

[162]D.P. Owen, "Fiduciary Obligations and Aboriginal Peoples: Devolution in Action" [1994] 3 C.N.L.R. 1 at 22.

The courts must respond to the need to give greater meaning to the relationship, and the responsibilities of each party, by explaining what it is about the Crown-Aboriginal relationship which is unique and declaring how that uniqueness impacts upon the application of fiduciary principles. As a minimum, it is considered that the relationship is unique because it encompasses "the range of areas in which the Crown has had and continues to have contact with Native peoples".[163] However, to the extent that there are a large number of distinct Aboriginal groups, each having their own uniquely historic relationships with the Crown, this minimum content view of the term *sui generis* really does not assist us much. The *sui generis* label must be applied in a way which gives meaning and certainty to the relationship or forsaken in favour of a more certain characterization.

In some cases, the latter option may well represent the best solution. For example, to the extent that the Aboriginal title interest approximates a proprietary interest, there may well be some benefit to abandoning the *sui generis* label and moving towards a trust model to define the duties of the Crown in relation to that particular interest. As Wilson J. observed in *Guerin*,

> [t]here is no magic to the creation of a trust. A trust arises, as I understand it, 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.[164]

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[163]Rotman, *supra* note 22 at 283.

[164]*Guerin*, *supra* note 72 at 355.

It has been suggested that the existence of a trust was denied in *Guerin* "on the basis of a misunderstanding of the United States jurisprudence, and certainly due to a misunderstanding of the nature of the Indian interest in surrendered lands".[165] More specifically, it has been argued that "the trust concept was unnecessarily put aside in *Guerin*" on the mistaken assumption that a personal interest in land could not form the basis of a trust.[166] In this latter regard, Waters makes the point that "a personal interest, less than an equitable estate, is an acceptable beneficial interest for the purposes of a trust".[167] Indeed, whether or not one chooses to characterize the Aboriginal title interest as a legal or beneficial interest, it remains that the Aboriginal title interest is capable of being quantified, which is typically what happens when a surrender for sale or lease is being considered. In this respect, few would dispute the fact that the interest may be assigned a proprietary value.

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[165]R.H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990) at 199. Bartlett observes, at p. 197, that in its factum, the appellant Indian band had relied on American case law in support of the proposition that the Crown should be considered a trustee in the private law sense. While the Band's arguments were evidently unsuccessful, they ultimately proved persuasive in the United States. In this respect, Bartlett points out that at the time *Guerin* was decided, in the United States "the rationale of accountability had not crystallized in the way that it did immediately thereafter" in the United States Supreme Court. He concludes that the Court in *Guerin* "proceeded on a flawed understanding of the United States jurisprudence".

[166]Waters, *supra* note 40 at 423.

[167]*Ibid.* at 423. Waters cites examples from private trust law including *Moore* v. *Royal Trust Co.*, [1956] S.C.R. 880, where a "mere personal licence to live in a particular house was accepted by the Supreme Court as a valid beneficial interest" for the purposes of a trust. Similarly, Salembier, *supra* note 161 at 19, concludes that "all property, including equitable and legal interests in realty and personalty, can form the subject matter of trust".

Waters argues that "a declared trust relationship" would better serve the requirements of each party and suggests that a trust relationship can still be achieved through legislative change.[168] In a similar vein, Salembier recommends that,

> in order to construct a sustainable rationale for future dealings in Indian lands, both within the confines of the *Indian Act* and under future self-government legislation, the Court should set aside Dickson J.'s analysis and adopt a proprietary model for the Indian interest.[169]

The latter proposal may not be as far farfetched as it might, at first blush, seem. Indeed, the Supreme Court may now be in the process of rethinking itself if Gonthier J.'s characterization of a surrender as a "*variation of a trust in Indian land*" in *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)* can be considered indicative.[170] In this respect, it is hoped that the Supreme Court will take the opportunity to reconsider the application of the *sui generis* characterization when it considers the appeal in *Delgamuukw*.[171]

While the adoption of the trust model would probably have little immediate impact - inasmuch as a trustee is also a fiduciary and "because, in all practical respects, the Crown is held to the standards of a true trustee in such circumstances anyway" - there is

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[168]Waters, *supra* note 40 at 424-25.

[169]Salembier, *supra* note 161 at 38 at 19.

[170][1995] 4 S.C.R. 344; 130 D.L.R. (4th) 193 [hereinafter *Blueberry River* cited to D.L.R.]. The point is discussed in greater detail at notes 77 and 89 of Chapter five.

[171]As Salembier, *supra* note 161 at 24, correctly observes, "the lower courts will continue to echo the *sui generis* mantra in situations that call for a touch of judicial mysticism to justify a departure from established practice, until the Supreme Court ventures a clear and unambiguous definition of Indian title or, at the very least, the nature of the Indian interest in reserve land".

arguably some benefit to creating a stronger theoretical basis for the Crown's role insofar as surrendered land is concerned.[172] Waters argues that such a move would provide certainty concerning the "confines" of the Crown's powers as a fiduciary, and the nature of the liabilities owed, while at the same time providing greater "direction to the Indian peoples in their acknowledged aspirations".[173] Moreover, by equipping Crown administrators with a clearer definition of their roles and responsibilities as trustees for the Aboriginal title interest, it may be possible to insulate them from the negative effects which the sorts of internal government conflicts present in the second type of paradigm situation described in Chapter one, can generate.

The *sui generis* label, which is more convenient than descriptive, has proven singularly unsatisfactory in the Aboriginal context. In this respect, the process of "assessment of the Crown-aboriginal fiduciary relationship requires a creative and purposive approach to remedying and modifying its many *sui generis* aspects".[174] To the extent that the parties have a right to some level of certainty, concerning the rights and responsibilities which may be said to derive from a fiduciary characterization, more meaningful ways must be found to describe the salient features of the Crown-Aboriginal relationship.

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[172]*Ibid.* at 20.

[173]Waters, *supra* note 40 at 424. In a similar vein, Bryant, *supra* note 1 at 44, predicts that, "[o]nce the *sui generis* nature of the relationship is refined and circumscribed, the remedies available via fiduciary-like analysis will be invaluable to the achievement of justice for aboriginal peoples".

[174]Bryant, *supra* note 1 at 48-49.

v. Measures to Limit Conflict and Enhance Government Integrity and Accountability.

As we have seen, some sources of conflict are implicit in our philosophy of the role of government. Conflict is also evident in the process by which policy is formulated. Ways must be found to restore confidence in the ability of government to uphold the Crown-Aboriginal relationship. To that end, the government must work to ensure that those whose responsibility it is to discharge the Crown's lawful fiduciary obligations are shielded from obvious sources of conflict through the devolution of responsibility and the implementation of organizational reforms.[175] To the extent practicable, it must also work to eliminate longstanding sources of irritation in the Crown-Aboriginal relationship. Each of these requirements will now be discussed in turn.

a. The Devolution of Responsibility.

The current approach of assigning one federal department - the Department of Indian Affairs and Northern Development (DIAND) - primary responsibility for discharging the Crown's duties in relation to the Aboriginal title interest in reserve lands is considered to be consistent with the objective of certainty which the trust model features. But does this approach offer a sufficient guarantee that the government officials who exercise the Crown's discretion in relation to that and other Aboriginal interests will

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[175]While the focus of our attention is directed towards the federal government, it is recognized that provincial governments also have the ability to adversely affect the Aboriginal interests protected by the Crown-Aboriginal fiduciary relationship. In this regard, the proposals discussed in this portion of the chapter could be duplicated at the provincial level, with such necessary modifications as may be appropriate in the circumstances.

be insulated from the systemic sources of conflict which were identified at the outset of this chapter?

Arguably, the potential for conflict will never disappear so long as the government has a managerial role to play in relation to Aboriginal interests. In this respect, the best approach to conflict avoidance may well involve the Crown turning over the discretion it currently exercises in relation to the Aboriginal title and related Aboriginal interests, to a third party. In this respect, the *Royal Commission Report* has recommended adopting an approach to self-government which would result in Aboriginal governments assuming jurisdiction over a number of core interests which are "of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity".[176] Aboriginal lands, waters and natural resources are included in the list of subject matters which it recommends fall under Aboriginal jurisdiction.[177] Where an Aboriginal nation chooses to assume jurisdiction over such interests the federal government would no longer exercise its responsibilities under the Indian Act, including its obligations in relation to "governance and community servicing".[178] It stands to reason that the self-governing Aboriginal body concerned would assume the fiduciary responsibilities which the

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[176]*Royal Commission Report*, vol. 2 *supra* note 18 at 215. The *Royal Commission Report* acknowledges, at p. 5 of vol. 2, that "Aboriginal people are not a homogeneous group, and it seems unlikely that any one model of self-government will fit all First Nations, Métis people and Inuit. The basic principles, however, should be settled by negotiations; the flexibility should be in their application."

[177]*Ibid.* at 217. The Royal Commission defines the term "Aboriginal lands" to include both "reserve and settlement lands" (p. 578 refers).

[178]*Ibid.* at 360.

government currently exercises in these areas, in much the same way that Indian Chiefs and Band councillors currently assume fiduciary responsibilities when they exercise management and control over specific band assets and funds on behalf of Band members.[179]

Some have questioned whether the Crown, as a fiduciary, acts properly when it delegates its responsibilities.[180] On a strict reading of fiduciary principles the answer is probably no. However, that is not what the Crown would be doing in these circumstances. Rather, it would be acting pursuant to the directions of the Aboriginal group concerned to, in effect, cease acting as a fiduciary in relation to a specified Aboriginal interest or interests.[181] On the direction of the membership of that Aboriginal group, the Crown's discretionary powers would then be assumed by Aboriginal government administrators. In this respect, there is nothing in law which would preclude a beneficiary from directing that a fiduciary quit exercising its discretion in relation to a particular interest, nor prevent that beneficiary from requesting that control over that interest be transferred to a third party, who would then assume the responsibilities and duties of a fiduciary for that limited purpose.

Inasmuch as the preceding approach depends entirely on the consent of the Aboriginal beneficiaries, it may be unduly optimistic to suggest that the Crown will ever

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[179]See *Campbell* v. *Cowichan Band*, [1988] 4 C.N.L.R. 45 (F.C.) and *Leonard* v. *Gottfriedson* (1980), 21 B.C.L.R. 326 (B.C.S.C).

[180]Waters, *supra* note 40 at 419.

[181]"As the Native peoples are the sole beneficiaries of the Crown's fiduciary obligations stemming from their relationship, they alone possess the ability to terminate the relationship" (Rotman, *supra* note 22 at 257).

be fully able to divest itself of its fiduciary obligations in relation to the Aboriginal title or other interests over which DIAND, or other federal or provincial departments, currently exercise discretionary powers. To the extent that the Crown will continue to have a fiduciary role to play in relation to such interests, it may be appropriate to consider institutional changes to the manner in which the Crown discharges its fiduciary obligations with a view to eliminating or minimizing the potential for conflict in the Crown-Aboriginal relationship.

b. A Model for Minimizing the Impact of Systemic Conflict on the Exercise of the Crown's Discretion.

As noted at the outset of this chapter, the Aboriginal peoples of Canada have been traditionally and uniquely vulnerable to the exercise of the Crown's powers in situations where the interests of the Crown have conflicted with Aboriginal interests. The problem of conflict is pervasive in the sense that it is embedded in the philosophy and processes of government. Moreover, it has undermined the ability of government to live up to its responsibilities.

Under our present system of government many of the sources of conflict in the Crown-Aboriginal relationship are, or are presumed to be, unavoidable. Having said that, it must also be observed that the fiduciary construct exacts loyalty by requiring that fiduciaries not engage in activities which conflict with the interest to be served. This proscription is considered to have implications for the structures of government itself. In this respect, logic would seem to dictate that the Crown must take steps to organize itself in ways which are designed to eliminate or minimize the potential for conflict in the

Crown-Aboriginal relationship. In practical terms, this would involve ensuring that the organizational structure of those governmental bodies having primary responsibility for discharging the Crown's obligations to the Aboriginal peoples of Canada are insulated from internal, systemic sources of conflict. Arguably, the organizational challenge can only be met by enhancing the independence of those governmental organizations in ways which will ensure that they are in a position to exercise their various discretions, in relation to Aboriginal interests, free from undue influence. At the same time, it must be recognized that government must be free to set policy in a way which ensures that the managers who exercise the Crown's discretions are held accountable for their actions. The challenge is in balancing the twin notions of independence and accountability.

One means of achieving the requisite degree of independence would be to assign the responsibility to administer the Crown-Aboriginal relationship to one independent government agency or Department. The key word is independence. Much as a federal Crown prosecutor must not be influenced by political considerations when exercising his discretion in relation to the charge laying function,[182] the governmental officials employed in such an agency would have to have the primary responsibility and mandate to discharge the discretionary responsibilities associated with the Crown-Aboriginal fiduciary

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[182]Canada, Attorney General of Canada, *Prosecution Policy of the Attorney General of Canada: Guidelines for the Making of Decisions in the Prosecution Process* (Ottawa: Ministry of Supply and Services, 1993). See in particular chapter 1. entitled "The Decision to Prosecute".

relationship within a structure which would insulate them from the systemic sources of conflict referred to at the outset of this chapter.[183]

To ensure independence, it is deemed essential that government officials working in this new agency have the latitude to exercise the Crown's discretion in individual cases free of undue influence or pressure. In this respect, other government bodies would be statutorily prohibited from issuing specific directions concerning the discharge of any discretionary power in relation to a specific Aboriginal interest, unless this was to be done publicly. To further enhance its independence, the agency could be headed by a Governor in Council appointee who would serve for a fixed term - perhaps on the joint recommendation of the the leaders of national Aboriginal organizations and the minister

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[183]The independent prosecutor model is considered analogous. Its structure is designed to insulate the exercise of a discretion - in that case the prosecutorial discretion - from sources of undue influence, including political intervention. The notion of independence which underscores the independent prosecution service model refers to organizational independence and should not be confused with the concept of judicial independence. The independent prosecutor model is now in place in the Province of Nova Scotia. Similarly, the Law Reform Commission has recommended that the federal government establish a Director of Public Prosecutions to "ensure the independence of the prosecution service from partisan political influences and reduce potential conflicts of interest within the Office of the Attorney General" (Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62 (Ottawa: Supply and Services Canada, 1990) at 115, Recommendation 1.). Of note, in its recent report to the Prime Minister, the Special Advisory Group on Military Justice and Military Police Investigation Services, which was chaired by the Right Honourable Brian Dickson, recommended that the Canadian Forces appoint an independent Director of Prosecutions" to "ensure the independence of the prosecutorial function and reduce potential conflicts of interest" (Canada, Department of National Defence, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: Queen's Printer, 14 March 1997) at 26, Recommendation 8). This particular recommendation has been accepted by the Prime Minister and is now in the process of being implemented.

or Agency head who, like an Attorney General under an independent prosecutor model, would be responsible for formulating policy of general application.

Although it is anticipated that most discretionary powers which are currently exercised by the Indian affairs branch of government would be assumed by the newly created government agency, it is acknowledged that many other government departments are also in a position to influence Aboriginal interests. In this regard, it is suggested that the destabilizing effect of conflict be mitigated by creating an oversight role for officials in the new agency which would allow them a measure of control over the fiscal resources which other Departments currently rely upon to deliver services to Aboriginal communities in Canada.

While the new agency would be accountable for its actions, accountability would have to be established in ways which did not undermine the independence of its role and mandate. For example, while the head of the agency would exercise sole managerial control over agency officials in their day-to-day activities, those officials would also be required to comply with <u>general</u> government policy directives concerning the administration and delivery of services, and the overall discharge of the fiduciary duties appertaining to the Crown-Aboriginal relationship.[184] Therefore, to the extent that the

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[184]The Interdepartmental Working Group Report, *supra* note 26, filled a void when the first draft was introduced in 1994. The existing version dates to 1995. The overall effect of the report is difficult to gauge. Because it expressly indicates that it is not intended as a statement of federal government policy one suspects that the guidance contained therein may be subject to uneven application. In this respect, it may be a little like a bank manager circulating a post-it note to the bank's tellers instructing them to watch out for and give preferred customer treatment to a particular client - one might well wonder whether, almost two years later, the message is still being acted on? It is considered that

government of the day would continue to set policy of general application, the officials who would be employed in this independent government agency would be responsive to government in a way which would enhance accountability. Moreover, the head of the agency could be required to submit an annual report to Governor in Council, to describe the agency's operations during the previous year and report on the state of the Crown-Aboriginal relationship.

In fact, a number of these features are incorporated in recommendations contained in the *Royal Commission Report*. In this respect, the Commissioners have recommended that a new "Indian and Inuit Services" department be established which would "be responsible for delivery of the government's remaining obligations to status Indians, Inuit and reserve communities under the Indian Act".[185] Under the Royal Commission model of government, the policy making function would, however, be assumed by a new Department of Aboriginal Relations, which would "guide all federal actions associated with developing and implementing the new federal/Aboriginal relationship".[186] Among its other responsibilities, that latter department would negotiate "renewed and new treaties with Aboriginal nations".[187]

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the necessary guidance concerning managerial duties should be conveyed in a policy format and circulated in a manner which will facilitate compliance. Moreover, in light of more recent case law, the sections of this report which relate to the role and responsibilities of the Crown in the litigation context need to be enhanced.

[185]*Royal Commission Report*, vol. 2 *supra* note 18 at 365-66.

[186]*Ibid.* at 363.

[187]*Ibid.* at 365. That particular responsibility would be carried out by a "Crown treaty Office".

While these latter recommendations would result in an structured approach which would, in many ways, be similar to the model being contemplated here, it is considered that the proposed "Indian and Inuit Services Department" would lack the requisite level of independence in its day to day operations. In this respect, it is important to recognize that the structural model which the Royal Commission is advocating would place control in the hands of a new Department of Aboriginal Relations rather than in the hands of those who would actually be exercising the various discretionary powers on the Crown's behalf. As the head of a senior ministerial portfolio, the Minister of Aboriginal Relations would no doubt have a high level of influence in Cabinet. However, because that Department would be structured along traditional lines its officials would be subject to the same influences and conflicting governmental priorities which currently serve to undermine the ability of government officials to uphold the Crown's obligations to the Aboriginal peoples of Canada. Therefore, while the officials in that Department would have the responsibility to "monitor the Crown's implementation of its treaty and other undertakings as well as its fiduciary obligations to Aboriginal nations",[188] they would themselves be vulnerable to the same systemic, destabilizing forces which now serve to frustrate the implementation of the government's Aboriginal policy. Moreover, one might well question how the officials in that Department will have the credibility to act

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[188]*Ibid.* at 365. A function which would be carried out by a "Crown implementation Office". Moreover, the Minister would "allocate funds from the federal government's expenditures on Aboriginal issues and operations across the government" and have the authority to "withdraw or withhold" funds from those monitored Departments who fail to meet federal commitments (p. 364 refers).

as watchdogs to ensure that other line departments - including the Department of Indian and Inuit Services - properly discharge their fiduciary obligations, when other officials in the Department of Aboriginal Relations will be engaged in the highly partisan process of negotiating Aboriginal treaties and agreements?

The alternative model canvassed here represents only one of a number of possible solutions. What is considered essential is that those Crown officials whose primary responsibility it is to discharge the Crown's fiduciary duties be allowed to do so within an institutional structure which is capable of shielding them from undue influence. Arguably, this can only be achieved where the intended structure affords them a meaningful level of independence in the exercise of their day-to-day discretionary powers.

c. Eliminating Sources of Irritation.

Both parties must work to remove longstanding sources of irritation in the Crown-Aboriginal relationship. This presumes, a renewed commitment to resolving disputes through meaningful dialogue, negotiated settlement and a rejection of confrontation.

In this respect, it is considered essential to recognize that the government represents a wide variety of interests when it engages in the process of negotiating Aboriginal treaties and claims. While it must ensure that it treats with Aboriginal peoples in a manner which upholds the "honour of the Crown", it must also be free to advance governmental objectives. The Royal Commission has recognized the "political and even diplomatic nature of treaty processes". In this respect, the Commissioners have recommended that treaty commissions be established, to "assist the treaty parties to

resolve political and other disputes arising in treaty processes".[189] This specific recommendation is concurred in.

In similar fashion the Royal Commission has recommended that an Aboriginal Lands and Treaties Tribunal be created to, "monitor both the specific and the comprehensive land claims process".[190] The Royal Commission anticipates that such a tribunal would,

> ensure, among other things, that claims were being dealt with in a timely fashion, that the parties were negotiating in good faith, and that the disputed resources were not being depleted pending the disposition of the claim. The goal would be to ensure that the process was not being abused, that delays were kept to a minimum, and that the principles of fundamental justice and fairness were being respected.[191]

The suggestion of having a third party act as an arbitrator to resolve conflicts in the claims processes is hardly novel.[192] As one observer so aptly put it, "[t]he bottom line on this

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[189] *Ibid.* at 90, 92.

[190] *Ibid.* at 6. The Royal Commission anticipates that most of the tribunal's efforts "will focus on the bilateral process for negotiating new or renewed treaties, which may include claims arising from existing treaties, comprehensive land claims and self-governance" (p. 596 refers).

[191] *Ibid.* at 6, where the rationale for this particular recommendation is expressed in the following terms: "[t]he Commission is persuaded that without such a supervisory body, land claims negotiations will continue to drag on, to the detriment of only one of the negotiating parties - Aboriginal claimants".

[192] For similar recommendations, see Waters, *supra* note 40 at 419 and Rotman, *supra* note 22 at 267. As Mercredi and Turpel, *supra* note 21 at 138, observe:

> [a]lmost everyone who has examined the issue of land claims has recommended that an independent land claims resolution process be established. Such recommendations have been put forward on many occasions by the Canadian Bar Association, the Canadian Human Rights Commission and by many others, including several prominent church organizations. In fact the Parliamentary Standing Committee on Aboriginal Affairs put forward this same recommendation

question is that the Crown governments are in a hopelessly conflicted position. There will continue to be few settlements, and more Okas, until these claims can be brought to an independent decision-making authority."[193] In this respect, the government itself considers unilateral decision-making to now be fraught with danger - even in situations where it only has a duty to consult.[194] All things considered, the presence of an impartial body to "police the bargaining process", and exercise "the power to make binding orders", would enhance the objective credibility of a process which until now has been largely cloaked in secrecy.[195]

The federal government's power to expropriate lands which are subject to the Aboriginal title interest continues to be a source of irritation for many Aboriginal Canadians. The power to expropriate reserve land, in the absence of a surrender, dates to 1876.[196] That power, which has been described as "the most substantive exception to the principle of voluntary cession",[197] has been criticized on the basis that its very existence

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as a result of the Oka crisis.

[193]D.R. Colborne, "Overview of Legal Issues" (Address to Conference on Doing Business with First Nations, Toronto, 15, 16 June 1994)[unpublished] at 26.

[194]For example, see the Interdepartmental Working Group Report, *supra* note 26 at 27, which warns that "caution should be exercised if the consultation does not result in consent, since political or legal considerations may render the implementation of a unilateral decision problematic".

[195]*Royal Commission Report*, vol. 2 *supra* note 18 at 596.

[196]*Indian Act, 1876*, S.C. 1876, c.18, s.20.

[197]D. Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: Native Law Centre, 1989) at 79.

tips the balance in favour of the Crown whenever the terms of a potential surrender are being negotiated.[198] Moreover, its continued use would seem to be at odds with the fiduciary nature of the Crown-Aboriginal relationship, to the extent that the government is able to retain the expropriated lands for its own use and benefit.[199] Inasmuch as the expropriation power may now be said to be subject to a heavy justification requirement, and the payment of full and fair compensation,[200] one would expect that the expropriation power will only be exercised in the rarest of cases. However, to the extent that the power may have outlived its usefulness, the government should consider whether it is still needed in view of the negative connotations which have always surrounded it. Moreover, if it is to be retained, the government may wish to consider adopting a form of binding arbitration to establish appropriate levels of compensation in those unique cases where recourse to the power may still be appropriate.[201]

E. Conclusions:

Canadian governments have proven singularly ill-equipped to discharge their obligations to the Aboriginal peoples of Canada. While the reasons for this are many and

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[198]As Binnie, *supra* note 69 at 239, points out, "in terms of the dynamics of negotiation, the important fact is that an expropriation power exists".

[199]Rotman, *supra* note 22 at 269.

[200]*Sparrow*, *supra* note 67 at 1119.

[201]Waters, *supra* note 40 at 419, where the binding arbitration proposal is suggested in the context of his discussion of the government's use of the expropriation power on the facts in *Kruger*.

varied, it is considered that the conflict of interest, which has always existed at the heart of Crown-Aboriginal relations, has been a constant feature of the relationship. In this respect, it may be argued that Aboriginal peoples are, and have always been, vulnerable to the exercise of the Crown's power in situations where their interests conflict with other interests which the government considers essential to advance in furtherance of the national interest.

Aboriginal vulnerability is accentuated under a liberal-democratic view of the role of government - a view which places a premium on ensuring that laws and policies reflect the requirement to achieve the greatest good for the greatest number. In this respect, it may well be argued that Aboriginal groups are at distinct disadvantage whenever they attempt to advance collective rights which do not coincide with, or which are directly in conflict with, majoritarian interests or the will of Parliament. The problem is compounded under a policy formulation process which, in the interests of pragmatism, economy and political expediency, massages conflicting interests and objectives in ways which force short-term, *ad hoc* solutions on complex problems. The resulting "policy confusion" undermines the attempts of individual departments to advance the sort of coherent, principled measures which are required to achieve long-term objectives.

Given its small size and low Cabinet profile, many observers consider the effects of the current approach to policy formulation to be particularly debilitating in the case of the Indian Affairs branch of government. Some have linked the resulting uncertainty and apprehension within that branch to the government's seeming reluctance to meaningfully engage the difficult problems which now bedevil the Crown-Aboriginal

relationship. The legacy of conflict is evident in the state of the relationship between the Crown and Aboriginal treaty nations, in the processes which appertain to specific and comprehensive Aboriginal claims and in the justification standard which applies whenever s.35(1) Aboriginal and treaty rights have been infringed.

Arguably, the Supreme Court's decision to affix a fiduciary label on the Crown-Aboriginal relationship has been a mixed blessing. From a government perspective, there is little in the *sui generis* label to guide the Crown in discharging its duties. In its current incarnation, the basic principles of the fiduciary doctrine - including the concept of loyalty - only function as a rough, "after the fact" indicator of when a court is likely to intervene. Moreover, the increasingly flexible nature of the no-conflict rule has done little to enhance certainty.

The federal government has responded with strategies which have sought to distance and distinguish its role as a fiduciary from its duties, in ways which attempt to minimize its potential liability, including declining to act at all in difficult situations. Despite the recent explosion of litigation involving alleged breaches of the Crown's fiduciary obligations, the Aboriginal perspective on the Crown-Aboriginal relationship has not been altogether positive either. While some Aboriginal Canadians have cautiously embraced the fiduciary construct as a "blunt tool" which can be used to hold the Crown accountable for its actions, others consider it to be regressive, paternalistic, and at odds with their sovereign aspirations. The former view may well explain the strong undercurrent of suspicion with surrounds the government's recent policy on self-government and any suggestion that the government can divest itself of its fiduciary

obligations. Indeed, many look to the fiduciary construct as a "positive" source of new obligations. However, while there is some level of Aboriginal support for the fiduciary doctrine, there is considerably less confidence in the ability or will of government to protect Aboriginal interests. Given the conflicting nature of the various obligations and interests which the Crown must advance, this lack of trust, while unusual in a fiduciary relationship, may not be entirely misplaced. Nevertheless, it should be cause for concern.

The Royal Commission on Aboriginal Peoples has argued that the Crown-Aboriginal relationship must be "renewed". While this recommendation is concurred in, it is considered that "renewal" will only be effective if it is done in a way which does not ignore the systemic sources of conflict which have served to undermine all efforts to implement the principles upon which the Crown-Aboriginal relationship is based. In this respect, five fundamental requirements have been identified. If the fiduciary construct is ever to live up to its potential, it is considered essential that these five fundamental requirements be addressed when the process of renewal is applied to the Crown-Aboriginal fiduciary relationship. These fundamental requirements, which are meant to inform the process of debate which must now take place, reflect the need to: approach the question of fiduciary duty having regard to a rational, principled consideration of what the fiduciary construct is, and what it can and cannot be expected to achieve; clear up the confusion surrounding the fundamental question of when a fiduciary relationship may be said to arise outside of the traditional fiduciary classifications, and address the implications of that choice in terms of the Crown-Aboriginal relationship and the application of the no-conflict rule; enforce the no-conflict rule where it would be appropriate to do so;

explain how the Crown-Aboriginal relationship is *sui generis*; and, restore confidence in the ability of government to uphold the Crown-Aboriginal relationship by ensuring that those whose responsibility it is to discharge the Crown's lawful fiduciary obligations are shielded from obvious sources of conflict and by eliminating longstanding sources of irritation in the Crown-Aboriginal relationship. In this latter context, we have considered a number of specific recommendations, including devolving authority to Aboriginal self-governments, reforming the institutions of government, establishing treaty commissions, creating an Aboriginal Lands and Treaties Tribunal, and eliminating the expropriation power.

The success of the renewal effort, and by implication the future of the Crown-Aboriginal fiduciary relationship, hinges on the active involvement and participation of all parties. It presumes an active role for our courts in defining and refining the fiduciary doctrine in ways which will uphold the rationale of accountability and enhance certainty.

Chapter 7 - Summary of Conclusions and Recommendations.

In recent years, we have seen how Canadian courts have increasingly looked to equitable doctrines in their search for judicial solutions to problems which appear to warrant the rationale of accountability. This tendency may explain the popularity of the fiduciary construct, and the decision of the Supreme Court of Canada to apply fiduciary principles to define the relationship between the Crown and the Aboriginal peoples of Canada in *Guerin et al.* v. *The Queen* and *Regina* v. *Sparrow*.[1] In this thesis, an attempt has been made to clear up some of the confusion and uncertainty which surrounds the Crown-Aboriginal fiduciary relationship with a view to enhancing the utility of the fiduciary doctrine, in this context, in the future.

To that end, we endeavoured in Chapter two to arrive at a broad, theoretical understanding of the fiduciary construct and the problems associated with its practical application through a general discussion of fiduciary principles, focusing on: the unique features of what traditionally have been termed fiduciary relationships; the scope and nature of fiduciary duties, both specific and general; and the criteria used by Canadian courts in recent years to expand the fiduciary doctrine beyond its conventional boundaries.

We concluded that a fiduciary owes a "general" duty of loyalty, good faith and avoidance of a conflict of duty or self-interest. The duty derives from the fiduciary's

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[1]*Guerin et al.* v. *The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 32 (S.C.C.); *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1108 (S.C.C.).

undertaking "to act in relation to a matter in the interests of another". As the *Lac Minerals* case suggests,[2] a fiduciary relationship can exist in situations which do not immediately give rise to a more specific duty. However, depending on the particular nature of any given undertaking, additional "specific" duties may also be owed. Typically, they embrace more onerous requirements than those which will arise in connection with the "general" fiduciary duty.

We saw how, commencing in 1974, the fiduciary construct entered a period of transition as the courts attempted to grapple with the perceived need to apply the fiduciary doctrine to relationships which had not previously been subject to equitable analysis. This development caused some to question whether the courts were guilty of stretching the fiduciary principle into shapes never intended. Indeed, while Dickson J.'s judgment in *Guerin* may, in part, have ushered in a "principled" approach to the assessment of relationships which can be said to give rise to fiduciary duties, as the *Hodgkinson* v. *Simms* case seems to suggest,[3] the Supreme Court has yet to fully come to terms with the fiduciary construct outside of its traditional setting. Indeed, there may well be grounds to suggest that the fiduciary doctrine remains a "concept in search of a principle".

By choosing to define the historic Crown-Aboriginal relationship in fiduciary terms, the Supreme Court of Canada would provide Aboriginal groups with a promising

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[2]*Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.).

[3]*Hodgkinson* v. *Simms*, [1994] 3 S.C.R. 377 (S.C.C.).

means of holding the Crown to an equitable standard of conduct. While this development raises both practical and theoretical concerns which have yet to be fully resolved, it may be argued that the requisite "characteristics" of fiduciary relationships, as first enunciated by Wilson J. in *Frame* v. *Smith*, are all present in the Aboriginal context.[4] For example, it seems evident that the Crown has some scope for the unilateral exercise of a discretion or power, or both, in relation to the interests of Aboriginal peoples. While for most purpose this may amount to little more than the power of governance, in some cases, such as in relation to the Aboriginal title interest, the Crown's intervenor status is indicative of the exercise of a power which far exceeds that which is involved whenever the interests of non-Aboriginal Canadians are being considered. Moreover, as the record of Crown dealings with Aboriginal peoples amply demonstrates, the Crown's ability to effect Aboriginal interests, coupled with Aboriginal reliance, affirms that the position of the Aboriginal peoples of Canada is not without an element of vulnerability.

As Dickson J. affirmed in *Guerin* and *Sparrow*, the basis for a fiduciary characterization of the Crown-Aboriginal relationship is *historic*. While rooted in the concept of Aboriginal title, the relationship owes its existence, as a fiduciary construct, to the long-standing, *historic*, pattern of dealings between the Crown and Aboriginal peoples. While it may be tempting to explain away any supposed anomalies in the Crown-Aboriginal fiduciary relationship by simply asserting that the relationship is "*sui generis*", such an approach is meaningless unless the anomalies are sourced back to the unique

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[4]*Frame* v. *Smith*, [1987] 2 S.C.R. 99 at 136 (S.C.C.).

attributes of the Aboriginal interests concerned, the powers and responsibilities assumed by the Crown in relation to those interests, and the corresponding reliance which Aboriginal groups placed on the Crown. Moreover, any attempt to grapple with the modern issues which surround the Supreme Court's characterization of the Crown-Aboriginal relationship - including any meaningful assessment of the Crown's ability to discharge its fiduciary obligations in the sorts of conflict situations illustrated by the two paradigm situations presented in the introductory chapter - presupposes some understanding and appreciation of the *historic* forces and processes which resulted in its creation and lent it content. In this respect, it is important to appreciate that the Crown-Aboriginal relationship did not evolve in a vacuum. Nor can we attempt to apply fiduciary principles to Crown-Aboriginal dealings as if the relationship had just been created in the latter half of the twentieth century.

While, prior to 1763, the Crown's policy towards Aboriginal land was influenced, to some extent, by the broader rules and principles of imperial common law, the powers and responsibilities of the Crown were largely assumed for reasons of equity, convenience and, most importantly, to further Britain's own regional interests. Although British imperial policy was capable of being managed in conflict situations by balancing Aboriginal and non-Aboriginal interests, the outcome would invariably favour those interests which most closely served imperial goals. In this regard, it is important to appreciate that the tone of Britain's early relations with the Aboriginal peoples of North America was largely dictated by Britain's own strategic requirements.

In advancing its own sovereign interests, Britain was obliged to acknowledge that Aboriginal persons lived on the land in distinctive societies - a fact which led the British Crown to take a number of principled measures to safeguard Aboriginal interests. This latter development is most apparent in relation to the protections afforded the Aboriginal title interest - protections which prompted Dickson J. to use the term "fiduciary" in describing the Crown-Aboriginal relationship in his landmark judgment in *Guerin*. Moreover, when it became apparent that the abuses associated with private land purchases were acting as a destabilizing influence on the Crown-Aboriginal relationship, and threatening Britain's larger interests, the Crown took steps to regulate such transactions by inserting itself between the colonists and Aboriginal groups. In the process, the British Crown would claim that it had acquired sovereignty over those lands.

The Crown's sovereignty or power over the Aboriginal peoples of Canada was exerted piecemeal over an extended period of time. The process by which each Aboriginal group became reliant upon the Crown was largely a function of history and historic forces. Therefore, the portrait of Crown-Aboriginal relations which emerges is far from uniform. Echoes of this particular approach can still be seen reflected in the specific fiduciary duties which are now owed particular Aboriginal groups as a result of certain "unique" treaty provisions.

This is not to say that there were not some common, defining moments in the evolution of the Crown-Aboriginal relationship as a whole. Notwithstanding the British Crown's initial motivation for pursuing what might charitably be described as a "liberal" Aboriginal policy, by 1763 certain principles had been established which could not be

officially denied if strong Crown-Aboriginal relations were to continue. The *Royal Proclamation* was the means chosen to formally announce its intention to legally bind itself to these principles. With the *Royal Proclamation*, Britain was forced to concede that she was obliged, as a matter of imperial common law, to treat with Aboriginal groups in order to bring them under British authority or to acquire their lands. For their part, Aboriginal groups were encouraged to place reliance on the Crown, and the guarantees enshrined in the treaties they entered into, as well as the provisions of the *Royal Proclamation* of 1763.

Implementation would be another matter entirely. With its American colonies on the verge of revolt, Britain choose to transfer its responsibility for "Indian Affairs" to its colonial governments. Without strong central control, the Aboriginal policy embodied in the *Royal Proclamation* would be placed at the mercy of regional politics and self-interest. While Confederation restored central control over "Indian Affairs" in Canada, and while the essential features of Aboriginal title were recognized in the *Indian Act*, by that time much of Canada had been settled without regard to the provisions of the *Royal Proclamation*.

While it was the proposition of inalienability which led Dickson J.'s to conclude that the Crown was a fiduciary on the facts in *Guerin*, further to the discussion in Chapter four, it now seems clear that the broad undertaking, which is at the heart of the overarching Crown-Aboriginal fiduciary relationship referred to in *Sparrow*, imposes duties on the Crown which extend well beyond the Aboriginal land interest. In light of

the *Van der Peet* trilogy,[5] it may be argued that the Crown's "general" responsibility to act in a fiduciary capacity with respect to the Aboriginal peoples of Canada derives from the Crown's *historic* undertaking to act on behalf of the Aboriginal peoples of Canada, to protect their "practices, traditions and cultures" in dealings with third parties. It seems logical to conclude that the Crown incurred this responsibility in consequence of assuming sovereignty over both the land mass of what is now Canada and the Aboriginal people who reside there, by which it is meant that the Crown either: extended its protection to them, and their lands, in return for their giving up of any claim to an independent sovereign status, or, unilaterally took up the "mantle of protector" by simply exercising the power of governance over them, or both. In this context, the proposition of the "inalienability" of Aboriginal land title, except to the Crown by means of a public purchase, may be viewed as the most visible policy initiative advanced by the Crown in furtherance of the "guarantee of protection" embodied in its undertaking. However, we now know that the Aboriginal title interest is only one component of "Aboriginal rights" as that term was defined by Lamer C.J. in *R.* v. *Van der Peet*. In this regard, there can now be little doubt that the Aboriginal peoples of Canada have a multiplicity of "interests" or "rights", related to their distinctive "practices, traditions and cultures", which the Crown undertook to protect. The affirming provisions of the *Constitution Act, 1982*, serve to acknowledge and reconcile Aboriginal rights with the sovereignty of the Crown.

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[5] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 (S.C.C.); *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528; and, *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648.

In order to better understand the *sui generis* nature of the Crown-Aboriginal relationship, it is essential to appreciate the oft-times subtle distinction between the general duty which the Crown owes all Aboriginal peoples by virtue of its fiduciary status, on the one hand, and the more specific duties which may arise whenever the Crown purports to exercise a particular discretion in relation to specific Aboriginal interests held by individual Aboriginal groups, on the other. More specifically, in light of *Sparrow*, we know that the Crown has a "general" responsibility to act in a fiduciary capacity with respect to the Aboriginal peoples of Canada. The responsibility has been described as a duty to uphold "a high standard of honourable dealings". "Specific", additional fiduciary duties can also be seen to arise in connection with the particular application of a Crown discretion, or power to act, which is expressly provided for by statute, treaty or agreement. Such was the case in *Guerin*. "Specific" duties also may be owed in relation to the operation of s.35(1) of the *Constitution Act, 1982*, which demands the justification of any government regulation which infringes upon existing Aboriginal and treaty rights.

While fiduciary law may well offer the best means of ensuring that the government lives up to its undertaking to protect the interests of the Aboriginal peoples of Canada in dealings with third parties, questions remain as to whether the fiduciary standard is really appropriate in this context. In this respect, it must be acknowledged that there are a number of theoretical and practical issues pertaining to the Crown-Aboriginal fiduciary relationship which the Supreme Court did not fully resolve in either *Guerin*, *Sparrow*, or the *Van der Peet* trilogy. For example, while there is considered to be at least some

doctrinal support for the Supreme Court's conclusion that the Crown-Aboriginal relationship should be assessed according to fiduciary principles, there remains some doubt that conclusion is consistent with the test laid down in *Hodgkinson*. In view of the myriad of other duties, obligations and responsibilities owed by the Crown, one might also question whether the application of fiduciary principles to define the Crown-Aboriginal relationship is really appropriate having regard to the "no-conflict" proscription which features so prominently in fiduciary doctrine. If the extent and diversity of learned discourse on the subject serves as any valid indicator, then this is one area of the law which seems prone to confusion and error. This apparent tendency may, in turn, serve to explain the obvious difficulties which some of our courts have encountered.

In Chapter five, we examined how Canadian courts, at all levels, have attempted to find workable solutions to problems posed by the requirement to apply fiduciary standards and principles to various aspects of the Crown-Aboriginal relationship, and to determine what fairness now requires that the Crown do or refrain from doing. While for the most part, the courts have succeeded in explaining when specific fiduciary duties will be owed by the Crown, they have largely failed to define or give meaning to the Crown's general duty of loyalty beyond the vague assertion that the "honour of the Crown" must be upheld. Moreover, there has been a disturbing lack of uniformity demonstrated in the methodology and criteria being used by the courts to determine who they are prepared to hold primarily responsible for discharging the Crown's duties - a situation which may in part reflect the pragmatic considerations associated with the *ad hoc* approach which has tended to dominate judicial decision-making in this field. Similarly,

the courts' response on the "conflict" issue has not always been consistent or principled. Although the recent emergence of the so-called "relaxed" approach to the no-conflict rule is considered noteworthy, the courts have so far failed to explain how it upholds the rationale of accountability or enhances certainty in the relationship. Nevertheless, the law has advanced to the extent that it is possible to speculate on how some of the issues presented in the two paradigm situations, set out in the introductory chapter, might be addressed. To that end, an analysis of those problems has been included in the Appendices to this thesis.

Having said that, it must be appreciated, as we attempted to demonstrate in Chapter six, that the Aboriginal peoples of Canada are, and have always been, vulnerable to the exercise of the Crown's power in situations where their interests conflict with other interests which the government considers essential to advance in furtherance of the national interest. The legacy of conflict is evident in the state of the relationship between the Crown and Aboriginal treaty nations, in the processes which appertain to specific and comprehensive Aboriginal claims, and in the justification standard which applies whenever s.35(1) Aboriginal and treaty rights have been infringed. The conflict of interest, which exists at the heart of Crown-Aboriginal relations, has been a constant feature of the relationship. It explains why Canadian governments have proven singularly ill-equipped to discharge their obligations to the Aboriginal peoples of Canada.

Aboriginal vulnerability is accentuated under a liberal-democratic view of the role of government - a view which places a premium on ensuring that laws and policies reflect the requirement to achieve the greatest good for the greatest number. As a result, it may

be argued that Aboriginal groups are at distinct disadvantage whenever they attempt to advance collective rights which do not coincide with, or which are directly in conflict with, majoritarian interests or the will of Parliament. The problem is compounded under a policy formulation process which, in the interests of pragmatism, economy and political expediency, massages conflicting interests and objectives in ways which force short-term, *ad hoc* solutions on complex problems. The attendant "policy confusion" undermines the attempts of individual departments to advance the sort of coherent, principled measures which are required to achieve long-term objectives. Some have even linked the resulting uncertainty and apprehension within the Indian Affairs branch to the government's seeming reluctance to meaningfully engage the difficult problems which now bedevil the Crown-Aboriginal relationship.

Following our discussions of the "sources of conflict" in the modern Crown-Aboriginal relationship, we went on to examine government and Aboriginal perspectives on the fiduciary characterization with a view to broadening our understanding of the concerns and expectations which the parties bring to the relationship. While the federal Crown has always acknowledged its obligation to play the role of intermediary in Aboriginal land transactions involving third parties, it has, until very recently, viewed its relationship with the Aboriginal peoples of Canada either in political terms or as a function of its legislative role. Faced with the requirement to adhere to a fiduciary standard, with respect to an expanding list of Aboriginal interests, it has adopted strategies which have sought to distance and distinguish its role. as a fiduciary, from its duties in ways which attempt to minimize its potential liability, including declining to act at all in

difficult situations. In this respect, it must be acknowledged that there is little in the *sui generis* label to guide the Crown in discharging its duties. Moreover, in its current incarnation, the basic principles of the fiduciary doctrine - including the concept of loyalty - only function as a rough, "after the fact" indicator of when a court is likely to intervene.

While some Aboriginal Canadians have cautiously embraced the fiduciary construct as a "blunt tool" which can be used to hold the Crown accountable for its actions, others consider it to be regressive, paternalistic, and at odds with their sovereign aspirations. The former view may well explain the strong undercurrent of suspicion which surrounds the government's recent policy on self-government and any suggestion that the government can divest itself of its fiduciary obligations. However, while many other Aboriginal peoples look to the fiduciary construct as a "positive" source of new obligations, there is little confidence in the ability or will of government to protect Aboriginal interests. Given the conflicting nature of the various obligations and interests which the Crown must advance, this lack of trust, while unusual in a fiduciary relationship, may not be entirely misplaced. Nevertheless, it should be cause for concern.

The Royal Commission on Aboriginal Peoples has argued that the Crown-Aboriginal relationship must be "renewed". While this recommendation is concurred in, it is argued that there is a need for a process of renewal which is fully cognizant of the depth and implications of conflict in the relationship, including its impact on the Crown's ability to discharge its fiduciary obligations to the Aboriginal peoples of Canada.

To that end, a number of specific recommendations were presented with a view to facilitating the process of renewal which the *Report of the Royal Commission on*

Aboriginal Peoples now urges be undertaken.[6] These proposals were discussed within the framework of what are considered to be five fundamental requirements which must be addressed before the principles of renewal can be applied to the Crown-Aboriginal fiduciary relationship in any meaningful way. In this regard, it is considered essential that the following requirements inform the process of debate which must now take place:

> 1) All parties must approach the question of fiduciary duty having regard to a rational, principled consideration of what the fiduciary construct is and what it can and cannot be expected to achieve.
> 2) The courts must work diligently to clear up the confusion surrounding the fundamental question of when a fiduciary relationship may be said to arise outside of the traditional fiduciary classifications and address the implications of that choice in terms of the Crown-Aboriginal relationship and the application of the no-conflict rule.
> 3) If the fiduciary doctrine is to have meaning in the Crown-Aboriginal context, then the no-conflict rule must be enforced where it would be appropriate to do so.
> 4) The courts must respond to the need to give greater meaning to the relationship and the responsibilities of each party by explaining how the Crown-Aboriginal relationship is *sui generis*.
> 5) Government must work to restore confidence in its ability to uphold the Crown-Aboriginal relationship by ensuring that those whose responsibility it is to discharge the Crown's lawful fiduciary obligations are shielded from obvious sources of conflict. To the extent practicable it must also work to eliminate longstanding sources of irritation in the Crown-Aboriginal relationship.

Until these fundamental requirements have been addressed many will continue to question whether the role of fiduciary, which presupposes a strong measure of loyalty and good faith, is demonstrably unsuited to the Crown, and indeed, whether the fiduciary construct is capable of living up to its potential within the context of this particular relationship.

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[6]Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Queen's Printer, October 1996).

Insofar as the first requirement is concerned, it is submitted that, in assessing the potential impact of the fiduciary characterization of the Crown-Aboriginal relationship, we must be mindful of the fact that the fiduciary doctrine has inherent limitations. Since it acts as a default scheme of regulation, the fiduciary principle should not be viewed as an independent source of rights. Nor will it cure all the ills which have traditionally plagued the Crown-Aboriginal relationship. Having said that, it must be appreciated that, in theory, the very existence of the fiduciary doctrine should serve to ensure that the Crown does not act in a manner which conflicts with the interests to be served. In this respect, the challenge for those who would uphold the Crown-Aboriginal relationship lies in ensuring that the fiduciary construct operates as it was intended. In view of the fact that the Crown, as a government, has many other unavoidable obligations and responsibilities, this is considered to be an onerous task indeed.

The second requirement reflects the need for our courts to clearly define the criteria which render a relationship "fiduciary", in a way which lends certainty to the relationships and obligations which bear the fiduciary label. To the extent that La Forest J.'s judgments in *Lac Minerals* and *Hodgkinson* may be said to be indicative of the Supreme Court's current thinking on the issue, then perhaps we need to critically examine whether, based on the historic record, it can reasonably be said that the Crown ever agreed to relinquish its own self-interest and act "solely" on behalf of the Aboriginal peoples of Canada, and if so, whether it did so in relation to all or only some Aboriginal interests. Moreover, it is submitted that the presence of what amounts to a long-standing, systemic conflict of interest must be taken into account in determining what is "reasonable". In

this regard, it may be observed that the Supreme Court has never categorically identified the undertaking which is at the heart of the Crown-Aboriginal relationship. Clearly, further guidance would be of assistance.

While it is apparent that the courts have yet to come to terms with the application of the no-conflict rule in the Crown-Aboriginal context, given its fundamental nature, the wholesale abandonment of the no-conflict rule hardly seems likely. It is therefore assumed that the courts will be required to enter into a critical examination of the Crown-Aboriginal relationship with a view to assessing whether the rationale of accountability should be used to assess the Crown's conduct in relation to all, or only some, Aboriginal interests. If the fiduciary doctrine is to have meaning in the Crown-Aboriginal context then the no-conflict rule must, as a minimum, be enforced in relation to those interests in respect of which it may reasonably be said that the Crown owes exclusive, specific duties. To the extent that it is considered that a modified approach to the no-conflict rule is appropriate in other contexts, then our judges need to validate that approach having regard to the basic tenets of fiduciary law. The third requirement addresses these concerns.

Insofar as the fourth requirement is concerned, we have seen how the *sui generis* label, which Dickson J. first choose to affix to the Crown-Aboriginal fiduciary relationship in *Guerin*, is more convenient than descriptive. While the description has allowed courts the flexibility to develop their interpretation of the relationship in accordance with its "spirit and intent", it has, at the same time, been blamed for the protracted ambiguities, silences and inconsistencies in the case law. Such a description has

little to commend itself in a relationship which is already suffering from a lack of doctrinal certainty. Indeed, as we have seen in Chapter five, without necessarily acknowledging that they are doing so, courts in the post-*Guerin* era have interpreted the Crown's responsibilities in ways which have lessened its fiduciary content while emphasizing its *sui generis* nature. To the extent that the parties have a right to some level of certainty, concerning the rights and responsibilities which may be said to derive from a fiduciary characterization, more meaningful ways must be found to describe the salient features of the Crown-Aboriginal relationship. The *sui generis* epithet must be applied in a way which gives meaning and certainty to the relationship or forsaken in favour of a more certain characterization.

In terms of the fifth requirement we examined a number of specific measures which could be implemented with a view to restoring confidence in the ability of government to uphold the Crown-Aboriginal relationship. The possibilities for reform which have been explored include, devolving authority to Aboriginal self-governments, reforming the institutions of government, establishing treaty commissions, creating an Aboriginal Lands and Treaties Tribunal, and eliminating the expropriation power. The list should not be considered exhaustive. Rather, the discussion of these potential reform initiatives is intended to serve as the catalyst for further debate. The likely impact of these reforms, in terms of the practical problems posed in the two paradigms presented in Chapter one, is discussed in the accompanying appendices.

The success of the renewal effort, and by implication the future of the Crown-Aboriginal fiduciary relationship, hinges on the active involvement and participation of

all parties. It presumes an active role for our courts in defining and refining the fiduciary doctrine in ways which will uphold the rationale of accountability and enhance certainty. Perhaps, what is required most of all is a principled vision for the future of the Crown-Aboriginal fiduciary relationship - a vision which is responsive to the need to lead the parties out of the debilitating cycle of conflict which threatens to subvert the best intentions of those who would forge a more equitable Crown-Aboriginal relationship.

Appendices

In the Appendices which follow, an attempt will be made to analyse the problems presented in the paradigm situations set out in Chapter one, to the extent that the current state of the law permits. The analysis will borrow heavily from the discussion of the cases and conclusions presented in Chapters four and five. An attempt will also be made to consider the potential impact which the recommended reforms, referred to in Chapter six, would have on the outcome.

Appendix A - Discussion of Paradigm 1

A. Restatement of Facts:

"As a result of years of heavy logging on Crown lands in a coastal region of a province many salmon spawning areas of a particular river system have become degraded to the point where the continued viability of recreational and commercial fishing is in question. A federal scientific study suggest that unless it acts quickly to restrict salmon fishing at the mouth of the river, no fish will be available to support any future use. The federal Department of Fisheries and Oceans (DFO) is considering implementing the study recommendations and has also asked the province to consider imposing limitations on the lumbering activities being carried out in the river valley. While local and international environmental groups are lobbying both the federal and provincial governments in an attempt to halt all future logging and fishing in the vicinity, the lumber company, which is operating under a short-term provincial licence, claims it will be forced to close its only lumber mill if it can no longer conduct wood harvesting operations there. The federal and provincial governments are under political pressure to keep that mill from closing.

Two distinct Aboriginal groups reside in the area. Members of each distinct group have Aboriginal rights to fish for food. In addition, the members of one group claim an Aboriginal right to sell the fish they catch. Each group holds different views on how best to manage the resource. While many individuals in the Aboriginal and non-Aboriginal communities located on the river, and along the adjacent ocean coast, depend on both the recreational and commercial fishery for their employment, others are employed in the forest industry and do not routinely exercise their Aboriginal fishing rights. Many individuals in both Aboriginal groups distrust the federal fisheries department and have taken their concerns to the Department of Indian Affairs and Northern Development (DIAND).

How will the Crown-Aboriginal relationship impact on the federal Department of Fisheries and Ocean's plans to regulate the fishery? What, if any fiduciary obligations is DIAND under? In considering whether or not to impose limitations on the logging operations in the river valley, is the provincial government under a fiduciary duty to consider the interests of the Aboriginal peoples in the region? Do those interests take precedence over the other competing interests at stake?"

B. Analysis of Problem:

Based on the decision in *Sparrow*, we know that the government has a responsibility to act in a fiduciary capacity with respect to Aboriginal peoples.[1] That responsibility serves as the guiding principle for s. 35(1) of the *Constitution Act, 1982*. As such, it may be assumed that there is a duty to consider the Aboriginal right holders' interests when the government is considering the options available to it on the facts of this hypothetical case. To the extent that the Federal Department of Fisheries and Oceans (DFO) is in a position to adversely affect the Aboriginal interests protected by the relationship, it would be considered a fiduciary.

Moreover, the DFO officials concerned have a discretionary power to exercise when deciding whether to implement the recommendations contained in the scientific study. It is assumed, for the purposes of analysis, that the power to be exercised is statutory in nature. Based on the *Union of Nova Scotia Indians* case, it may be concluded that any decision to restrict or limit fishing would, in these circumstances, give rise to a duty to consider the potential impact on the Aboriginal rights holder's interests.[2]

As the *Jack* case illustrates, the Crown would also be under an obligation to consult with both Aboriginal groups before regulating the resource in a manner which could

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[1] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 (S.C.C.)[hereinafter *Sparrow*].

[2] *Union of Nova Scotia Indians* v. *Canada (Minister of Fisheries and Oceans)*, [1996] F.C.J. No. 1373 (F.C.T.D.) (QL)[hereinafter *Union of Nova Scotia Indians*].

constitute a *prima facie* infringement of their Aboriginal rights.[3] Consultation will only reflect the fiduciary nature of the Crown-Aboriginal relationship where it is conducted *meaningfully*. For the consultations to be meaningful, the Aboriginal groups concerned should be informed of the scientific study's findings and recommendations, and the conservation measures which the government is considering implementing. They must also be given the opportunity to make representations to DFO. Having said that, it seems equally apparent that Aboriginal groups do not have a veto over any particular conservation measure being proposed.

It will be incumbent upon the government to justify any infringement of Aboriginal rights which may result in this case. In light of Cory J.'s 1996 judgment in *Badger*, and his subsequent comments in *Nikal*, "reasonableness" may now be said to form an integral part of the *Sparrow* justification test.[4] Moreover, *per Gladstone* and *Adams*, it is permissible for governments to impose limitations on Aboriginal rights in order to pursue objectives of "compelling" and "substantial" importance to all Canadians.[5] The requirement to conserve a resource has been held to constitute a justifiable limitation on Aboriginal rights. Indeed, provided there are "compelling and substantial" reasons to do so, the government may even halt all fishing in the vicinity. However, to the extent that

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[3] *R.* v. *Jack* (1995), 103 C.C.C. (3d) 385 (B.C.C.A.).

[4] *R.* v. *Badger*, [1996] 1 S.C.R. 771 (S.C.C.)[hereinafter *Badger*]; *Nikal* v. *The Queen*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658 (S.C.C.).

[5] *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 (S.C.C.)[hereinafter *Gladstone*]; *R.* v. *Adams*, [1996] 3 S.C.R. 101; 138 D.L.R. (4th) 657 (S.C.C.)[hereinafter *Adams*].

other, less drastic, measures are imposed, DFO must adhere to an allocation scheme which gives preference to Aboriginal rights holders, both in terms of the number of fish which may be caught and the preferred means of doing so.

Aboriginal rights holders who are exercising the right to fish for social, ceremonial or sustenance purposes will have a priority over those who possess an Aboriginal right to fish commercially. In establishing the correct order of priority to be given to Aboriginal rights which have a commercial aspect, the government will be allowed to consider the fact that such Aboriginal rights are not "internally limited". However, *per Gladstone*, the government will still be required to take the "existence and importance" of such rights into account, in a manner which is consistent with its fiduciary obligations. While other Aboriginal peoples may be employed in the recreational fishery and forest industries, it is presumed that, unless an Aboriginal right appertains to such activities, any duty on the part of the government to consider their interests will be of a political rather than fiducial nature.

In light of the Ontario Court of Appeal decision in *Perry*, it would seem that there is no "affirmative obligation" on governments to reach agreements with Aboriginal groups concerning the nature and extent of any alleged Aboriginal right, before establishing wildlife enforcement policies.[6] Nevertheless, as the decisions in *Adams* and *Coté* indicate,[7] it is incumbent upon Parliament to provide specific regulatory guidance to its

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[6]*Perry* v. *Ontario*, [1997] O.J. No. 2314 (C.A.) (QL).

[7]*R.* v. *Coté*, [1996] 3 S.C.R. 139 (S.C.C.)[hereinafter *Coté*].

departmental officials to ensure that they are properly equipped to discharge their functions in a manner which is consistent with the Crown's fiduciary responsibilities. In other words, in enacting regulations which purport to limit Aboriginal rights in the area in question, the government must clearly define the circumstances under which Aboriginal persons will be prevented from exercising their rights.

Notwithstanding the fact that DFO may be the "lead responsible party" for the purposes of determining how best to regulate the fishery, on the facts provided it is clear that officials within DIAND are aware of the Aboriginal concerns with respect to DFOs plans. Although not free from doubt, given the prominence of the role traditionally accorded DIAND in Crown-Aboriginal relations, it may be argued that DIAND is under a minimal obligation to at least communicate the specific concerns which only it has been made aware of, to DFO, and to remind DFO of its fiduciary responsibilities.

In his 1996 judgment in *Coté*, Lamer C.J. cited *Badger* as authority for the proposition that the *Sparrow* test has application to both federal and provincial laws which infringe upon Aboriginal and treaty rights.[8] While not entirely clear, it might well be argued that the province is under a corresponding duty to protect the Aboriginal fishing rights in question, when considering whether or not to restrict lumbering activities in the river valley, on the basis that those Aboriginal rights will be rendered moot once the fish habitat is rendered unfit for the intended Aboriginal use. In this regard, it is considered that the "honour of the Crown" would at least obligate the provincial government to

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[8] *Ibid.* at 185.

consider any Aboriginal concerns concerning these logging activities, before reaching any final decision. Similarly, to the extent that the province has jurisdiction to regulate the inland fishery, and purports to do so in this case, it will be subject to fiduciary obligations which are similar in nature to those which have already been identified in relation to DFO.

C. Potential Impact of Proposed Reforms:

It is obvious that DFO has a mandate which obligates it to consider a number of interests and concerns. It is equally apparent that there are other outside influences which may well be brought to bear on DFO. In this respect, it is important to recall that both the federal and provincial levels of government are under political pressure to keep the lumber mill from closing. At the same time, national and international environmental groups are attempting to halt all fishing in the area. Finally, there are third parties who have a vested interest in ensuring that their existing fishing and logging activities are allowed to continue. In the face of such pressures, there is a very real concern that the Aboriginal interests will not be accorded the requisite level of protection.

It is considered that the structural model being proposed in this thesis would be useful in such circumstances. Under that model, the destabilizing effects of conflict are mitigated by creating an oversight role for officials in the new independent government agency which would be set up to administer the Crown-Aboriginal relationship. That department would ensure that other line departments - such as DFO - properly discharge

their fiduciary obligations. This would help prevent the sort of scenario where no one involved in the assessment process acknowledges any responsibility to discharge the Crown's obligations - a problem which was evident on the facts in the *Union of Nova Scotia Indians* case. Under the model proposed, the Government would also be required to formulate and promulgate policy of general application to clearly outline the fiduciary obligations of government administrators in a wide variety of circumstances.

For the purposes of this analysis, it is presumed that the five fundamental requirements, noted in Chapter six, have been addressed in renewing the Crown-Aboriginal relationship. In particular, it is considered essential that the courts come to grips with the no-conflict rule within the context of the Crown-Aboriginal relationship. More specifically, it is assumed that the courts will have determined whether the rationale of accountability should be used to assess the Crown's conduct in relation to all, or only some, Aboriginal interests. To the extent that a modified approach to that rule is deemed appropriate insofar as the *Sparrow - Van der Peet* justificatory standard is concerned,[9] it is further assumed that the courts will have validated that approach in a way which lends certainty to the roles and expectations of the parties concerned.

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[9] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 (S.C.C.).

Appendix A - Discussion of Paradigm 2

A. Restatement of Facts:

"A developer wishes to open a golf course, casino and theme park adjacent to a national park. The proposed resort promises to provide stable, year round employment in what is otherwise considered to be a depressed region of the province. The provincial and municipal governments are anxious to see the project proceed and are offering significant tax concessions to the developer to locate in the region, which is within the riding of a prominent federal cabinet minister who was recently elected on an economic renewal platform. The Province has agreed to act as a partner in the project and share expenses and revenues. The deal hinges on the developer's ability to acquire a suitable piece of property. Suitable land is scarce due to the fact that the federal government has been expropriating cottage land in the area with a view to expanding the national park. National and international environmental groups consider the implementation of the federal government's plans for national park expansion to be long overdue.

The developer proposes to locate the development on half of a parcel of reserve land which is adjacent to the lands being considered for the park expansion. Although uninhabited, the reserve lands, which are considered sacred, are used by some members of a local band for subsistence hunting and fishing. The province has approached DIAND with a long-term offer to lease the lands based on its assessment of their "fair market" value. The province will in turn sub-lease the land to the developer for a nominal fee. DIAND has explained the offer to the Band.

Band members are bitterly divided on the proposal. Some elders oppose the development in principle - arguing that it is inconsistent with their traditional lifestyle and beliefs. They point out that many Band members depend on the fish and game which live on the land for sustenance and believe that the remaining land will be too small to support traditional pursuits in the future. Other members of the Band support the surrender and lease in the belief that Band members will benefit from the job guarantees the developer has promised the Band Chief. They argue that if the deal does not go through, the reserve will be vulnerable to expropriation anyway as the national park is expanded. DIAND officials have sought assurances from Parks Canada that the reserve will not be expropriated as part of any future park development proposal. The response, which merely promises to "take Aboriginal concerns into account in any future park expansion

which may be undertaken", only serves to fuel suspicions in the Aboriginal community.

The developer, who is experiencing pressure from his investors to start construction, has threatened to abandon the project if a deal cannot be concluded quickly. DIAND is also facing pressure from a number of federal cabinet ministers who have voiced their support for the project and are worried that any further delay will play into the hands of the environmental groups who are opposed to any development in the region. Nevertheless, some officials in DIAND are concerned that the compensation package does not adequately reflect the value of the land. Nor does the package include any offer to provide the Band with suitable replacement lands elsewhere in the immediate vicinity. DIAND has written to advise the Band of its concerns, the developer's threat and DIAND's recommendation that further negotiations be undertaken on the basis of a more comprehensive property assessment and a survey of suitable replacement lands. The recommendation is rejected and a Band meeting is hurriedly convened to consider the surrender and lease agreement. When the vote is held the Band narrowly agrees to proceed with the surrender on the terms offered by the developer.

Must DIAND permit the lease to proceed based on the results of the surrender vote? Will it be in breach of a fiduciary duty if it allows what later turns out to be an improvident bargain to proceed? Which Aboriginal interest are to be given paramountcy when considering how best to discharge its fiduciary obligations? Is DIAND the only government entity which is seized with fiduciary duties with respect to the Aboriginal title interest. In view of the various interests involved, is the federal Crown in a conflict of interest and, if so, how are its various competing interests to be managed? What if any fiduciary duties will be owed by the provincial Crown as the principal lessee in these circumstances?"

B. Analysis of Problem:

There exists, *per Guerin*, a specific fiduciary obligation on the part of the Crown to exercise its discretion in the best interests of the Aboriginal band concerned, when Aboriginal title is surrendered.[10] That obligation raises a specific fiduciary duty to ensure that proper compensation is paid, regardless of the means used to effect the transfer. It also

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[10] *Guerin et al.* v. *The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.).

imposes a duty on the part of the Crown to prevent "exploitative bargains". The specific fiduciary obligation which arises on surrender will continue to exist for the duration of any lease which may subsequently be entered into. Moreover, the duty may give rise to the further requirement to revoke any lease or purchase agreement - provided the Crown has the means at its disposal to do so.[11] Given the nature of the proposed transaction this is not considered to pose a problem here.

The federal Department of Indian Affairs and Northern Affairs (DIAND) will typically be the Crown entity which is responsible for discharging the fiduciary duties which arise on surrender; a conclusion attributable to those provisions of the *Indian Act* which assign specific, defined duties to DIAND whenever reserve lands are alienated. Moreover, following a surrender for lease, that Department will be under a continuing obligation to deal with the land on the Aboriginal Band's behalf - notwithstanding the fact that the lands in question may have been leased to another Crown entity. In this respect, the mere fact that the provincial government will be the principal lessee should not serve to shift the burden from DIAND to the provincial lessee.

To the extent that the law treats Aboriginal peoples as autonomous actors, the Crown must respect a band's decision to surrender its land.[12] However, as a fiduciary, DIAND could be held liable to account if it allows an improvident transaction to proceed.

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[11]See *Lower Kootenay Indian Band* v. *Canada* (1991), 42 F.T.R. 241 (F.C.T.D.).

[12]See *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; 130 D.L.R. (4th) 193 (S.C.C.)[hereinafter *Blueberry River*].

In this case, the difficulty lies in determining whether or not the particular transaction in question is indeed in "the best interests" of the Band members.

The facts raise a number of troubling concerns which need to be explored further. In this respect, DIAND officials would be advised to take note of the fact that the surrender was only narrowly agreed to. The apparent lack of unanimity may make it very difficult for DIAND to determine where the best interests of the Band members really lie. In light of the *Wewayakum* case,[13] it may even be argued that the Crown is under a fiduciary obligation to attempt to arbitrate and reconcile the conflicting Aboriginal interests before deciding how best to proceed. Other relevant concerns which DIAND officials will want to take into account include, the fact that the vote had been taken without benefit of a comprehensive property assessment and survey of suitable replacement lands, the possibility that the threat of a real or imagined expropriation may have swayed the surrender vote, and the possibility that the developer may have been exerting undue pressure on the Band by approaching the Band Chief with job guarantees while at the same threatening to "pull-out" of the deal unless it could be concluded quickly.

The ultimate decision on whether or not to permit the lease to proceed will no doubt hinge on the validity of the surrender and the results of the assessment and survey. That being the case, prudence would dictate that DIAND fully investigate the manner in which the vote was obtained and proceed to have the necessary property assessments and

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[13] *Wewayakum Indian Band* v. *Canada and Wewayakai Indian Band* (1995), 99 F.T.R. 1 (F.C.T.D.).

surveys conducted. The resultant delay may well jeopardize the project. However, in assessing the extent to which the fiduciary duty to act in the best interests of the Aboriginal beneficiaries has been discharged, it is important to recognize that a court will not look behind the exercise of the Crown's discretion where it has acted "honestly" and "prudently" for the benefit of the Aboriginal title holders.[14]

The facts are complicated by the apparent conflict of interests which is present in this case. Clearly, in discharging its specific fiduciary obligations with respect to the Aboriginal title interest, DIAND must not allow itself to be swayed by the outside interests concerned. Indeed, as a fiduciary, it would be precluded from using its position to its own or a third party's advantage or having other interests which conflict with the interest to be served. These proscriptions are typically embraced by the so-called "no-conflict" rule. On the facts of this case, the other federal and provincial entities do not appear to be bound by the same proscription.[15]

C. Potential Impact of Proposed Reforms:

As in the first paradigm situation, it is assumed that the five fundamental requirements noted in Chapter six have all been addressed. In particular, it is considered

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[14]See *Kruger* v. *The Queen* (1985), 17 D.L.R. (4th) 591, [1986]1 F.C. 358 (F.C.A.)[hereinafter *Kruger*].

[15]Indeed, given the fact that the other federal Departments concerned have wider public interests to consider, it may be very difficult to say that they can ever truly be in a conflict of interest, unless they realize a personal economic benefit. In this vein, see the judgments of Gonthier and McLachlin JJ. in the *Blueberry River* case cited *supra* note 12.

essential that the courts enforce the no-conflict rule in relation to those interests in respect of which it may be said that the Crown owes exclusive, specific duties. Of course, difficulties can arise when the Crown's other interests or duties conflict with the Crown's fiduciary role or offend the Aboriginal "interest to be served". In this respect, it is difficult to see how the specific fiduciary duties which arise on surrender can be assessed and discharged by the Crown having regard to other competing interests and obligations, as was suggested in *Kruger*.[16]

It is also deemed imperative that the courts apply the *sui generis* label in ways which give meaning and certainty to the relationship - such as by utilizing the trust model to define the Aboriginal title interest. While it still raises fiduciary obligations, the trust model would add certainty to the relationship by creating a stronger theoretical foundation for the Crown's role on surrender. Moreover, by equipping Crown administrators with a clearer definition of their roles and responsibilities as *trustees* for the Aboriginal title interest, it may be possible to insulate them from the negative effects which the sorts of internal government conflicts, present on the facts here, can generate.

The potential for conflict, in such circumstances, would largely disappear where the fiduciary obligations appertaining to the Aboriginal title interest are assumed by Aboriginal governments - which was one of the reform options canvassed in this thesis.

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[16]The same tendency would seem to underscore the "co-existence" approach which Macfarlane J.A. advocated in *Delgamuukw et al.* v. *The Queen in right of British Columbia et al.* (1993), 104 D.L.R. (4th) 470, 5 W.W.R. 97 (B.C.C.A.) [leave to appeal & cross-appeal to S.C.C. granted 109 D.L.R. vi]. That approach seeks to minimize the role of law and strict adherence to legal rights.

However, even where the latter option is not pursued, it would still be possible to minimize the potential, destabilizing effects of conflict, by ensuring that the responsibility for discharging this type of specific fiduciary obligation is transferred to an *independent* government agency or Department, in the manner proposed in Chapter six. Such an entity would be insulated from the sorts of political pressures which might otherwise be brought to bear on those government officials whose duty it is to discharge the Crown's lawful fiduciary obligations, in these circumstances.

Finally, on the facts of this case, the elimination of the expropriation power would have simplified the situation considerably. In this respect, the Band members concerned would not have felt pressured to agree to a precipitous arrangement in order to avoid a less favourable "taking" at some later date. As one less factor in the equation, it would have also made it much easier for DIAND to determine where the best interests of the Band members lay.

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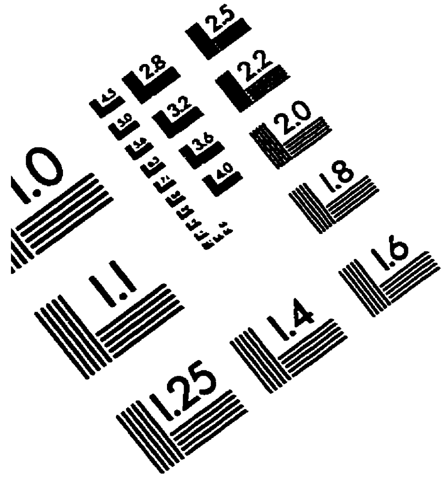
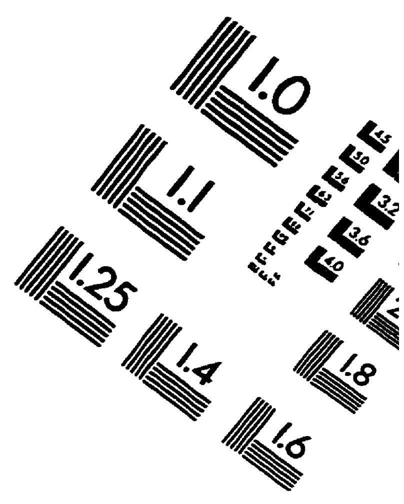
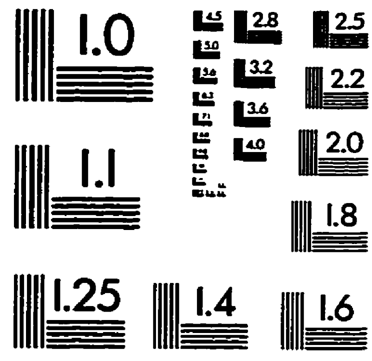
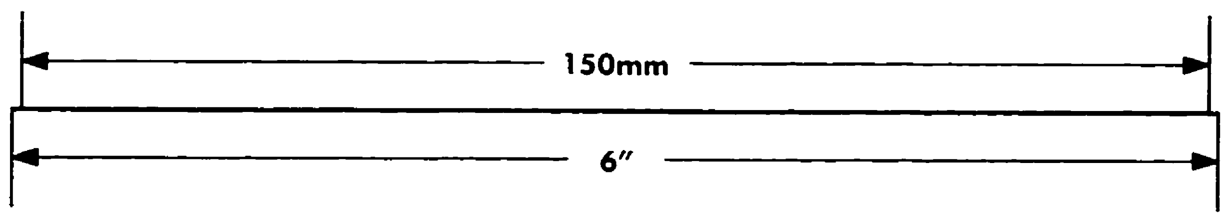

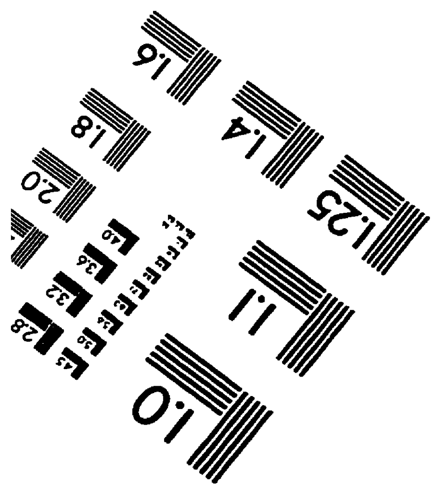

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