Fiduciary Trust Concepts and Aboriginal Peoples - important case law.

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The Crown has a general fiduciary duty towards native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands.[1]

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In our opinion, *Guerin*, [[1984] 2 S.C.R. 335,] together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, 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.[2]

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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 protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation.[3]

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In 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. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. 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, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[4]

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1 B. Slattery, "Understanding Aboriginal Rights"(1987) 66 Can. Bar Rev. 727 at 753.

2 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1108.

3 *R. v. Van Der Peet*, [1996] 2 S.C.R. 507 at 536-537.

4 *R. v. Adams*, [1996] 3 S.C.R. 101. at paragraph 54.

1 What is Fiduciary Duty?

The characteristics of a fiduciary relationship were set out by Madam Justice Wilson in *Frame v. Smith*, [5] at page 136:

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; and
3. the beneficiary is peculiarly vulnerable or at the mercy of the fiduciary holding the discretion or power.

Once a fiduciary role is established strict rules of conduct are required by law. The person bound by the fiduciary duty must act to protect the interests of the other who is known as the principal or the beneficiary.

There are numerous duties placed on a fiduciary such as:

1. not to delegate his or her discretion;
2. not to act under another's orders;
3. not to fetter the discretion;
4. not to act for his or her own benefit or a third party's benefit at the expense of the principal;
5. not to let any personal interest conflict with the fiduciary obligation;
6. not to let any duty to a third person conflict with the fiduciary obligation.

The duties depend on the particular circumstances of each case. Not all fiduciaries are bound by the same rules. The categories of fiduciary relationships are wide ranging and continue to grow. Examples of fiduciary relationship include those established by a trust or by agency. The law is still discovering new fiduciary relationships. Fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which require the exercise of discretion, do not typically give rise to a fiduciary relationship.[6] However, given the historic relationship between the Crown and Aboriginal Peoples the Courts have determined that a unique or *sui generis* fiduciary relationship exists. The limits of that relationship also remain open. How far the Crown's fiduciary obligations to Aboriginal Peoples extend and which of the myriad dealings between the parties is subject to the duty has not been settled by the Courts.

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5 *Frame v. Smith*, [1987] 2 S.C.R. 99.

6 *Guerin et al. v. The Queen et al.*, [1984] 2 S.C.R. 335.

2 A Review of The Major Cases concerning the Crown-Aboriginal Fiduciary Relationship

The Crown, whether federal or provincial,[7] has fiduciary duties to Aboriginal Peoples that are social, political and legal. Fiduciary duties and obligations apply when the Crown exercises its discretion in dealing with Aboriginal Peoples, for example when it seeks the surrender of Aboriginal lands or when it wishes to enter into a treaty with Natives. Aboriginal Nations have essentially no choice but to deal with the Crown on these occasions. The fiduciary duty also applies when the Crown enacts legislation or takes some action which **may** infringe Aboriginal or Treaty rights in a significant number of cases.

The fiduciary relationship must be taken into account by the courts whenever the rights and/or interests of Aboriginal Peoples are affected by the government. The Supreme Court of Canada has clearly said that a *sui generis* fiduciary relationship governs Crown actions relating to Aboriginals. This relationship directs the interpretation of legislation, Treaties, and documents relating to Aboriginal Peoples.

In *Guerin v. The Queen*,[8] the Supreme Court of Canada formally set aside the idea that the crown was only governed by a "political trust." Rather, it declared that the Crown was subject to a legally binding fiduciary duty to Aboriginal Peoples in cases concerning land transactions. This fiduciary duty was based on the historical relationship between the Crown and Aboriginal Peoples along with the nature of Aboriginal title. The duty was emphasized by the fact that Aboriginal Peoples' interests in land may only be surrendered to the Crown.

The legal fiduciary duties of the Crown are not limited to the surrender of one or more interests in land and although the legal duty probably does not apply to every single aspect of the relationship between the Crown and Aboriginal Peoples, it is the foundation of Aboriginal law and must be considered in litigation between the Crown and Native Peoples or Native individuals.

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7 As stated by Professor Slattery:

> The Crown's general fiduciary duty binds both the Federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.

B. Slattery, "Understanding Aboriginal Rights, *supra*, at 155.

8 *Guerin v. The Queen*,[1984] 2 S.C.R. 335.

2.1 Fiduciary Duty, Land & Related Issues

2.1.1 Early Decisions

The Courts have recognized Aboriginal title to the land since at least 1743 and recognized the legal Crown-Native relationship in land transactions. The first such decision is that of the Privy Council validating a Council of Commissioners' statement in *re Mohegin Indians.* It concerned sovereignty and land rights. The judgment states:

> The Indians, though living amongst the king's subjects in these countries, are a separate and distinct people from them, they are treated as such, they have a policy of their own, they make peace and war with any nation of Indians when they think fit, without controul [sic] from the English.
>
> It is apparent that the crown looks upon them not as subjects, but as a distinct people, for they are mentioned as such throughout Queen Anne's and His Present Majesty's commission by which we now sit. **And it is as plain, in my conception, 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 purchases of the natives.[9] [emphasis added]

In 1832 in *Worcester v. The State of Georgia*,[10] the U.S. Supreme Court said that the British and U.S. governments had always recognized Native political integrity. The right of internal self-government was declared inviolable by the U.S. Constitution. Entering into treaties did not convey Native sovereignty to the U.S., but rather reaffirmed it.

With *St. Catherine's Milling and Lumber*,[11] in 1888, the Privy Council held that the Crown had underlying title to the land but that Native rights were a burden on that title.[12] Note that the Court said that Provincial rights to benefit from land as a source of revenue were

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9 Barsh, R.L., and Henderson, J.Y., *The Road: Indian Tribes and Political Liberty* (Los Angeles: UCLA Press, 1980) at 32 citing: *The Governor and Company of Connecticut and Moheagan Indians* (London: 1769); *5 Acts of the Privy Council of England, Colonial Series* 218 (London 1912); Smith J.H. *Appeals to the Privy Council from the American Plantations* 418 (New York: 1950); Henderson, J.Y., "Unravelling the Riddle of Aboriginal Title" (1977), 5 American Indian L. Rev. 75 at 96-102. also cited in Henderson, J.Y., "Empowering Treaty Federalism" (1994), 58 Sask. L. Rev. 241, db JOUR (QL) at 37-38 QL.

10 *Worcester v. the State of Georgia* (1832), 31 U.S. (6 Peters) 530.

11 *St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 A.C. 46 (P.C.).*

12 *Id.*, at 58.

contingent upon surrender of the land by Aboriginal Peoples.[13] This decision essentially made all Provincial legislation relating to natural resources in "unsurrendered" land contrary to law, although the issue was never pursued - likely because the *Indian Act* forbade the raising of money to litigate Aboriginal Peoples' interests in land until 1951.

Later, with *Tijani v. The Secretary, Southern Nigeria*,[14] the Privy Council determined that the English system of property law was not to be applied carte blanche in or to other nations. Indigenous Peoples' values, the rights of local communities, and the historical context of the issues of land ownership and use were to be considered. English legal principles were to be used only circumspectly:

> Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.[15]

Indigenous use and occupancy of the land might restrict the rights of the Crown:

> . . . a communal usufructuary occupation, . . . may be so complete as to reduce any radical right in the Sovereign to one which extends to comparatively limited rights of administrative interference.[16]

2.1.2 Later Decisions

As mentioned above, *Guerin* set the modern courts on the road to defining the Crown's legal fiduciary duties. Dickson J., stated that the decision of Justice Hall in *Calder v. Attorney General of British Columbia*,[17] means the existence of Aboriginal title is "a legal right derived from the Indians' historic occupation and possession of their tribal lands,"[18] and that Indigenous Peoples'

> . . . interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive order or

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13 *Id.*, at 59.

14 *Tijani v. The Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.).

15 *Id.*, at 404.

16 *Id.*, at 409-410.

17 *Calder v. Attorney General of British Columbia*, [1973] 1 S.C.R. 313.

18 *Guerin, supra*, at 376.

legislative provision.[19]

The Court determined that there exists "a distinct fiduciary obligation owed by the Crown to the Indians."[20] This duty is grounded in Aboriginal title and the judiciary is to enforce the responsibilities such a concept places upon the Crown.[21] The Court clearly stated that fiduciary relationships are not to be considered narrowly: "the categories of fiduciary, like those of negligence, should not be considered closed."[22]

In *Blueberry River Indian Band v. Canada,*[23] [*Apsassin*] the Band sued the Crown for various breaches of its fiduciary duty during the surrender of the land in question. The land was surrendered to the Crown and sold to armed forces veterans. The SCC generally rejected the Band's arguments relating to breaches of pre-surrender fiduciary duty of the Crown but determined that the *Indian Act* imposed a duty to prevent "exploitive bargains" regarding the surrender of Reserve land. Apparently in this particular case the record did not show an exploitive bargain nor did it demonstrate that Crown officials had misinformed the Band about the nature and consequences of the surrender.

Nonetheless the terms of the surrender did impose on the Crown post-surrender fiduciary duties in how it dealt with the land regarding both surface and subsurface rights. Having failed to reserve out the subsurface rights for the benefit of the Band when selling the land, the Crown had breached its fiduciary duty. The mineral rights had been conveyed despite the policy of the Department of Indian Affairs to avoid transferring these rights on the sale of surrendered land.

Justice McLachlin outlined the Crown's fiduciary duties prior to the surrender transaction:

1. The *Indian Act* did not prevent the band from making its own decisions about the surrender transaction.
2. The act imposed a duty on the Crown to avoid exploitive bargains.
3. It did not impose on the Crown a duty to ensure the best surrender arrangement for the band.
4. The courts will not interfere in a surrender transaction if it is not exploitive and if its terms are clearly and fairly explained to the concerned Aboriginal Peoples by the Crown.

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19 *Id.*, at 379.

20 *Id.*, at 376.

21 *Id.*, at 388.

22 *Id.*, at 384.

23 *Blueberry Indian Band v. Canada*, [1995] 4 S.C.R. 344.

5. When the Crown assumes a discretion in the management of the surrendered lands, when the Crown misrepresents terms of the surrender transaction, or when the transaction is an exploitive bargain, the courts may hold the Crown to its fiduciary duties and obligations.

The case was sent back to the trial judge to determine what level of damages were to be awarded for the Crown's breach of its fiduciary obligation. The government was ordered to pay $147,000,000 to the Blueberry River and the Doig River Indian Bands.

In *Semiahmoo Indian Band v. Canada*,[24] the Federal Court of Appeal found that the decision in *Apsassin* bound the government to a fiduciary duty to avoid exploitive bargains concerning surrenders of interests in land. This particular surrender (in 1951) was deemed exploitive as the surrender was absolute, an adequate price was not paid, and the majority of the land was surrendered for no specific reason. In addition the band would not normally have surrendered the land but felt powerless before the Crown due to the likelihood of expropriation. Chief Justice Isaac set out the Crown's duty in this passage:

> I should emphasize that the Crown's fiduciary obligation is to *withhold its own consent* to surrender where the transaction is exploitive. In order to fulfil this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary, the Crown must be held to a strict standard of conduct. Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility to scrutinize the transaction. The Trial Judge's findings of fact, however, suggest that this is precisely what the respondent did. I note, for example, the first sentence of her reasons for her judgment reads:"The issue in this case is whether the defendant breached its fiduciary duty to the plaintiffs when it *encouraged (required)* the surrender of part of the plaintiff's reserve". . . . In failing to alleviate the Band's sense of powerlessness in the decision-making process, the respondent failed to protect, to the requisite degree, the interests of the Band. [Original emphasis][25]

The band had relied on Crown representations that the surrender was required to expand customs facilities, but in fact the land was not needed for this public purpose. The Crown had a clear duty to protect the band by refusing to consent to an absolute surrender of reserve land for which there was no real public need. The pre-surrender fiduciary duty also applied following the surrender, because the Crown was under a fiduciary duty to return the surrendered land as it was not needed. The Court further explained the fiduciary duties of the Crown following the surrender:

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24 *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3 (C.A.).

25 *Id.*, at 25-26.

> In *Apsassin*, the Crown's mistake in the original surrender was failing to reserve the mineral rights for the benefit of the Indian band contrary to a long-standing government policy to do so. In my view, the Crown made a similar mistake in this case as to the quality or scope of the surrender that was required. The Crown obtained an absolute surrender from the Band when, having regard to the uncertainty of the public need for the land, a conditional or qualified surrender would have sufficed. In both cases the result was that the original surrender did not impair as little as possible the interests of the affected Indian band. Therefore, I am of the view that in this case, as in *Apsassin*, the Crown was under a post-surrender fiduciary duty to correct the error that it made in the original surrender for as long as it remained in control of the land.[26]

The Court ordered the return of the surrendered lands and decided that the band could be awarded damages for lost opportunities and for injurious affection to the remainder of the reserve lands. It referred the issue of compensation to the Trial Division.

In *Gitanyow v. Canada*,[27] the Court issues a Declaration that the fiduciary duty applies to treaty negotiations. The head note of the case report encapsulates the decision as follows:

> A declaration was granted that both BC and Canada, in undertaking to negotiate with the Gitanyow within the framework of the BC treaty process and in proceeding with those negotiations, were obliged to negotiate in good faith with the Gitanyow, and all Crown representatives were bound by such duty. There was nothing obliging the Crown to negotiate a treaty. However, once negotiations began, the duty to negotiate in good faith, founded upon the longstanding fiduciary relationship between aboriginal peoples and the Crown, applied equally to the Federal Crown and the BC Crown. The Crown was not divisible. In addition to recognizing existing aboriginal and treaty rights, section 35(1) of the Constitution Act, 1982, included aspects of the fiduciary relationship. Nothing, including the provision of adequate funding to the Gitanyow for the negotiation process or the Crown's public interest responsibility, released the Crown from its fiduciary duties. The courts had jurisdiction to ensure that the Crown did not fail in its fiduciary obligation to aboriginal peoples.

In a later decision in the same case[28] Justice Williamson held that the Crown must take into account and deal with all overlapping claims on a given territory when engaging in treaty negotiations.

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26 *Id.*, at 32-33.

27 *Gitanyow v. Canada*, [1999] B.C.J. No. 659 (S.C.), (QL) leave to appeal granted, [1999] B.C.J. No. 1258 (C.A.) (QL).

28 *Gitanyow v. Canada*, [1999] B.C.J. No. 1453 (S.C.) (QL), see paragraph 41.

2.2 Fiduciary Duty and Aboriginal & Treaty Rights

The decision in *R. v. Sparrow*[29] is perhaps the most promising from the Supreme Court on Aboriginal rights. This unanimous decision expanded the scope of the fiduciary duty under which the Crown must operate when dealing with Indigenous People.[30] For the first time the Court addressed s. 35(1) of the Constitution[31] and determined that it:

> . . . calls for just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[32]

Aboriginal rights are not to be frozen in time but are meant to be interpreted in a flexible manner "so as to permit their evolution" and are to be viewed in their "contemporary form rather than in their simplicity and vigour."[33] The fiduciary duty is held to be incumbent upon the Crown in its dealings with Indigenous Peoples.

> In our opinion, *Guerin*, [[1984] 2 S.C.R. 335,] together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, 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

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29 [1990] 1 S.C.R. 1075.

30 For a variety of views on the meaning and importance of this case, see: Asch, M., and Macklem, P., "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991), 29 Alta. L.R. 498; Binnie, W.I.C., "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" 15 Queen's L.J. 217; Bowker, A., "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995), 53 Toronto Fac. L. Rev. 1; Doyle-Bedwell, P.E., "The Evolution of the Legal Test of Extinguishment: From *Sparrow* to *Gitskan*" 6 C.J.W.L. 193; Henderson, J.Y., "Empowering Treaty Federalism" (1994), 58 Sask. L. Rev. 241; Hutchins, P., Schulze D., & Hilling C., "When do Fiduciary Obligations to Aboriginal People Arise?" (1995), 59 Sask. L. Rev. 97.

31 *Constitution Act 1982*, as enacted by Schedule B of the *Canada Act*, 1982 (U.K.), c. 11, section 35(1) states:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed

32 *Sparrow*, supra note 14 at 1106, citing Lyon, N., "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95 at 100.

33 *Id.*, at 1093.

aboriginal rights must be defined in light of this historic relationship.[34]

The Court referred to earlier cases in setting out basic principles to be applied prior to infringement of Aboriginal [or treaty] rights:

> Federal power must 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. Such scrutiny is n keeping with the liberal interpretive principles enunciate in *Nowegijick, supra,* and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin.*[35]

In *R. v. Van der Peet,*[36] the Supreme Court was asked whether the accused's aboriginal rights included the right to sell fish and, if the right existed, whether it had been infringed by federal and provincial legislation. The Court considered what principle of interpretation should apply to statutes and treaties. At paragraph 24, Lamer C.J.C. said that the appropriate principle:

> ... arises from the nature of the relationship between the Crown and aboriginal peoples. 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 protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation.[37]

I submit that this passage along with those from *Sparrow*, above, and *Adams* ,on page one herein, indicate that a broad fiduciary obligation should cover all relations between Aboriginal Peoples and the Crown. The courts should interpret and apply the various provisions of the *Indian Act* and its regulations with the fiduciary duty of the Crown foremost in their minds. Thus the Crown's administration of Reserve lands and related interests such as timber, oil and gas, etc. should be governed by the fiduciary relationship. Failure of the Crown to make decisions and take action in the best interests of Aboriginal Peoples should be subject to legal penalties. The courts should interpret other legislation to protect Aboriginal rights, interests and values.

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34 *Id.*, at 1108.

35 *Id.*, at 1077.

36 *R. v. Van der Peet,* [1996] 2 S.C.R. 507.

37 *Id.*, at paragraph 24.

In *Delgamuukw v. British Columbia,*[38] the court referred extensively to the "special relationship between the Crown and Aboriginal Peoples" when it formulated the legal test for justification of the Crown's infringement of Aboriginal Title. Under *Delgamuukw* the government must show that it took Aboriginal rights into consideration before the actions of government are legal. There is always a duty on the government to consult with Aboriginal Peoples. The nature and scope of that duty of consultation varies with the circumstances of each case. In most cases, the Court said the government must engage in something far deeper than simple consultation and there are instances where the full consent of an Aboriginal Nation may be required prior to the government taking any action. Because Aboriginal title involves an economic aspect, compensation is relevant to government interference with that title. The compensation must be fair and in balance with the type of infringement. In effect this means settlements in the multi-billions of dollars given the array of such infringement throughout the country.

The reconciliation of Aboriginal rights with the sovereignty of the Crown appears to be the focal point for the S.C.C. in *Delgamuukw*. Reconciliation simply means agreement and partnership. This case and many others clearly set out the duty of the government to consult with Aboriginal Peoples. That duty limits the ability of Parliament or the Provinces to enact legislation dealing with natural resources and the environment.

In *Union of Nova Scotia Indians v. Canada (A.G.),*[39] The Federal Court made it clear that the fiduciary duty of the Crown extends to federal ministries other than Indian Affairs. The ministries of fisheries and environment had failed to consider the adverse effects of dredging Bras d'Or Lake on the Aboriginal right to fish, when reviewing the project under the *Canadian Environmental Assessment Act*. INAC refused to participate in the process. The decision to dredge was set aside due to the failure of the Crown to be guided by its fiduciary duty to the Mi'kmaq in assessing the project. The Court said at paragraph 21 and 22:

> The Crown's fiduciary duty to the applicants as representing Aboriginal people continued throughout the assessment process and thereafter. It may be that within the public service, at least on this occasion, the perception was that the sole responsibility for discharge of that duty was that of DIAND. . . . There simply was no reference by the responsible authorities here involved, acting on behalf of the Ministers of Fisheries and Oceans and of Environment, to the fiduciary duty owed by Her Majesty's government to the Mi'kmaq Aboriginal people. Failure to consider that duty and the responsibility it raises, where an Aboriginal interest has been earlier recognized and may be adversely affected by the project, in my view, constitutes a failure by those acting on behalf of the respondent Ministers to act with fairness towards the applicants in the environmental assessment process. Indeed,

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38 *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010.

39 *Union of Nova Scotia Indians v. Canada (A.G.)* (1997), 1 F.C. 325 (T.D.).

> it is an error in law, in my view, to fail to address the Aboriginal interest, and if it be affected, to assess whether that effect is warranted, in accord with the approach set out by the Supreme Court of Canada in R. v. Sparrow,
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> I am persuaded that by their failure to consider the fiduciary duty here owed to the applicants, when the decision was made on behalf of the Ministers, those acting on behalf of the Ministers did breach that duty.

2.3 Fiduciary Duty, Crown Lawyers & Crown Legal Opinions

In *R. v. Seward*,[40] Justice Higinbotham determined that the Crown position contesting that the Penelakut Band constituted an organized society was not in keeping with the Crown's fiduciary duty at page 143:

> I consider the Crown's position in contesting that the Penelakut Band constituted an organized society at the time of the assertion of British sovereignty to be egregious and opportunistic, and not in strict keeping with its obligation to take a trust-like approach as opposed to an adversarial approach. If the crown is going to take the position that selected tribes must prove that they constituted an organized society in 1846, the Indian tribes that will suffer are those that have not been litigious in the past or near future, because clearly it will become more and more difficult to prove that fact as time goes by and the memories of the elders are not available to assist us.

In a series of interlocutory decisions in *Buffalo v. Canada (Samson Indian Nation & Band v. Canada)*[41] the Federal Court determined that due to the Crown's fiduciary obligations, legal opinions sought by Indian Affairs are to be disclosed to a Band when the opinions relate to assets under management by the Crown and the government is acting as trustee of the Band's assets.[42]

In *Chippewas of Nawash First Nations v. Canada (Minister of Indian and Northern Affairs)*,[43]

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40 *R. v. Seward*,[1997] 1 C.N.L.R. 139 (B.C. Prov. Ct.) (QL) reversed on other grounds, [1997] B.C.J. No. 1691 (S.C.) (QL), appeal denied [1999] B.C.J No. 587 (C.A.) (QL), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 238.

41 (1994), 86 F.T.R. 1 (T.D.), (1995), 125 D.L.R. (4th) 294 (F.C.A.); 2 F.C. 528 (T.D.), [1998] 2 F.C. 60 (C.A.).

42 Please refer to Appendix I, excerpts from Mary Locke Macaulay, *Aboriginal & Treaty Rights Practice* (Toronto: Carswell, 2000) for a summary of the various decisions.

43 *Chippewas of Nawash First Nations v. Canada (Minister of Indian and Northern Affairs)* (continued...)

the Federal Court determined that Band Council Resolutions held by Indian Affairs were not subject to the fiduciary duty and could be disclosed to a third party applying under the *Access to Information Act*.[44] The decision also declared that the fiduciary relationship between the Crown and Aboriginals is based on the unique nature of Aboriginal title and relied on judgments limiting the duty to surrendered lands, rather than finding a general duty owed by the Crown.[45]

2.4 Fiduciary Duty and Narrowing Court Views

As noted immediately above, some lower courts are beginning to narrow the scope of the fiduciary duty. In *Fairford First Nation v. Canada (A.G.)*,[46] Rothstein J. of the Federal Court Trial Division (now at the Court of Appeal) rejected the idea of a "general on-going duty to protect aboriginal interests." He dismissed arguments that a fiduciary duty arises in holding Reserve land for the benefit of Natives under the *Indian Act*. He claimed that *Sparrow* and the *Union of Nova Scotia Indians* cases had not extended the fiduciary duty to a general duty. He did not limit the scope of the duty solely to surrenders of land but placed a very high burden of proof on any Aboriginal group claiming the duty applied to its specific circumstances. Moreover he found that the government is generally not subject to a fiduciary duty when exercising public law rather than private law duties.

Squamish Indian Band v. Canada,[47] per Simpson J., dealt with an 86 acre property which, before its surrender, was the False Creek Indian Reserve in the City of Vancouver. The plaintiffs (2 Bands and members thereof with competing claims) essentially alleged that the federal government breached its fiduciary duty to them by improperly allocating the Reserve, by mismanaging the Reserve, by improperly taking its surrender, and by selling the Reserve when it should have been leased over the long term.

In assessing whether the Crown had a pre-surrender duty to the Peoples concerned, Justice Simpson examined the effect of the Royal Proclamation of 1763, acknowledged that it protected some "Indian"rights but also claimed it gave absolute rights to the Crown to dispose of some Aboriginal lands. At paragraph 449 she states that by authority of the Royal Proclamation:

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43 (...continued)
(1996), 116 F.T.R. 37.

44 *Access to Information Act*, R.S.C. 1985, c. A-1.

45 Please refer to Appendix I, excerpts from Mary Locke Macaulay, *Aboriginal & Treaty Rights Practice* (Toronto: Carswell, 2000) for a summary of this decision.

46 *Fairford First Nation v. Canada (A.G.)* (1999), 2 C.N.L.R. 60

47 *Squamish Indian Band v. Canada*, [2000] F.C.J. No. 1568 (T.D.) (QL).

. . . the Crown retained the absolute discretion to reduce or eliminate a non-treaty reserve for its own purposes while, at the same time, protecting reserved land from third party encroachment.

Her Ladyship continued at paragraphs 450 & 451 :

> There is no evidence that, in colonial times, the consent of Indian people was required before lands which were reserved for Indians without treaties could be repossessed by the Crown for its own purposes. Indeed, it is clear that, in British Columbia, the colonial authorities diminished reserves without the consent of the Indians when they concluded that a reserve was too large for its native population. In such cases, the officials unilaterally took back reserve land and opened it for pre-emption by settlers without regard for its reserve status, its ancestral ownership or any seasonal use. For example, Joseph Trutch, who was the colony's Commissioner of Lands and Works, reduced the Kamloops, Shuswap and Okanagan reserves without consent, and these lands, once unburdened of the Indian interest, were opened for settler pre-emption . . . . As well, reserves that had been set aside during Governor Douglas' era for Indian bands in the Okanagan valley and South Thompson River region (in B.C.'s southern interior), were later reduced . . . . Colonial officials also reduced the size of reserves previously set aside for Indian groups in the lower Fraser River valley.
>
> Clearly, in colonial times, non-treaty reserve interests were diminished without consent to reflect changes in the Imperial Crown's policy about the appropriate ratio between the Indian population and the extent of reserve land. Further, there was no evidence from the colonial era which suggested that consent was required or was customary for the elimination of a non-treaty reserve. In the absence of any such evidence, and because of the wording of the 1763 Proclamation, it is my conclusion that the Crown had the power to reduce and eliminate non-treaty reserves for its own purposes without consent because they existed only "at pleasure"

With respect this reasoning appears circular. How is it that by repeatedly taking land in breach of the Crown's fiduciary duty, the Crown becomes absolved of that duty? The Crown-Aboriginal partnership enabled the building of Canada. In sharing with the newcomers, the First Peoples relied on the honour of the Crown to protect their rights. Unilateral decision making that ignored and reduced those rights is clearly a breach of fiduciary duty.[48]

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[48] Imperial policy consistently ensured the friendship and cooperation of Native Peoples so as to enable settlement on peaceful terms. This policy necessarily protected Native rights, especially as they related to land. The policy was carried forward after Confederation and has been recognized in law as fundamental to the creation of Canada. See for example, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paragraph 82:

(continued...)

3 Fiduciary Duty - Court Decisions in 2001

3.1 Fiduciary Duty, Land & Related Issues

In *Kingfisher v. Canada,*[49] Mr. Justice Gibson reviewed Semiahmoo and found that there was such a thing as a pre-surrender fiduciary duty owed by the Crown. By the 1890s members of the Chief Chipeewayan Band had apparently become leaderless and dispersed. They never took up residence on the Stoney Knoll Indian Reserve set aside for them as signatories to Treaty No. 6. By Order in Council in 1897, without consultation with the Band and without efforts to identify members of the Band for that consultation, authority was granted for DIAND to relinquish control of the Reserve. Control passed to the Department of the Interior. Stony Knoll Reserve ceased to exist as a Reserve for the Band or any other band. No compensation was paid to or otherwise provided for any member of the Chief Chipeewayan Band. Discussing the pre-surrender duty of the Crown the Court said at paragraph 108:

> On the facts of this matter . . . I am satisfied that the reasoning in Guerin and Apsassin, when applied to this case, imposed on the defendant a fiduciary duty to the Band not to implement a release or surrender of the Stony Knoll Reserve without clear and convincing proof, in the absence of any decision by the Band to surrender the Reserve, that the Band had ceased to exist. As earlier noted, I am satisfied that no such clear and convincing proof could have been before the defendant.

And at paragraph 110:

> Once again as in Semiahmoo, I am satisfied that the Band was, at the relevant time, "particularly vulnerable", not simply to the influence of the Crown, but, because of its leaderless and dispersed condition, to exploitation by the Crown itself.

And at 111:

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[48] (...continued)

> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. **The "promise" of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments.** The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

[49] *Kingfisher v. Canada,* [2001] FCJ 1229 (T.D.).

Finally, in Semiahmoo under the heading "Did the respondent breach its pre-surrender fiduciary duty?", Chief Justice Isaac wrote at paragraph 41:

> Having regard to the circumstances of this case, I am in respectful agreement with the Trial Judge's characterization of the respondent's [here the defendant's] pre-surrender fiduciary duty. I also agree with the Trial Judge's conclusion, based on the facts, that the respondent breached this duty when it consented to the 1951 surrender. ...

If required, I would reach a similar conclusion here.

3.2 Fiduciary Duty and Aboriginal & Treaty Rights

In *R. v. Powley*,[50] the Ontario court of Appeal found that the rights of Metis to hunt had been limited by the government in a manner that conflicted with the Crown's fiduciary obligation to Aboriginal Peoples. Before the Court of Appeal (but not at trial), the Crown attempted to establish that the "equitable sharing of resources" was a valid legislative objective in order to uphold the limits on the Metis right. The Court found:

1. An appeal to equitable sharing, without more, cannot amount to a valid legislative objective if, in fact, what is left of the resource after conservation measures is insufficient to satisfy the aboriginal right to harvest for food.

2. Even if "equitable sharing" does amount to a valid legislative objective, the present scheme cannot be justified as being consistent with the Crown's trust-like duty. It accords no recognition to the Métis right, in stark contrast to the blanket exemption given status Indians. A scheme that creates such an obvious imbalance between rights holders, and gives the Métis no priority over those who have no constitutional right to hunt, cannot be described as "equitable" or in keeping with the Crown's trust-like duty.

In *R. v. Guimond*,[51] the accused (members of the Sagkeeng First Nation) were acquitted of charges of unlawfully fishing without a licence contrary to the Manitoba Fishery Regulations and with unlawfully possessing fish (lake sturgeon) taken with a net, contrary to those same regulations. The case boiled down to two issues:

1. Was there justification for the complete closure of the sturgeon fishery?

2. Was there reasonable consultation with the aboriginal peoples concerned on

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50 *R. v. Powley* (2001), 53 O.R. (3d) 35 (C.A.).

51 *R. v. Guimond*, [2001] M.J. No. 294 (Provincial Court)

the issue leading up to closure of the sturgeon fishery?

The Court found that conservation issues warranted a complete closure but that the Regulations had failed to guarantee the aboriginal priority to the sturgeon fishery and:

> . . . in the circumstances of the case at bar, that in respect of the honour of the Crown and the special trust relationship and responsibility of the government vis-à-vis aboriginals, the justificatory test has not been met. That is to say, I am of the view that the infringement is greater than that necessary in order to effect the desired result. Furthermore, the unilateral action taken (closure), without any apparent discussion or consultation, in the face of all earlier indications (i.e. some allowable harvest) to the contrary and within 2 - 5 days of the last such indication, support the finding of failure to meet the applicable test. [52] [the *Sparrow* justification test]

In *R. v. Bernard*, [2001] N.S.J. No. 48 (S.C.) the Nova Scotia Supreme Court (on appeal from a conviction in the Provincial Court) found the accused Mi'kmaq individual not guilty of hunting deer at night with a light, because the regulation prohibiting that activity was a violation of the Aboriginal right to hunt for food. If the regulation had been enacted for safety there would have been infringement but it could have been justified. However the court found the purpose for the prohibition to be ambiguous and therefore constitutionally inapplicable to the accused.

Of interest for the purposes of this paper is the approval by Mr. Justice MacDonald of the remarks of Professor Sullivan in *Driedger on the Construction of Statutes.* [53] At page 381 of that text, Sullivan proposes that the underlying reason for the common law rule that legislation relating to Aboriginal peoples is to receive a large, liberal and purposive interpretation (with doubts or ambiguities being resolved in favor of the Aboriginal peoples) is the Crown's fiduciary duty and commitment of honour to Aboriginals. Sullivan writes:

> To date, the Aboriginal claim to social justice has received little attention in the interpretation of legislation. Arguably it is a logical extension of the concern for the Crown's honor that historically has concerned the courts. Seen from this perspective the liberal construction of legislation relating to Aboriginal peoples is in part an attempt to remedy injustice resulting from the Crown's failure to live up to its commitments and to discharge its fiduciary responsibilities.

This particular failure is ongoing. It occurs at all levels of government. Legislation and

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[52] *Id.*, at paragraph 223.

[53] *Driedger on the Construction of Statutes* (Toronto: Butterworths Canada Ltd. 1994, 3rd ed.)

government policy seem to be formulated with the overriding purpose of evading the Crown's commitments and avoiding its fiduciary duties. There is some tinkering with social injustice but the Crown has apparently refused to even recognize that a massive revision of the status quo, including rewriting most legislation and reformulating most government policy, is needed to correct racial inequity and the exclusion and deprivation most Aboriginals continue to suffer.

3.3 Fiduciary Duty and section 88of the *Indian Act*.

In Paul v. British Columbia (Forest Appeals Commission), [54] the B.C. Court of Appeal stated the issues it was asked to decide as:

1. The first question is whether the Provincial Legislature has the constitutional capacity to confer on the Forest Appeals Commission the jurisdiction to decide questions of aboriginal rights and aboriginal title, including questions of entitlement, infringement and justification, and past extinguishment, in the context of deciding appeals about alleged violations of the Forest Practices Code. That is a constitutional question.
2. The second question is whether, if the Provincial Legislature has that constitutional power, it has exercised it by conferring that jurisdiction on the Forest Appeals Commission. That is a statutory interpretation question.

The accused, Mr. Paul, had cut down four cedar trees without a licence in order to renovate his home. He claimed an Aboriginal right to harvest trees for home construction. The local Forest Service District Manager an Administrative Review Panel determined he had violated provisions of the BC *Forest Act*. The Forest Appeals Commission determined to let the parties ask the Supreme Court whether the Commission had the jurisdiction to hear the appeal. It phrased the central issue thus:

> Although the Commission is prepared to hear and decide the aboriginal rights issues in this appeal, and is of the view that it has jurisdiction to do so, we are prepared to adjourn these proceedings to enable the parties to bring an action in the B.C. Supreme Court to determine whether the Appellant has an aboriginal right to harvest timber for house construction, provided that the parties are in agreement to do so.

The chambers judge decided that the Legislature had conferred on the Forest Appeals Commission, but not on a District Manager or an Administrative Review Panel, the power to decide questions of aboriginal title and aboriginal rights in the course of its judicial function in relation to contraventions of the Forest Practices Code, and that the Legislature had the constitutional capacity to do so.

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[54] *Paul v. British Columbia (Forest Appeals Commission),* [2001] B.C.J. No. 1227 (C.A.).

The Court of Appeal determined that the Provincial Legislature could not confer quasi-judicial adjudicative jurisdiction over aboriginal title and aboriginal rights on forest tribunals.

Of interest for this paper are the words of Justice Lambert concerning the Crown's fiduciary duty and section 88 of the *Indian Act* at paragraph and following:

> [This] brings me to s. 88 of the Indian Act. For convenience of reference I will repeat it:
>
> > 88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.
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> When s. 88 was first passed, its purpose, in my opinion, was to confirm what was not then widely understood, namely that provincial laws of truly general application, like the Motor Vehicle Act, apply to Indians, on or off reserves. That principle came to prevail and, after a time, came to be seen as so independent from s. 88 of the Indian Act that a different purpose came to be attributed to s. 88. Since s. 88 was not required in order to confirm the principle that provincial laws of general application apply to Indians, the purpose of s. 88 came to be taken to be that not only laws of general application which affect Indians in the same way as they affect everyone else, but also laws of general application which affect Indians quite differently from everyone else, because in the case of Indians, the law strikes at the core values of the Indian society, would be made constitutional by the exercise of the legislative powers of Parliament invigorating what would otherwise be a provincial law which the principle of interjurisdictional immunity would prevent from applying to Indians. See Dick v. The Queen, [1985] 2 S.C.R. 309.
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> In short, s. 88 has, since the Dick case, come to be seen as a federal enactment specifically directed at overriding the constitutional principle of interjurisdictional immunity and, to the extent to which it applies, casting the core values of Indians out of the protection of Parliament. **Having regard to the fiduciary obligations of the Crown and the legislative assumption that Parliament cannot have intended to suppress those fiduciary obligations more than it can clearly be seen to have done, it is my opinion that s. 88 must benefit from the principle of construction which asserts that the essential core values of Indians and Indian society should not be adversely affected by legislation unless the legislation is free from ambiguity in expressing and carrying out that adverse effect.**

That principle brings me back to the wording of s. 88. It makes provincial laws of general application "applicable to and in respect of Indians". It says nothing about Indian lands. This omission is conspicuous because of the wording of head 91(24) of the Constitution Act, 1867: "Indians, and Lands reserved for the Indians", which separates the concept of Indians from the concept of Indian lands (and, of course, "lands reserved for the Indians" in head 91(24) cannot mean simply Indian reservations because it must surely encompass the legislative subject matter of aboriginal title and the main body of aboriginal rights which are intimately related to the use of land.)

3.4 Fiduciary Duty and Physical and Sexual Abuse

The issue of the Crown's breach of its fiduciary duty to literally thousands of individual Aboriginal people that resulted in their prolonged physical, sexual and cultural abuse at residential schools in the name of assimilation is a matter of national shame. It is also amongst the most difficult issues facing the legal system. The cases are complex and deeply troubling. The attitude of the Crown in defending many of these cases appears to repeat the breach of its fiduciary duty. The Crown's naming of Bands as third parties to some of the actions is similar to victim blaming in cases of domestic abuse.

T.W.N.A. v. Clarke,[55] dealt with the sexual abuse of seven Plaintiffs while students at St. George's Indian Residential School (St. George's) in Lytton, British Columbia in the 1960s. The Court had the following comments about the position of the Crown at trial in relation to its fiduciary duty to the Plaintiffs at paragraphs 290 to 292:

> I add that the preoccupation of the medical witnesses with the pre-St. George's period of these plaintiffs' lives as children assumes considerable importance in light of the defendant's submission that it is essential to consider the quality of life that awaited these plaintiffs had they not attended residential school and been sexually assaulted by Clarke. In short, Canada, supported by the Church, says the plaintiffs' early lives were characterized by dysfunctional families, ill health, alcoholism, violence, poverty and abandonment. Thus, it is suggested that the quantum of damages should be reduced, as they would have grown up with significant difficulties regardless of what happened at St. George's. This is consistent with Dr. Daylen's opinions.
>
> I find this submission troubling. As has been repeatedly emphasized by the Supreme Court of Canada, the Crown has a fiduciary obligation towards native peoples and indeed that "the honour of the Crown" is at stake in its dealings with native peoples: R. v. Marshall, [1999] 3 SCR 456. In effect, Canada is arguing that it did such a terrible job of fulfilling its constitutional and fiduciary responsibilities to native people, that what happened at St. George's made little difference.

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55 *T.W.N.A. v. Clarke*, [2001] B.C.J. No. 1621 (T.D.) (QL).

Could a person purporting to be in the role of a parent who sexually assaulted his or her child or step-child and was subsequently sued by that child, argue successfully that prior to the sexual assaults taking place he or she provided such a terrible environment in the complainant's home and life that the sexual abuse made little difference? I think not. It is disquieting that Canada, supported by the Anglican Church, has raised such a defence.

4 Final observations

Today the federal Department of Justice maintains a section that deals with Aboriginal litigation. There are over 600 people employed there. They receive civil servants wages. I understand that most of them are lawyers. In addition the Crown contracts out many of its Aboriginal law cases to private firms. Funding for the thousands of court cases the federal government faces appears to come from some bottomless pit. The Crown repeatedly raises a host of procedural issues that dramatically increase the time and cost of litigating for Natives. The Crown often requires full proof of every facet of a claim based on Aboriginal or Treaty rights and usually denies that these rights exist even where it has recognized them through such initiatives as fishing agreements. The Crown credo seems to be obfuscate, deny, delay and dissemble in the hopes that every Native claim will just disappear.

Aboriginal Peoples on the other hand have extremely limited budgets with which to assert and protect their rights in court. Many lawyers representing the interests of natives are underpaid and sometimes unpaid. Experts are desperately sought who can provide opinions at bargain prices or pro bono.

If the Crown really was to fulfill its fiduciary duty to Aboriginal Peoples it would recognize that Aboriginal Peoples do have rights, enable them to exercise those rights freely and ensure that its legislation protected and enhanced those rights. It would sit down at negotiating tables and listen to Aboriginal People and try to reach agreement on contentious issues rather than arrive with its prepackaged resolution and stall until that package is accepted or until Aboriginal People are forced into litigation. In instances where there really are legal questions that need to be answered the Crown should do its best to expedite the pace of the litigation. It should stop trying to have the courts strike virtually every Statement of Claim. It should not raise every procedural hurdle it can think of to prevent important issues from being heard. It should ensure that adequate funding is made available to Aboriginal Peoples to enable them to fully present their case in the Courts.