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Provincial Fiduciary Obligations to First Nations: The Nexus between Governmental Power and Responsibility

Leonard I. Rotman

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Abstract

The Canadian Crown's fiduciary duty to First Nations is entrenched in Canadian Aboriginal rights jurisprudence. More than ten years after the Supreme Court of Canada's decision in *Guerin*, however, yet to be ascertained are the various emanations of the Crown bound by that duty. This paper argues that both federal and provincial Crowns are properly bound by fiduciary obligations to First Nations. It also suggests that the basis of this assertion may be found in existing jurisprudence, the Canadian Constitution, the spirit and intent of Indian treaties, and in Aboriginal understandings of "the Crown."

Keywords

Indigenous peoples--Legal status, laws, etc.; Indigenous peoples--Government relations; Canada

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PROVINCIAL FIDUCIARY OBLIGATIONS TO FIRST NATIONS: THE NEXUS BETWEEN GOVERNMENTAL POWER AND RESPONSIBILITY[©]

BY LEONARD I. ROTMAN*

The Canadian Crown's fiduciary duty to First Nations is entrenched in Canadian Aboriginal rights jurisprudence. More than ten years after the Supreme Court of Canada's decision in *Guerin*, however, yet to be ascertained are the various emanations of the Crown bound by that duty. This paper argues that both federal and provincial Crowns are properly bound by fiduciary obligations to First Nations. It also suggests that the basis of this assertion may be found in existing jurisprudence, the Canadian Constitution, the spirit and intent of Indian treaties, and in Aboriginal understandings of "the Crown."

Que la Couronne canadienne ait une obligation fiduciaire envers les Premières Nations est implanté par la jurisprudence canadienne en matière de droits des autochtones. Néanmoins, plus de dix ans après la décision *Guerin* de la Cour suprême du Canada, il reste à établir quelles sont les émanations de la Couronne liées par ladite obligation. Cet article soutient que les deux Couronnes provinciale et fédérale sont correctement liées par des obligations fiduciaires envers les Premières Nations. L'article suggère aussi que la base de cette proposition peut se trouver dans la jurisprudence actuelle, la *Constitution* canadienne, l'esprit et l'intention des traités indiens, et les compréhensions aborigènes de la Couronne.

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I. INTRODUCTION

In the landmark case of *Guerin v. R.*,¹ the Supreme Court of Canada unanimously declared that the relationship between the Crown² and First Nations³ was fiduciary in nature. Since that time, the number of claims by First Nations alleging breaches of the Crown's fiduciary

¹ [1984] 2 S.C.R. (4th) 335 [hereinafter *Guerin*].

² For the purposes of this paper, the use of the term "the Crown" refers to the sovereign power and position of the body that possesses ultimate responsibility for discharging the fiduciary obligations to First Nations incurred in its name. Where specific emanations of the Crown are indicated, those distinctions will be clearly made in the text.

³ The terms "First Nations," "Aboriginal peoples," "Native peoples," and "Indians" will be used interchangeably to refer to those people who are encompassed within the definition of Aboriginal peoples in section 35(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*], namely Indian, Inuit, and Métis peoples of Canada—and to reflect their use in judicial decisions and legislation. For a more detailed discussion of these terms, see C. Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867" (1978-79) 43 Sask. L. Rev. 37; B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at note 18 and note 175; and, generally, C. Bell, "Who Are the Métis People in Section 35(2)?" (1991) 29 Alta. L. Rev. 351. See also, P. Chartrand, "'Terms of Division': Problems of 'Outside-Naming' for Aboriginal People in Canada" (1991) 2:2 J. Indig. Stud. 1; and T. Isaac, "The Power of Constitutional Language: The Case Against Using 'Aboriginal Peoples' as a Referent for First Nations" (1993) 19 Queen's L.J. 415. For various legal definitions, see section 35(2) of the *Constitution Act, 1982*; section 2(1) of the *Indian Act*, R.S.C. 1985, c.I-5; and *Re Eskimos*, [1939] S.C.R. 104.

obligations has steadily increased.⁴ The Court later furthered this finding in *R. v. Sparrow*⁵ by holding that the Crown's fiduciary duty to First Nations was entrenched in section 35(1) of the *Constitution Act, 1982*. Following the *Sparrow* decision, the judiciary's perception of the Crown-Native relationship was completely transformed from its pre-*Guerin* notions, which had viewed the Crown's obligations to First Nations as moral, rather than legal, and certainly not binding:

The Indians must in the future ... be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.⁶

More than a decade has passed since *Guerin* was decided. In that time, Canadian courts have not questioned the application of fiduciary principles to the Crown-Native relationship. Rather, they now hold as fundamental the notion that the Crown owes fiduciary obligations to First Nations.⁷ Unfortunately, while the number of cases considering the fiduciary nature of the Crown-Native relationship continues to increase at a substantial rate, the vast majority have done little to enhance the juridical understanding of that relationship. Since the *Guerin* decision, itself, failed to establish a sufficient basis for

⁴ Among the more prominent of these are *Kruger v. R.* (1985), 17 D.L.R. (4th) 591 (F.C.A.), aff'g (1981), 125 D.L.R. (3d) 513 (F.C.T.D.); *Bruno v. Canada (Minister of Indian Affairs and Northern Development)* (1990), [1991] 2 C.N.L.R. 22 (F.C.T.D.) [hereinafter *Bruno*]; *Cree Regional Authority v. Robinson*, [1991] 4 C.N.L.R. 84 (F.C.T.D.) [hereinafter *Cree Regional Authority*]; *Lower Kootenay Indian Band v. Canada (Federal Administrator)* (1991), [1992] 2 C.N.L.R. 54 (F.C.T.D.); *Eastmain Band v. Canada (Federal Administrator)* (1992), [1993] 3 C.N.L.R. 55 (F.C.A.), rev'g (sub nom. *Eastmain Band v. Robinson*), [1992] 1 C.N.L.R. 90 (F.C.T.D.) [hereinafter *Eastmain Band*]; *Apsassin v. Canada*, [1993] 2 C.N.L.R. 73 (F.C.A.), aff'g (sub nom. *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*), [1988] 3 F.C. 3 (T.D.) [hereinafter *Apsassin*].

⁵ [1990] 1 S.C.R. 1075 at 1108-09 [hereinafter *Sparrow*].

⁶ *St. Catherine's Milling and Lumber Co. v. Canada (A.G.)* (sub nom. *St. Catharines Milling and Lumber Co. v. Canada (A.G.)*) [1887] 13 S.C.R. 577 at 649 [hereinafter *St. Catherine's Milling, SCC*], aff'g (sub nom. *St. Catharines Milling and Lumber Co. v. Canada (A.G.)*) (1886), 13 O.A.R. 148 [hereinafter *St. Catherine's Milling, OCA*], (sub nom. *St. Catharines Milling and Lumber Co. v. Canada (A.G.)*) (1886), 10 O.R. 196 (Ch.) [hereinafter *St. Catherine's Milling, Ch*], aff'd (1888), 14 A.C. 46 (P.C.) [hereinafter *St. Catherine's Milling, PC*]. Indeed, in the Federal Court of Appeal's decision in *Guerin*, Le Dain J.A. held that the Crown's obligations were no greater than politically- or morally-based obligations: see (1982), 143 D.L.R. (3d) 416 (F.C.A.) at 469-71.

⁷ See, for example, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at 677; *Roberts v. Canada*, [1989] 1 S.C.R. 322 at 337 and 339; *Sparrow*, supra note 5 at 1108-09; *Bruno*, supra note 4 at 27; *Cree Regional Authority*, supra note 4 at 99; *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 at 573, aff'g (1989), 58 D.L.R. (4th) 117 (Ont. C.A.), and (1984), 15 D.L.R. (4th) 321 (Ont. H.C.J.) [hereinafter *Bear Island*]; *R. v. Vincent*, [1993] 2 C.N.L.R. 165 (Ont. C.A.) at 179; *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 182-85.

determining the effects of the Crown's general fiduciary capacity toward First Nations, this is hardly surprising.

The *Guerin* case centred around the nature and extent of the federal Crown's obligations to the Musqueam band in regard to the leasing of that band's land by the Crown to a third party on the band's behalf. Although authorized by the band to lease out the land, the lease in question did not meet certain conditions set out by the Musqueam band. The Supreme Court of Canada determined that a fiduciary relationship existed between the Crown and the band, due to the nature of their interaction, and that the Crown had breached its duty to the band by failing to lease the land in accordance with the specified terms. In so doing, the Court answered the pivotal questions: *Who* were the fiduciary and beneficiary? *Why* was the relationship between them fiduciary in nature? *How* did the Crown's actions amount to a breach of its obligations? And *what* was the basis of the awarded remedy? Since its release, *Guerin* has been used to find fiduciary relationships between the Crown and Aboriginal bands in a wide variety of situations.

The Crown-Native fiduciary relationship is actually comprised of two distinct types of fiduciary relationships. One is a general duty while the other is a specific duty. The Crown owes a general duty to First Nations as a result of the historic relationship between the parties dating back to the time of contact.⁸ The key characteristics of this relationship are bilateral needs, respect, trust, and the mutually recognized and respected sovereignty of both European and Aboriginal nations during the formative years of the relationship. In addition to the Crown's general duty, the Crown also owes specific fiduciary duties to certain First Nations stemming from particular treaties, agreements, alliances,⁹

⁸ The word "contact" has been purposely used in place of the more common term "discovery" to describe the meeting of European and Aboriginal peoples in North America. This is due to the historical fact that what is now known as North America was possessed and occupied by indigenous peoples who inhabited, hunted, fished, trapped, and farmed the land well before Europeans were aware of the New World's existence or possessed the ability to travel to its shores. "Contact" suggests the reciprocity of discovery that followed upon European initiatives of exploration, for "as surely as Europeans discovered Indians, Indians discovered Europeans": F. Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill, N.C.: University of North Carolina Press, 1975) at 39.

⁹ Due to the unique quality of treaties, agreements, and alliances between the Crown and First Nations, which are built upon or stem from the special, *sui generis* relationship between the parties, the obligations assumed thereunder by the Crown are fiduciary in nature.

and government initiatives such as the *Indian Act*.¹⁰

Within the realm of the Crown's general duty, the *Guerin* case did not address these characteristics. Although the Court made strong statements about the fiduciary nature of the Crown-Native relationship in general and detailed some of the reasons why that relationship is fiduciary, *Guerin* neglected to answer a number of fundamental questions, which are necessary precursors to a proper understanding of the Crown-First Nations general fiduciary relationship. Within this larger context, the most notable defect of the *Guerin* decision was its failure to answer the question of who owed fiduciary obligations to First Nations.

The *Guerin* case is not the only case to avoid discussing who is responsible for discharging the fiduciary obligations owed to First Nations. In the majority of post-*Guerin* decisions, judicial attention to fulfilment of the fiduciary duties owed to First Nations has been directed to the Crown. However, these decisions have not addressed the issue of which emanations of the Crown—the Crown in right of Canada, the Crown in right of a province, or both—possess fiduciary obligations to First Nations.

It is insufficient to state, as the Supreme Court of Canada did in *Bear Island*,¹¹ that "the Crown ... breached its fiduciary obligations to the Indians"¹² without revealing which personifications of the Crown are bound by those obligations. In a juridical context, the phrase "the Crown" has a multitude of meanings that refer to a variety of personae. It may refer to the historic constitutional notion of a single and indivisible Crown, to a British Crown in its various personalities, or,

¹⁰ *Supra* note 3. See, for example, *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 108-09 [hereinafter *Mitchell*], where Dickson C.J.C. stated that the *Indian Act* represented "a confirmation of the Crown's historic responsibility for the welfare and interests" of First Nations; *Roberts v. Canada*, *supra* note 7 at 337, in which the *Indian Act* was held to codify some of the Crown's pre-existing duties towards Native peoples; *Guerin*, *supra* note 1 at 383, where Dickson J., as he then was, stated that the *Indian Act* confirms the "historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties." Note also Wilson J.'s emphasis on the historic nature of the Crown's duty, in *Guerin*, *ibid.* at 349, where she stated that "it is the acknowledgment of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest." For a more detailed discussion of the sources of specific Crown fiduciary duties to First Nations, see L.I. Rotman, *Historic Principles, Contemporary Effects: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, forthcoming).

¹¹ *Supra* note 7.

¹² *Ibid.* at 575.

domestically, to a federal Crown, or a particular provincial Crown.¹³ What is required, then, is a direct examination of the various elements of the Crown that may be bound by fiduciary duties to First Nations; in particular, the Crown in right of Canada and the Crown in right of a province.¹⁴

II. JURIDICAL TREATMENT OF CROWN OBLIGATIONS TO FIRST NATIONS

A. Overview

While the judicial recognition and sanction of the Canadian Crown's fiduciary obligations to First Nations are a relatively recent occurrence, great insight into ascertaining which emanations of the Crown are responsible for fulfilling those obligations may be derived from some landmark decisions of the late nineteenth and early twentieth centuries, including *St. Catherine's Milling and Lumber Co. v. Canada (A.G.)*;¹⁵ *Ontario (A.G.) v. Canada (A.G.): Re Indian Claims*;¹⁶ *Ontario Mining Company Ltd. v. Seybold*;¹⁷ and *Dominion of Canada v. Province of Ontario*.¹⁸ In these cases, the courts were faced with determining which levels of government were responsible for discharging treaty obligations owed to First Nations.

¹³ The significance of the various meanings associated with "the Crown" and the difficulties that have resulted from their indiscriminate use has been noted by a number of commentators. For a more detailed discussion of these distinctions, see J.T. Juricek Jr., *English Territorial Claims in North America to 1660* (Ph.D. Thesis, University of Chicago, 1970) [unpublished]; and the commentary upon it in G.S. Lester, *The Territorial Rights of the Inuit of the Northwest Territories* (D.Jur. Thesis, Osgoode Hall Law School, 1981) [unpublished].

¹⁴ The notion that the British Crown may have continuing fiduciary obligations to First Nations is discussed in Rotman, *supra* note 10. See also text accompanying note 22.

¹⁵ *Supra* note 6.

¹⁶ (1896), [1897] A.C. 199 (P.C.) [hereinafter *Robinson Treaties Annuities, PC*], aff'g (1985), [1896] 25 S.C.R. 434 [hereinafter *Robinson Treaties Annuities, SCC*].

¹⁷ (1902), [1903] A.C. 73 (P.C.) [hereinafter *Seybold, PC*], aff'g (1901), 32 S.C.R. 1 [hereinafter *Seybold, SCC*], (1900), [1901] 32 O.R. 301 (Div. Ct.) [hereinafter *Seybold, Div. Ct.*], (1899), and [1900] 31 O.R. 386 (Ch.) [hereinafter *Seybold, Ch.*].

¹⁸ [1910] A.C. 637 (P.C.) [hereinafter *Treaty #3 Annuities, PC*], aff'g (*sub nom. Province of Ontario v. Dominion of Canada*) (1909), 42 S.C.R. 1 [hereinafter *Treaty #3 Annuities, SCC*], rev'g (*sub nom. Dominion of Canada v. Province of Ontario*) (1907), 10 Ex. C.R. 445 [hereinafter *Treaty #3 Annuities, Ex. Ct.*].

It is important, when considering the judicial determinations made in each of these cases, to be aware of the context within which they were decided, as well as the underlying assumptions of the nature of the Crown-Native relationship upon which they were predicated. When the decisions were made, the Crown-Indian relationship was considered akin to that of guardian and ward, albeit without any resultant legal obligations attaching to the Crown.¹⁹ Moreover, the First Nations were not *represented* in any of them. Indeed, these cases are determinative only of the rights and obligations of the federal and provincial Crowns, *vis-à-vis* each other, in discharging the obligations owed to Aboriginal peoples under the terms of Indian treaties. They do not define the reciprocal rights and obligations of either the federal or provincial Crowns in relation to the Aboriginal peoples.

By virtue of its exclusive jurisdiction over "Indians, and Lands reserved for the Indians," under section 91(24) of the *British North America Act, 1867*,²⁰ the federal Crown was empowered to enter into treaty negotiations with Aboriginal groups across Canada. These negotiations resulted in the formation of numerous treaties, which entailed various obligations to the Native peoples. As a result of the nature of the Crown-Native relationship within which they originated, the obligations owed under these post-Confederation treaties—along with the Crown's pre-existing obligations stemming from pre-Confederation treaties, and other events and occurrences such as the *Royal Proclamation, 1763*²¹—are all part of the modern Crown fiduciary obligations.²²

Both pre- and post-Confederation treaties are independent roots of the modern fiduciary obligations. They create specific duties, but do not create the basis of the Crown's general fiduciary obligations, which date back to the period after contact. Due to the factual changes in the Crown's identity and the devolution of legislative and executive responsibilities for Canada to the newly-created federal and provincial Crowns in 1867, distinctions must be made between Crown fiduciary duties predating Confederation and those arising after Confederation. In circumstances in which a First Nation is a signatory to a treaty with

¹⁹ See *supra* note 6 and accompanying text.

²⁰ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (renamed the *Constitution Act, 1867*) [hereinafter *British North America Act*]. Since a number of the cases cited herein predate the name change of the *Act*, the *Act* will be referred to by its original name to avoid confusion.

²¹ R.S.C. 1985, App. II, No. 1.

²² See Rotman, *supra* note 10.

the Crown, the Crown owes that First Nation both general fiduciary duties, which predate Confederation, and more specific fiduciary obligations, which arise from the particular circumstances of the treaty, whether the treaty is pre- or post-Confederation.

The distinction between pre- and post-Confederation fiduciary duties may differentially affect the satisfaction of those duties by the Crown. For example, whether an obligation may be characterized as pre- or post-Confederation is relevant in determining the British Crown's liability. The British Crown would *prima facie* be liable for all pre-Confederation duties to First Nations. It may not be liable for all post-Confederation fiduciary obligations, or, due to the gradual devolution of powers to the Canadian Crown and the resultant lessening of its residual sovereignty over Canadian affairs, it may only be liable in part.²³ The liability of the Canadian Crown is also affected by the pre- or post-Confederation nature of a fiduciary obligation. This is due to the *British North America Act, 1867* and the assumption of pre-Confederation liabilities under it by the Dominion of Canada by way of sections 111, 112, 114, and 115.²⁴

While the Crown's treaty obligations to the Aboriginal peoples were well known in the nineteenth century—even if their fiduciary nature was not—the emanations of the Crown responsible for meeting them were relatively unknown. Over time, as the role of the British Crown diminished in response to the establishment of a stronger governmental presence in Canada,²⁵ it remained to be determined which personifications of the Crown in Canada were responsible for fulfilling these outstanding obligations. The judicial process of answering this question was initiated in the landmark case of *St. Catherine's Milling*.²⁶

B. *St. Catherine's Milling*

The precedent established in *St. Catherine's Milling*²⁷ has had far-reaching consequences that remain to this day. The decision drastically

²³ See Rotman, *ibid.*

²⁴ This issue is dealt with in greater detail in the treatment of the *Robinson Treaties Annuities* case in Part II.C.1, below.

²⁵ For a concise discussion of the devolution of the Crown's duties to the Canadian Crown, see B. Slaterry, "The Independence of Canada" (1983) 5 Supreme Court L.R. 369, especially at 390-92.

²⁶ *Supra* note 6.

²⁷ *Ibid.*

and forever altered the effect of Indian land surrender treaties²⁸ between the Crown and Aboriginal peoples in Canada. Noteworthy for its characterization of the Indian interest in land as a "personal and usufructuary right, dependent upon the good will of the Sovereign,"²⁹ the decision was also the first major pronouncement on the effect of the constitutional division of federal and provincial powers upon the surrender of lands obtained through Indian treaties.

The *St. Catherine's Milling* decision created a lingering and problematic legacy by juxtaposing the federal Crown's acquisition of Aboriginal lands and "extinguishment" of Aboriginal title by way of treaty to the provincial Crown's acquisition of a beneficial interest in the land once it had been disencumbered of the Aboriginal interest. This element of the case is particularly relevant to the examination of which emanation(s) of the Canadian Crown may be found responsible for discharging the fiduciary obligations owed to First Nations.

The *St. Catherine's Milling* decision centred around a dispute between the province of Ontario and the Dominion of Canada over the ownership of former Indian lands. The lands had been surrendered under Treaty #3, a post-Confederation treaty signed in 1873, by the Saulteaux Indians. The *St. Catherine's Milling* and Lumber Company had obtained a license from the Dominion Crown to cut timber on some of the lands that had been surrendered. The Ontario Crown sought to restrain the lumber company from cutting timber on those lands by claiming that it owned a beneficial interest due to section 109 of the *British North America Act, 1867*.³⁰ The main issue at bar was which body

²⁸ Whether such treaties actually involved the *surrender* of land is a disputed matter, as is the accuracy of the written account of treaties representing the nature of the bargains actually entered into between the Crown and Aboriginal groups. See, for example, L. Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm,'" in J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) 243; W.E. Daugherty, *Treaty Research Report: Treaty #3* (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986) at 64; R. Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton: Pica Pica Press, 1987); R. Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1973).

²⁹ See *St. Catherine's Milling, P.C.*, *supra* note 6 at 54. Although the *St. Catherine's Milling* decision has sparked significant discussion and debate over its characterization of Aboriginal title, it is examined here solely for its relevance to the determination of who is bound by fiduciary duties to the Aboriginal peoples of Canada.

³⁰ Section 109 reads:

All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

of the Crown possessed the beneficial interest in the surrendered lands—the federal Crown through the operation of section 91(24) of the *British North America Act, 1867*,³¹ or the Ontario Crown by way of section 109 of the *Act*.

Considering these sections, the Privy Council found that the federal Crown's section 91(24) power to enter into treaties and obtain surrenders of Indian lands did not give it any interest in the land once its Aboriginal title was extinguished. This conclusion was based upon their construction of section 109 and their understanding of that section's effects in the earlier case of *Ontario (A.G.) v. Mercer*.³²

In *Mercer*, the Privy Council had determined that the legal effect of section 109 was to exclude all ordinary territorial revenues of the Crown arising within the provinces from the duties and revenues appropriated to the Dominion. Section 109 effectively vested the Crown's underlying title to the unsurrendered Indian lands, which were still subject to Aboriginal title, in the province in which the lands were located. Once those lands were relieved of any Aboriginal interest, the full beneficial interest in those lands became vested in the province.³³

The Privy Council's finding in *St. Catherine's Milling*, that "the Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden,"³⁴ created a difficult situation. It separated the power to enter into treaties and the power to fulfil the terms of those treaties once they had been concluded. The lasting effect of the decision is to rest exclusive power to obtain a surrender of Indian lands and to create reserves³⁵ in the federal Crown, and, once a

³¹ Section 91(24) reads: "Indians, and Lands reserved for the Indians."

³² (1883), 8 A.C. 767 (P.C.) [hereinafter *Mercer*].

³³ *St. Catherine's Milling, PC*, *supra* note 6 at 57. Lands that were obtained by the Dominion Crown under section 108 or 117 of the *British North America Act, 1867* are excluded, of course. See Slattery, *supra* note 3 at 750-51.

³⁴ *St. Catherine's Milling, PC*, *ibid.* at 58. This determination was made by the Privy Council in light of its earlier determination, at 54, that the "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign." However, the appropriateness of these findings is not universally accepted. See, for example, J.D. Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin v. the Queen*" (1985) 30 McGill L.J. 559; and K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989). For further discussion of the characterization of the Aboriginal interest in land as usufructuary, see W.B. Henderson, "Canada's Indian Reserves: The Usufruct in Our Constitution" (1980) 12 Ottawa L. Rev. 167.

³⁵ This assertion is based upon a straightforward interpretation of the exclusive power vested in the federal Crown over "Indians, and Lands reserved for the Indians" in section 91(24) of the *British North America Act, 1867* and, more specifically, the power relating to "Indians," which exists independently of the power over "Lands reserved for the Indians" as determined by the Supreme Court of Canada in *Four B Manufacturing Ltd. v. United Garment Workers of America* (1979), [1980]

surrender is obtained, to rest exclusive proprietary and administrative rights over the surrendered lands in the provincial Crown.³⁶

The practical result of this division of powers is that although only the federal Crown may create a reserve, it cannot use provincial Crown lands (such as those obtained from First Nations by surrender under treaty) for that purpose without the cooperation of the province. Consequently, when a treaty provides for the creation of a reserve from lands surrendered under the treaty, the reserve may only be established through the joint effort of the federal and relevant provincial Crowns.

In addition to the implications flowing from the Privy Council's decision, judicial recognition of provincial obligations, with respect to lands surrendered by treaty, may be seen at each stage of *St. Catherine's Milling*. At trial, Chancellor Boyd implied that Ontario was bound by the Dominion Crown's obligations under Treaty #3 because it had received the benefit of the surrendered lands. As he explained in his judgment, "[i]t would seem unreasonable that the Dominion Government should be burdened with large annual payments to the tribes without having a sufficiency of land to answer, presently or prospectively, the expenditure."³⁷ Chancellor Boyd refused to rule upon the extent of Ontario's responsibilities to the treaty signatories since it was not made an issue at trial.³⁸ His statement nevertheless indicates that Ontario, as beneficiary of the surrender of land under the treaty, must also be held responsible for discharging the Crown's obligations under the treaty.

1 S.C.R. 1031 at 1048-50. While a province possesses exclusive power over lands surrendered under treaty by way of section 109, any attempt by a province to set aside an Indian reserve out of those lands would clearly infringe upon the exclusive federal power over Indians—which entails the sole ability to act and legislate in respect of matters that affects Indians *qua* Indians—and, therefore, would be *ultra vires*. See the discussion of the effects of section 88 of the *Indian Act* on the applicability of provincial legislation to Aboriginal peoples in Part V, below.

³⁶ The Privy Council determined that the British Legislature did not intend to deprive a province of its rights under section 109 of the *British North America Act, 1867* by conferring legislative powers over "Indians, and Lands reserved for the Indians," to the Dominion Crown under section 91(24) of the *Act*: *St. Catherine's Milling, PC*, *supra* note 6 at 59. Indeed, Lord Watson found, at 59, that having the beneficial interest in land accrue to the Crown in right of the province in which the land was located upon its surrender was not incompatible with having legislative control over the same land prior to the surrender reside with the Dominion Crown:

The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

³⁷ *St. Catherine's Milling, Ch.*, *supra* note 6 at 235.

³⁸ "Whatever equities ... may exist between the two Governments in regard to the consideration given and to be given to the tribes ... is a matter not agitated on this record": *ibid*.

On appeal, Hagarty C.J.O. argued that it would be natural to suppose that the federal and provincial Crowns would have arranged for an equitable distribution of the Treaty #3 obligations had the boundaries of Ontario and Manitoba been defined at the time the treaty was signed.³⁹ He also suggested that the federal and Ontario Crowns should share the financial responsibility to the Indians under the terms of the treaty.⁴⁰ Patterson J.A., meanwhile, refused to comment upon the distribution of treaty responsibilities between the Dominion and Ontario for the same reasons specified by Chancellor Boyd at trial:

[W]e see that certain outlay was incurred and certain burdens assumed by the Government. ... Whether they give rise to any claims or equities between the Dominion and the Province is a matter of policy as to which we have no information, and with which we are not concerned beyond the one question of the effect on the right to the timber.⁴¹

The majority of the Supreme Court of Canada did not discuss who was to bear the responsibilities under the treaty. The dissenting judgment of Strong J., as he then was, however, furthered the earlier reasoning of Chancellor Boyd and Hagarty C.J.O. in explicitly holding that the Dominion and Ontario governments were jointly and severally responsible for carrying out the terms of the treaty:

[A]ll the obligations of the crown towards the Indians incidental to their unsundered lands, and the right to acquire such lands and to make compensation therefor[e] by providing subsidies and annuities for the Indians, attach to and may be performed by the Provinces as well as by the Dominion.⁴²

Gwynne J., who also dissented from the majority decision, held that both the beneficial interest in the surrendered lands, and the responsibility for fulfilling the Treaty #3 obligations belonged to the federal Crown. The basis for his finding was that the body that obtained the benefits of the surrender was liable for discharging the treaty obligations that had given rise to those benefits.⁴³ The rationale behind Gwynne J.'s conclusion, therefore, although leading him to a different result, is nevertheless consistent with those underlying the judgments of Strong J., Hagarty C.J.O., and Chancellor Boyd.

³⁹ *St. Catherine's Milling, OCA*, *supra* note 6 at 157.

⁴⁰ This is evidenced by his statement that the distribution of the financial responsibilities under the treaty "could, I presume, be carried out in good faith by arrangement between the two Governments": *ibid.* at 158.

⁴¹ *Ibid.* at 173.

⁴² *St. Catherine's Milling, SCC*, *supra* note 6 at 622.

⁴³ *Ibid.* at 674-76.

In delivering the judgment in *St. Catherine's Milling* on behalf of the Privy Council, Lord Watson was explicit about Ontario's responsibilities to the treaty signatories. He held that the province was entirely responsible for discharging the annuity obligations incurred under the terms of the treaty:

Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government.⁴⁴

The results of the considerations of provincial responsibilities at the various stages of *St. Catherine's Milling* may consequently be seen to suggest the existence of concurrent federal and provincial fiduciary obligations to Aboriginal peoples, at least within the context of Treaty #3.

C. Robinson Treaties Annuities, Seybold, and Treaty #3 Annuities

A trilogy of cases, *Robinson Treaties Annuities*,⁴⁵ *Seybold*,⁴⁶ and *Treaty #3 Annuities*,⁴⁷ continued the discussion of joint federal-provincial responsibilities for the Crown's treaty obligations to First Nations that had been started in *St. Catherine's Milling*.⁴⁸ They each referred to Lord Watson's finding of provincial duties in *St. Catherine's Milling*. Ultimately, however, they each dismissed any legal basis that would oblige provinces to assume or offset the responsibilities incurred by the federal Crown in its negotiation of Indian treaties.

The judgments in these cases reveal that, in arriving at their respective conclusions, the judges either failed to recognize the equitable basis of the provincial duty, as illustrated by Lord Watson in *St. Catherine's Milling*, or mischaracterized that basis. Upon closer examination, all three cases may be seen to be consistent with the indications of provincial fiduciary obligations made in the *St. Catherine's Milling* decision.

⁴⁴ *St. Catherine's Milling*, PC, *supra* note 6 at 60.

⁴⁵ *Supra* note 16.

⁴⁶ *Supra* note 17.

⁴⁷ *Supra* note 18.

⁴⁸ *Supra* note 6.

1. *Robinson Treaties Annuities*

In the *Robinson Treaties Annuities*⁴⁹ case, the Supreme Court of Canada heard an appeal from an arbitration award of 13 February 1895. The arbitration⁵⁰ had been authorized to settle the long-standing issue of who was responsible for paying the increase in annuity payments under the terms of the Robinson-Huron and Robinson-Superior Treaties of 1850: the Dominion of Canada, as the successor of the old province of Canada,⁵¹ which had negotiated the treaties, the provinces of Ontario and Quebec which, after Confederation, had reaped the benefits of the lands surrendered under the treaties, or all three.

Both treaties included provisions that guaranteed the Aboriginal signatories a particular sum for a perpetual annuity. An identical clause in each treaty provided for the payment of increased annuities if the revenues from the surrendered lands rose sufficiently to allow for the payment of increased annuities to the signatories without resulting in a loss:

The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that should all the territory hereby ceded by the parties of the second part, at any future period produce such an amount as will enable the Government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order.⁵²

The arbitrators held that Ontario alone was responsible for paying the increase in the annuities since the lands surrendered under the treaties accrued to it.⁵³ Quebec was absolved of liability since the treaty lands were located within Ontario's boundaries. Ontario appealed the arbitrators' award to the Supreme Court of Canada. It maintained that since the former province of Canada had negotiated the treaties, the federal Crown was solely responsible for discharging any additional

⁴⁹ *Robinson Treaties Annuities*, SCC, *supra* note 16.

⁵⁰ The arbitration had been established under section 142 of the *British North America Act, 1867* to determine the "Division and Adjustment of the Debts, Credits, Liabilities, Properties, and Assets" of Upper and Lower Canada.

⁵¹ The Dominion was created out of the old Provinces of Upper and Lower Canada by the *Act of Union, 1840* (U.K.), 3 & 4 Vict., c. 35, reprinted as *The Union Act, 1840* in R.S.C. 1985, App. II, No. 3.

⁵² *Robinson Treaties Annuities*, SCC, *supra* note 16 at 495.

⁵³ The accrual occurred by virtue of section 109 of the *British North America Act, 1867*.

debts arising from them. Moreover, it claimed that the obligations for the annuity payments, both the original and any increased amounts, were subsumed under section 111 of the *British North America Act, 1867*.⁵⁴

The Supreme Court of Canada, with Gwynne and King JJ. dissenting, overturned the arbitrators' award. The majority held that Ontario was liable only for its portion of any increase in the obligations owed under the treaty by the former province of Canada, as it had existed prior to Confederation. Ontario's share of the increase in the annuities was determined to be in proportion to the amount of the surrendered lands situated within its post-Confederation boundaries. The Court's decision did not, however, entail provincial responsibility in the manner described in the arbitrators' report.

Instead, the duty imposed upon Ontario and Quebec was premised entirely on the fact that the cap placed upon the Dominion of Canada's assumption of the pre-Confederation debt of the province of Canada existing at Confederation, under section 111 of the *British North America Act, 1867*, had already been surpassed. Under section 112 of the *Act*, the Dominion's assumption of these pre-Confederation debts was given a limit.⁵⁵ Once the outer margin had been reached, the Dominion was still obligated to pay the entire debt, but was to be indemnified by Ontario and Quebec for any amount exceeding that point.⁵⁶ Contrary to the arbitrators' determination, therefore, the Supreme Court's ruling against the provinces was not based upon the provinces' role as successors to the liability belonging to the province of Canada. Strong C.J.C. determined that any increase in the annuity obligations to the Indians, which initially belonged to the province of Canada, was not transferred in whole or in part to Ontario and Quebec upon Confederation, notwithstanding section 109. Rather, he held that the annuities, both the original and any increased amount, were part of the general debts and liabilities of the former province of Canada and, therefore, became the responsibility of the Dominion upon Confederation under section 111:

That it was a "liability" though consisting of deferred periodical payments cannot be doubted, and that it was a "debt" though not payable *in presenti* is also clear; it therefore

⁵⁴ The terms of section 111 provided that, upon Confederation, the Dominion of Canada would absorb and become liable for "the Debts and Liabilities of each Province existing at the Union," subject to the limits on that amount imposed by sections 112, 114, and 115 of the *Act*. It was, in essence, a constitutional guarantee that pre-Confederation provincial debts would be paid.

⁵⁵ The amount of the debt was initially limited to \$62,500,000, but was later increased.

⁵⁶ The provinces were also obligated to pay interest on that amount at the rate of five per cent per annum.

comes within the literal meaning of the 111th section, and we are not at liberty to unravel the arrangements between the two divisions of the old province, upon which it may be assumed the provisions of the Union Act as to the apportionment of assets and liabilities was based in order to arrive at some secondary meaning contrary to the ordinary and natural import of the language of the Act.⁵⁷

Strong C.J.C. based his conclusion largely upon the arbitrators' pronouncement. At paragraph XIII of their report, they had determined:

That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate by the other of the said provinces.⁵⁸

Strong C.J.C. relied upon this passage to hold that the increased annuities were a part of the province of Canada's debt existing at Confederation. He also used it to refute the argument that the annuity payments constituted a charge on the lands and were thereby an "[i]nterest other than that of the Province" under section 109. It should be noted, though, that the arbitrators' report did not mention the increased annuities under the Robinson treaties being included within the debt of the province of Canada.

Strong C.J.C. contended that it was of no consequence to his findings that, at the time the arbitrators' award was made, the question of who was responsible for paying the increased annuities had yet to be posed.⁵⁹ He then attempted to fabricate a concordance between his judgment and the arbitrators' report by stating that, since the arbitrators' award had not been challenged for twenty-five years and may have formed the crux of other dispositions, "the arbitrators must therefore be taken to have had in mind all the annuities, the original fixed annuities as well as those contingently provided for."⁶⁰ In point of fact, there is no support for this conclusion in the arbitrators' report.⁶¹

⁵⁷ *Robinson Treaties Annuities*, SCC, *supra* note 16 at 506.

⁵⁸ Reproduced in *Robinson Treaties Annuities*, SCC, *ibid.* at 440.

⁵⁹ *Ibid.* at 507.

⁶⁰ *Ibid.* at 507-08.

⁶¹ See the discussion of King J.'s interpretation of paragraph XIII in relation to this issue in text accompanying note 65, below. In fact, Strong C.J.C.'s attempt to rationalize his conclusion with the arbitrators' report reads matters into the report that were neither contained within it nor contemplated at that time.

Interestingly enough, in determining that the original annuity payments were part of the general debts and liabilities of the former province of Canada—and, therefore, the responsibility of the Dominion Crown by way of section 111—and that the increase in the annuity payments was owed by each of the provinces of Ontario and Quebec in proportions that reflected their respective positions within the former boundaries of the province of Canada, Strong C.J.C.'s conclusions precisely follow the logic employed by Lord Watson in *St. Catherine's Milling*. Save for section 111's mandated transfer of provincial debts existing at Confederation to the Dominion, the provinces of Ontario and Quebec, as successors to the old province of Canada, would have been responsible for paying the original annuity money.

Strong C.J.C. deviated from this rationale in his discussion of the increased annuities. He held that the increase in the annuities was also part of the general debts and liabilities of the former province of Canada existing at Confederation; therefore, it too was subsumed under section 111. A closer examination of the premise upon which the increased annuities were to be awarded demonstrates that Strong C.J.C.'s finding is inconsistent with the proper construction of the *British North America Act, 1867* and the Robinson treaties.

The Robinson treaties clearly show an intention to provide for two separate annuities. The first annuity—the original amount—was payable on the signing of the treaty by the Aboriginal signatories, in a guaranteed sum. The second annuity—the increase—was potentially payable, depending on the revenues generated from the surrendered lands. The first annuity was guaranteed and ascertainable, thereby enabling it to be properly included under section 111 of the *British North America Act, 1867*. The second annuity, meanwhile, was entirely contingent upon future events, which may never have come to fruition, and it therefore may never have existed. This uncertainty of the second annuity rendered its classification by Strong C.J.C., under section 111, as a debt or liability existing at Confederation completely inappropriate.

Strong C.J.C.'s inclusion of the second annuity under section 111 imparted to it a far wider scope than that envisaged by a literal interpretation of either the Robinson treaties or section 111. The very nature of the basis of the increased annuity made it impossible to determine, other than from year to year, whether it was due and owing. Based upon the plain construction of section 111 of the *British North America Act, 1867*, moreover, it is difficult to sustain an argument that a future, contingent, and unascertainable liability may be characterized as "existing at the Union" and, consequently, transferrable to the Dominion. At best, Strong C.J.C.'s argument that the increased

annuities fell under section 111 may only sustain the proposition that an increased annuity was due and owing to the Aboriginal signatories in 1867 for that *particular* year, which ought to be included under the rubric of section 111.

The other judgments in the case did not adhere to the same foundation as Strong C.J.C.'s judgment. Sedgewick J.'s judgment affirmed Strong C.J.C.'s conclusions. An important aspect of Sedgewick J.'s decision, however, which was not reflected in that of Strong C.J.C., was his recognition of the equities of the matter before the court:

[T]here is the principle expressed in the maxim *qui sentit commodum sentire debet et onus*. If a person accept anything which he knows to be subject to a duty or charge it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself.⁶²

Sedgewick J. acknowledged that the provinces, by acquiring the benefits of the surrendered Indian lands obtained through the treaties upon Confederation *while in full knowledge of the Dominion's outstanding obligations under those treaties*, which it had assumed from the province of Canada, must, in principle, assume responsibility for the payment of the annuities. The provinces were only absolved of their liability for the original annuity payments due to the operation of section 111.

Gwynne J., dissenting, placed the responsibility for making the increased annuity payments squarely upon Ontario. He viewed the annuities as a charge upon the lands, which flowed to the province through the operation of section 109. In this regard, he disagreed with the findings in paragraph XIII of the 1870 arbitration, but sided with its ultimate recommendations:

And as by the 109th section of the British North America Act the province has become entitled to that fund [from which treaty obligations had been paid prior to 1867], Her Majesty's government of that province must take the same subject to the trust obligation in the interest of the Indians assumed by Her Majesty by the stipulations of the treaties. Her Majesty's government of the province of Ontario must in all reason and justice take the property mentioned in the section subject to the same obligation as to the payment of augmentation of the annuities ... as the late province of Canada would have held them if no union had taken place. This was the unanimous judgment of the arbitrators upon this point. That judgment is not at variance with any principle of law, or any statutory provision; on the contrary it is in perfect accordance with the plainest principles of justice and is not open to any sound legal objection.⁶³

King J. concurred in Gwynne J.'s dissent. He insisted that "Ontario, getting the lands subject to the trust, would have to discharge

⁶² *Robinson Treaties Annuities*, SCC, *supra* note 16 at 533.

⁶³ *Ibid.* at 525.

the burden which before that was upon the province of Canada, now represented by the provinces of Ontario and Quebec."⁶⁴ The trust he referred to was section 109 of the *British North America Act, 1867*; the burden was the responsibility of paying the original and the increased annuity money, as provided in the Robinson treaties.

King J. also refuted Strong C.J.C.'s position regarding the effect of paragraph XIII of the 1870 arbitrators' report and the increased annuity payments under the Robinson treaties:

[T]he matter of the augmentation of annuities was not raised before the arbitrators, and if the views herein stated upon the main point are correct, it is apparent that the two things do not rest entirely upon the same foundations. The finding of the arbitrators that the claim as to the fixed annuities that was brought before them did not constitute a charge upon the lands, is therefore not conclusive as to the matters in question here. Par. 13 is to be read in the light of the contention before the arbitrators, and not as an abstract and general denial of all charges, etc., respecting the annuities, but simply as a denial of the lands being subject to the alleged charge to which it was then claimed to be subject.⁶⁵

It is interesting to note that, on appeal, the Privy Council made no reference to the 1870 arbitrators' report.⁶⁶

Despite the majority's protestations to the contrary, its conclusion in the *Robinson Treaties Annuities* case may be seen to accord with Lord Watson's determination of provincial responsibilities for discharging treaty obligations in *St. Catherine's Milling*.⁶⁷ The majority's decision differs from Lord Watson's reasoning only in that section 111 of the *British North America Act, 1867* applied in the *Robinson Treaties Annuities* case, but it did not apply in *St. Catherine's Milling*, since that case was concerned with a post-Confederation treaty.

In his judgment, Strong C.J.C. attempted to distinguish Lord Watson's dictum in *St. Catherine's Milling* by illustrating the differences between the facts in *St. Catherine's Milling* and those in the *Robinson Treaties* case:

[I]n the case of *The St. Catherine's Milling Co. v. The Queen* ... the Privy Council held that this surrender enured to the benefit of the province of Ontario, and so holding it also decided that Ontario was bound to pay the consideration for which the Indians ceded their rights in the lands. I see no analogy between that case and the present. In the case before us no one doubts that the province of Canada, which acquired the lands, was originally bound to pay the consideration. In the case before the Privy Council the question was, as it were, between two departments of the government of the Crown, and

⁶⁴ *Ibid.* at 548.

⁶⁵ *Ibid.* at 549-50.

⁶⁶ *Robinson Treaties Annuities*, PC, *supra* note 16.

⁶⁷ *St. Catherine's Milling*, PC, *supra* note 6.

the most obvious principles of justice required that the government which got the lands should pay for them.⁶⁸

Ironically, and in direct opposition to its intended purpose, this passage clearly demonstrates that Strong C.J.C. *affirmed* Lord Watson's findings in *St. Catherine's Milling* within the context in which they arose. His attempt to distinguish on the facts Lord Watson's findings in *St. Catherine's Milling* from the matter before him in *Robinson Treaties Annuities* case, therefore, was a pointless endeavour. For all intents and purposes, the underlying rationale behind the two cases is the same. Furthermore, both cases would have had similar end results save for the application of section 111 to *Robinson Treaties Annuities*.

Upon the Dominion Crown's appeal of the matter to the Privy Council, Lord Watson, not surprisingly, affirmed the Supreme Court's majority decision.⁶⁹ In accordance with his earlier determination in *St. Catherine's Milling*, he held that the province of Canada, and its successors after 1867, were liable for discharging the annuity obligations under the Robinson treaties. Due to the operation of section 111 of the *British North America Act, 1867*, however, that responsibility was transferred to the federal Crown. Again, the only difference between his decision in the *Robinson Treaties Annuities* case and his earlier findings in *St. Catherine's Milling* is that in the former, the operation of section 111 removed the provinces' liability, whereas in the latter, section 111 did not apply, so Ontario retained its liability under Treaty #3.

2. *Seybold*

The issue of provincial responsibility for treaty obligations arose again in *Seybold*.⁷⁰ One of the issues in *Seybold* concerned the setting aside and establishment of Indian reserves under the provisions of Treaty #3, the same treaty dealt with in *St. Catherine's Milling*.⁷¹ Out of

⁶⁸ *Robinson Treaties Annuities*, SCC, *supra* note 16 at 505.

⁶⁹ *Robinson Treaties Annuities*, PC, *supra* note 16. He also dismissed the notion that the annuity obligations were a charge on the lands, as suggested by the dissenting judgments of Gwynne and King JJ: "Their Lordships have been unable to discover any reasonable grounds for holding that, by the terms of the treaties, any independent interest of that kind was conferred upon the Indian communities": *ibid.* at 211.

⁷⁰ *Supra* note 17.

⁷¹ *Supra* note 6. The matters in dispute in *Seybold*, *ibid.*, were not restricted to resolving who was responsible for fulfilling the obligation to set aside reserves under the treaty, but also addressed other issues such as the ownership of mineral rights. For present purposes, however, discussion of the case herein will be restricted to the former.

the lands surrendered under the treaty for the benefit of the treaty signatories, the federal Crown had set aside reserve lands in 1879. It later sold the reserve lands, without the consent of the province, after obtaining their surrender from the Indians. The vital question in *Seybold*, for present purposes, was whether the obligation to set aside reserves under the treaty rightfully belonged to the federal Crown, the Ontario Crown, or both.

At trial,⁷² Chancellor Boyd recognized the difficulty created by the *St. Catherine's Milling* decision regarding the establishment of Indian reserves under treaty. He nevertheless determined that the section 91(24) jurisdiction over "Indians, and Lands reserved for the Indians," gave the federal Crown the right to set aside, and exercise legislative and administrative jurisdiction over, the reserve lands. His ruling directly conflicted with the *St. Catherine's Milling* decision, which had clearly separated the two functions.⁷³ However, at the conclusion of his judgment—and perhaps in recognition of his contradiction of the *St. Catherine's Milling* precedent—Chancellor Boyd concluded that it would be preferable to have the treaty reserves allocated "with the approval and co-operation of the Crown in its dual character as represented by the general and the provincial authorities."⁷⁴

On appeal to the divisional court,⁷⁵ Street J. also recognized the problems in harmonizing the federal Crown's obligation to establish Indian reserves under the terms of the treaty and the precedent established in *St. Catherine's Milling*. To reconcile these incongruous positions, Street J. determined that since only Ontario could set aside the surrendered lands for use as a reserve, it was obliged to do so:

The surrender was undoubtedly burdened with the obligation imposed by the Treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it.⁷⁶

A majority decision of the Supreme Court of Canada dismissed the federal Crown's appeal without written reasons.⁷⁷ However,

⁷² *Seybold*, Ch., *supra* note 17.

⁷³ See the discussion of the *St. Catherine's Milling* decision in Part II.B., above.

⁷⁴ *Seybold*, Ch., *supra* note 17 at 398.

⁷⁵ *Seybold*, Div. Ct., *supra* note 17.

⁷⁶ *Ibid.* at 303-04.

⁷⁷ *Seybold*, SCC, *supra* note 17.

Gwynne J., dissenting, insisted that any obligations arising from the treaty must be assumed by Ontario, since it obtained the benefits from the surrender:

[F]or the benefit so obtained by the province by the treaty of surrender the province alone should in justice bear the burthen of the obligations assumed by Her Majesty and the Dominion to obtain the surrender of those lands as was held in the *St. Catherine's Milling & Lumber Co. v. The Queen*.⁷⁸

The federal Crown appealed the Supreme Court's decision to the Privy Council.⁷⁹

The Privy Council determined that the federal Crown's actions in setting aside, and later selling, the reserves were *ultra vires*. In delivering the Privy Council's judgment, Lord Davey stated that Ontario had a duty to fulfil the terms of the treaty. That duty, however, did not exist in a strictly legal sense; rather, it only constituted a moral obligation to cooperate with the federal Crown in setting aside reserves under the treaty:

[T]he Government of the province, taking advantage of the surrender of 1873, came at least under an *honourable engagement* to fulfil the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two Governments.⁸⁰ [emphasis added]

Lord Davey's characterization of Ontario's obligations under the treaty is misleading. As a result of the difficulties created by the constitutional division of powers in the *British North America Act, 1867*, the only way to have ensured that the reserve would be set aside was to have held Ontario and the federal Crown jointly responsible for establishing it. This necessitated that Ontario's duty be declared to be legally binding and not merely an "honourable engagement." Otherwise, a guarantee of satisfaction of the treaty promises did not exist, nor did the ability of the Aboriginal signatories to legally enforce the treaty obligations owed to them.

⁷⁸ *Ibid.* at 13. It should be noted that Gwynne J. determined that the power of the federal Crown over "Indians, and Lands reserved for the Indians," under section 91(24) of the *British North America Act, 1867* was not qualified by section 109 and, therefore, that the precedent in *St. Catherine's Milling* did not govern the matter before him: *ibid.* at 21-22.

⁷⁹ *Seybold, PC, supra* note 17.

⁸⁰ *Ibid.* at 82-83. While Lord Davey's "honourable engagement" did not legally bind the province, it indicated the Privy Council's recognition of existing provincial obligations, notwithstanding that he prefaced his statement with "Let it be assumed that"

It may be argued that negotiations between Canada and Ontario could resolve this dilemma. Indeed, negotiations between Canada and the provinces have resolved problems surrounding the establishment of Indian reserves under treaty.⁸¹ If Ontario's responsibility under the treaty in the *Seybold* scenario was not legally binding, however, it was not compelled to reach a settlement with Canada. Indeed, it was not obligated to engage in negotiations with Canada on the issue at all.

Lord Davey's characterization of the nature of Ontario's duty had the potential to create further problems if Ontario made unreasonable demands upon Canada for its cooperation in setting aside reserve lands, or simply refused to negotiate altogether. Since Ontario was only under an "honourable engagement" to cooperate with Canada, it was insulated from legal liability for the non-fulfilment of the treaty. Similarly, although legally bound to fulfil the terms of the treaty, Canada could rely upon the constitutional division of powers to protect itself from liability for not discharging the treaty promises.

As a result, even if the Aboriginal signatories to the treaty successfully concluded a legal action that affirmed their right to receive reserves under the treaty, the judiciary would have been unable to enforce that right. A court could neither compel Canada to unilaterally fulfil the treaty, since Canada does not possess the jurisdiction on its own to set aside reserves out of surrendered lands, nor compel Ontario to cooperate with Canada in the setting aside of the reserves, since Ontario was not legally bound by any such obligation.

An analogy may be drawn between this scenario and the proper method of interpreting a statute that explicitly binds *either* the federal *or* a provincial Crown, yet, due to the constitutional division of powers, implicitly binds *both* Crowns in order to effect its intentions. When such a statute would be frustrated or rendered absurd unless it is read to bind both Crowns, the Supreme Court of Canada has held that the statute must be read to bind both by necessity or logical implication.⁸² This concept is also consistent with the principles of interpreting treaties and

⁸¹ This is evidenced by some of the agreements between the federal and provincial Crowns regarding Indian lands. See, for example, *An Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario Respecting Indian Lands*, S.C. 1891, c. 5; *The Ontario Boundaries Extension Act*, S.C. 1912, c. 40; *The Quebec Boundaries Extension Act*, S.C. 1912, c. 45; and *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48.

⁸² *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 50-60; *Alberta Government Telephones v. Canada (C.R.T.C.)*, [1989] 2 S.C.R. 225 at 280-81; see also, *Bombay (Province of) v. Bombay (City of)*, [1947] A.C. 58 (P.C.) at 61; and P.W. Hogg, *Liability of the Crown*, 2d ed. (Toronto: Carswell, 1989) at 210.

statutes relating to Indians enunciated by the Supreme Court of Canada in *Nowegijick v. R.*⁸³ In that case, it was held that courts ought to prefer Aboriginal understandings of treaties and statutes over competing notions if there is a discrepancy regarding the proper construction to be give to a particular phrase or concept.⁸⁴

3. Treaty #3 Annuities

The last case in the trilogy, the *Treaty #3 Annuities*⁸⁵ case, is noteworthy for the Privy Council's attempt to wrap up the discussion of provincial responsibilities to First Nations. The issue to be determined in the case was whether the federal or Ontario Crown, or both, were responsible for the payment of annuity monies to the Aboriginal signatories to Treaty #3. In accordance with Lord Watson's determination in *St. Catherine's Milling*, the federal Crown contended that Ontario was obliged to pay the annuities since it had obtained the beneficial interest in the lands surrendered under the treaty. Ontario insisted that the federal Crown was solely responsible for the annuity payments since it had negotiated the treaty.

Burbidge J. ruled in favour of the federal Crown at trial. He agreed with Lord Watson's determination in *St. Catherine's Milling*⁸⁶ that provinces that reaped the benefits of a treaty were responsible for the costs incurred.⁸⁷ A majority decision of the Supreme Court of Canada,

⁸³ [1983] 1 S.C.R. 29 [hereinafter *Nowegijick*].

⁸⁴ "[T]reaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians": *ibid.* at 36. "Aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions": *Mitchell*, *supra* note 10 at 98. This principle of interpretation is consistent with the *contra proferentem* rule in contract law, which holds that any ambiguity in a contract or agreement is to be interpreted against the party that drafted the agreement: see S.M. Waddams, *The Law of Contracts*, 2d ed. (Toronto: Canada Law Book, 1984) at 345-61.

Earlier cases ascribing to the same interpretive mechanisms as those illustrated in *Nowegijick* include: *Worcester v Georgia*, 6 Pet. 515 (U.S. 1832) at 582; *Jones v. Meehan*, 175 U.S. 1 (U.S. 1899) at 4; *Robinson Treaties Annuities, SCC*, *supra* note 16 at 535; *R. v. George*, [1966] S.C.R. 267 at 279; and *Kruger and Manuel v. R.* (1977), [1978] 1 S.C.R. 104 at 109. See also the *Report of the Select Committee on Aborigines*, 1837, vol. I, pt II (Imperial Blue Book, 1837 nr VII. 425, Facsimile Reprint, C. Struik (Pty) Ltd., Cape Town, 1966) at 80: "[A] ready pretext for complaint will be found in the ambiguity of the language in which their agreements must be drawn up, and in the superior sagacity which the European will exercise in framing, in intrepreting, and in evading them."

⁸⁵ *Supra* note 18.

⁸⁶ *St. Catherine's Milling, PC*, *supra* note 6.

⁸⁷ *Treaty #3 Annuities, Ex. Ct.*, *supra* note 18 at 496-97.

however, overturned Burbidge J.'s decision.⁸⁸ Idington J. determined that Lord Watson's statements in *St. Catherine's Milling* regarding Ontario's liability under the treaty were purely *obiter dicta* and, therefore, of no legally binding force or effect. Had Lord Watson's statement been legally binding, Idington J. insisted that the *Seybold*⁸⁹ case would certainly have explicitly recognized this fact and given effect to it.⁹⁰ Curiously, *Seybold* neither explicitly affirmed nor rejected Lord Watson's conclusion in *St. Catherine's Milling* on this point.

Idington J. also explained that Ontario could not be held responsible for the obligations arising under Treaty #3 since it did not have the option of accepting or declining receipt of the beneficial interest in the surrendered lands.⁹¹ Duff J. agreed with Idington J., holding that Ontario would only be liable to pay the annuities under the treaty if it had taken *positive* action to derive the benefits it received by way of section 109.⁹² Idington and Duff JJ. also dismissed the existence of any equitable grounds upon which to base Ontario's responsibility to fulfil the terms of the treaty.⁹³ In dissent, Davies J., with Girouard J. concurring, affirmed the trial judgment on two grounds: Lord Watson's pronouncement in *St. Catherine's Milling*,⁹⁴ and Strong C.J.C.'s affirmation of it in *Robinson Treaties Annuities*.⁹⁵ The dissenting judgment in the *Treaty #3 Annuities* case is significant, since the disputes in *St. Catherine's Milling* and *Treaty #3 Annuities* are identical.

When the *Treaty #3 Annuities* case was appealed to the Privy Council, Lord Loreburn L.C. held that there was no legal principle upon which to find Ontario legally responsible for fulfilling the payment of the

⁸⁸ *Treaty #3 Annuities*, SCC, *supra* note 18.

⁸⁹ *Seybold*, *supra* note 17.

⁹⁰ *Treaty #3 Annuities*, SCC, *supra* note 18 at 114-15.

⁹¹ *Ibid.* at 111. Indeed, Ontario received the beneficial interest in the surrendered lands through the operation of section 109 of the *British North America Act, 1867*, rather than through any positive actions of its own.

⁹² *Ibid.* at 126. He also found that Lord Watson's statements in *St. Catherine's Milling*, PC, *supra* note 6, were purely *obiter* and of no legally binding effect: *ibid.* at 130-32.

⁹³ *Treaty #3 Annuities*, SCC, *ibid.* at 111, Idington J., and Duff J. at 25.

⁹⁴ *St. Catherine's Milling*, PC, *supra* note 6.

⁹⁵ See *Robinson Treaties Annuities*, SCC, *supra* note 16 and text accompanying that note.

annuity under the treaty.⁹⁶ He did not leave the matter entirely without comment, though:

It may be that, as a matter of fair play between the two Governments, as to which their Lordships are not called upon to express and do not express any opinion, the province ought to be liable for some part of this outlay. But in point of law, which alone is here in question, the judgments of the Supreme Court appears unexceptionable.⁹⁷

Entirely *obiter*, Lord Loreburn L.C.'s statement is by no means conclusive on the issue of provincial legal responsibility.⁹⁸ It nevertheless recognizes that, as a result of the circumstances created by the constitutional division of powers, the province may well hold obligations to First Nations independent of those owed by the federal Crown.

D. *Summary and Conclusions*

This discussion of *St. Catherine's Milling*,⁹⁹ and the subsequent trilogy of cases,¹⁰⁰ illustrates the existence of provincial responsibility for the payment of annuities under pre-Confederation treaties as well as joint federal-provincial obligations regarding the setting aside of reserves from lands surrendered under treaty. It also shows the significant distinction between the obligation to pay annuities under a treaty and the obligation to set aside Indian reserves from lands surrendered under it. Since Indian treaties are concrete manifestations of the Crown's fiduciary obligations to First Nations,¹⁰¹ these cases demonstrate one basis for the existence of provincial fiduciary duties to First Nations.

The issue of provincial responsibility in these cases may have been made clearer had the majority of judges rendering decisions not

⁹⁶ *Treaty #3 Annuities, PC*, *supra* note 18 at 645: "In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable."

⁹⁷ *Ibid.* at 646.

⁹⁸ *Ibid.* at 647.

⁹⁹ *Supra* note 6.

¹⁰⁰ *Robinson Treaties Annuities*, *supra* note 16; *Seybold*, *supra* note 17; and *Treaty #3 Annuities*, *supra* note 18.

¹⁰¹ See notes 9, 10, and accompanying text.

been adversely affected by the issue of privity.¹⁰² Since the treaties in question had been negotiated and signed by the federal Crown, the judges had difficulty finding that the provinces could be held liable for obligations undertaken by the federal Crown. This reluctance existed separate and apart from the tangible effect of section 109 of the *British North America Act, 1867* on these situations. In particular, it resulted in the provinces receiving the benefits derived from the treaties.

The judges' problems with the privity issue are particularly evident in the *Treaty #3 Annuities* case, where Lord Loreburn L.C. stated:

In making this treaty the Dominion Government acted upon the rights conferred by the Constitution. They were not acting in concert with the Ontario Government, but on their own responsibility, and it is conceded that the motive was not any special benefit to Ontario, but a motive of policy in the interests of the Dominion as a whole.¹⁰³

Both Idington and Duff JJ. voiced similar concerns in the Supreme Court of Canada's determination of the *Treaty #3 Annuities* case.¹⁰⁴ What the judges failed to consider was that, at the time that the Robinson treaties and Treaty #3 were signed, the constitutional understanding of the Crown was that it was "one and indivisible" throughout the Commonwealth.¹⁰⁵

When the *British North America Act, 1867* created federal and provincial Crowns in Canada, it did not affect the existing constitutional understanding of the Crown or the nature and extent of its pre-Confederation obligations and responsibilities. It merely divided the powers, responsibilities, and benefits of a single and indivisible Canadian

¹⁰² The principle of privity of contract holds that two parties to a contract cannot impose obligations upon a third party who was not privy to the agreement, subject to certain exceptions. See S.M. Waddams, *supra* note 84, especially at 200-04. See also, *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847 (H.L.); *Vandepitte v. Preferred Accident Insurance Co.*, [1933] 1 D.L.R. 289 (P.C.); and *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228. Note as well the discussion of privity in relation to the *Bear Island* decision, *supra* note 7, in K. McNeil, "The High Cost of Accepting Benefits From the Crown: A Comment On The Temagami Indian Land Case" [1992] 1 C.N.L.R. 40 at 50-54.

¹⁰³ *Treaty #3 Annuities*, PC, *supra* note 18 at 644.

¹⁰⁴ See *Treaty #3 Annuities*, SCC, *supra* note 18 at 111, 126, and 130-32. See also text accompanying notes 91 and 92.

¹⁰⁵ See, for example, *Theodore v. Duncan*, [1919] A.C. 696 (P.C.) at 706: "The Crown is one and indivisible throughout the Empire, and it acts in self-governing states on the initiative and advice of its own Ministers in these States." See also *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] 2 All E.R. 118 (C.A.) at 127-28, where Lord Denning M.R. explained that the constitutional understanding of "the Crown" as "single and indivisible" was changed at the Imperial Conference of 1926 (Cmd 2768) to "separate and divisible" according to the particular territory in which it was sovereign.

Crown¹⁰⁶ among the newly-created federal and provincial Crowns. This division included the Crown's pre-existing fiduciary obligations to First Nations. Therefore, the allocation of powers in the *British North America Act, 1867* did not remove or reduce the Crown's fiduciary obligations to the First Nations, but simply redistributed them.¹⁰⁷

The fact that the Canadian Crown remained single and indivisible prevented it from escaping its obligations to First Nations by donning a provincial—or federal—Crown “hat” at its convenience. Moreover, the Crown could not escape liability for adequately discharging its fiduciary duties by virtue of jurisdictional problems, such as those surrounding the establishment of Indian reserves from Indian lands surrendered by treaty:

Each level of government has an independent constitutional role and responsibility. ... Both are, however, subject to the demands of the honour of the Crown, and this must mean, at a minimum, that the aboriginal people to whom the Crown in all its emanations owes an obligation of protection and development, must not lose the benefit of that obligation because of federal-provincial jurisdictional uncertainty.¹⁰⁸

Mutual power entails mutual responsibility¹⁰⁹ and it is this mutual responsibility, founded in part upon the sharing of legislative and executive powers by the federal and provincial Crowns, that underlies the Crown's fiduciary obligations to First Nations. If a provincial Crown obtains exclusive proprietary and administrative rights over Indian lands surrendered by treaty, then it must, by necessity or logical implication, also obtain a portion of the fiduciary duties owed to the Aboriginal signatories to the treaty.¹¹⁰ Section 109 of the *British North America Act, 1867* is the conduit by which this transfer is effectuated. Once this

¹⁰⁶ The Canadian Crown was, itself, a part of the larger “single and indivisible” Crown in right of the Commonwealth.

¹⁰⁷ See B. Slatery, “First Nations and the Constitution: A Question of Trust” (1992) 71 Can. Bar Rev. 261 at 274:

The rearrangement of constitutional powers and rights accomplished at Confederation did not reduce the Crown's overall fiduciary obligations to First Nations. Rather, these obligations tracked the various powers and rights to their destinations in Ottawa and the Provincial capitals.

¹⁰⁸ A. Pratt, “Federalism in the Era of Aboriginal Self-Government” in D.C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 19 at 53.

¹⁰⁹ See W.N. Hohfeld, “Some Fundamental Legal Conceptions As Applied in Judicial Reasoning” (1913-14) 23 Yale L.J. 16; W.N. Hohfeld, “Fundamental Legal Conceptions As Applied in Judicial Reasoning” (1916-17) 26 Yale L.J. 710; and W.N. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (New Haven, Conn.: Yale University Press, 1964).

¹¹⁰ See the references, *supra* note 82 and accompanying text.

transfer takes place, the province is legally bound to cooperate with the federal Crown in fulfilling the terms of the treaty.¹¹¹ Brian Slattery has expressed similar sentiments in "First Nations and the Constitution: A Question of Trust:"

Where the benefiting Province has the exclusive constitutional authority to fulfill the Crown's promises, it cannot take the benefit of the surrender without incurring corresponding fiduciary obligations. Thus, if the Federal Crown has undertaken to set aside reserves out of the lands surrendered, this promise binds the Province to which the lands pass, because it alone has the power to carry out the promise.¹¹²

III. RECENT JUDICIAL INFERENCES OF PROVINCIAL FIDUCIARY OBLIGATIONS TO FIRST NATIONS

In opposition to the judicial determinations in the *Robinson Treaties Annuities*,¹¹³ *Seybold*,¹¹⁴ and *Treaty #3 Annuities*¹¹⁵ decisions, more recent judicial consideration of provincial obligations indicates a return to the reasoning espoused by Lord Watson in *St. Catherine's Milling*.¹¹⁶

A. *Smith*

In *Smith v. R.*,¹¹⁷ the federal Crown, on behalf of the Red Bank Indian Band, sought a declaration for possession of surrendered reserve lands that had been squatted upon since 1838. In 1895, the band had surrendered reserve lands to the federal Crown to enable them to be sold for the band's benefit.¹¹⁸ At the time the action was commenced,

¹¹¹ The province is bound to the extent that it is legally or constitutionally able to cooperate.

¹¹² *Supra* note 107 at 275.

¹¹³ *Supra* note 16.

¹¹⁴ *Supra* note 17.

¹¹⁵ *Supra* note 18.

¹¹⁶ *Supra* note 6.

¹¹⁷ [1983] 1 S.C.R. 554 [hereinafter *Smith*].

¹¹⁸ In Canada, Indian interests in land cannot be alienated to anyone other than the Crown. This restriction exists as a result of British practice originating in the early colonization of North America. The most noteworthy indication of the Crown's practice of interposing itself as a requisite intermediary in the sale of Aboriginal lands may be seen in the *Royal Proclamation, 1763*, *supra* note 21. Note that this practice also existed in other parts of the British Empire: see, for example, *R. v. Symonds*, [1847] N.Z.P.C.C. 387 (S.C.) at 391. Today, the requirement that surrenders may only be made to the Crown in right of Canada is entrenched in section 37 of the *Indian Act*, *supra* note 3,

the surrendered lands had not been sold and remained occupied by squatters.

The Supreme Court of Canada held that the federal Crown could not maintain the action since it no longer possessed jurisdiction over the lands after their surrender. The Court did not address the issue of whether the federal or provincial Crowns, or both, were legally responsible for discharging the obligations incurred under the terms of the surrender. It did not, however, leave the issue entirely without comment.

In determining that the band's release of its interests was absolute, Estey J. referred to the *Seybold*¹¹⁹ decision by stating that the effects of the band's release "might give rise to differences as between the parties to the release."¹²⁰ He suggested that "if and when such related, but here extraneous, issues arise, the courts concerned may find of interest the comment of Street J. in the judgment of the Divisional Court of Ontario in *Ontario Mining Co. v. Seybold*."¹²¹ The portion of Street J.'s judgment quoted by Estey J. reads:

The surrender was undoubtedly burdened with the obligation imposed by the treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it.¹²²

Later, in the context of discussing the effects of the Crown's obligations to the band under the terms of the surrender, Estey J. commented that "other consequences could arguably flow from such a transaction," but that they went beyond the Court's focus upon "the surrender and its consequences in law in relation to the title to the said lands."¹²³ While Estey J. neglected to pursue this line of inquiry,¹²⁴ the *Smith* case hints that a provincial Crown may be found liable for discharging the

and in the exclusive jurisdiction of the Crown in right of Canada over "Indians, and Lands reserved for the Indians," in section 91(24) of the *British North America Act, 1867*. For further discussion and analysis of the surrender requirements contained within the *Indian Act*, see J.P. Salembier, "How Many Sheep Make a Flock? An Analysis of the Surrender Provisions of the *Indian Act*" [1992] 1 C.N.L.R. 14.

¹¹⁹ *Supra* note 17.

¹²⁰ *Smith*, *supra* note 117 at 564.

¹²¹ *Ibid.*

¹²² *Ibid.* at 565. See also *Seybold*, *Div. Ct.*, *supra* note 17 and accompanying text.

¹²³ *Supra* note 117 at 570.

¹²⁴ Undoubtedly, the neglect was due to his earlier characterization of these issues as "extraneous" to the matter before the court: *ibid.* at 564.

obligations stemming from an Indian land treaty or from a surrender of Indian reserve lands to the Crown.

B. Gardner

In *Gardner v. Ontario (A.G.)*,¹²⁵ the Eagle Lake Band had commenced an action against the federal and Ontario Crowns for their roles in excluding certain lands from the band's reserve allotment under Treaty #3. In particular, the band sought a declaration of their right of possession of headlands in the parts of their reserves that were bordered by bodies of water. By agreement with the federal Crown,¹²⁶ Ontario had initially undertaken to protect those interests, but effectively reneged upon that agreement through its enactment of contrary legislation.¹²⁷

Due to legislative requirements at the time the band brought its suit, to seek redress against both Crowns, the band was forced to bring concurrent actions in the federal and provincial courts.¹²⁸ Ontario insisted that the actions were identical and could not both be maintained. To prevent what it viewed as an abuse of process, Ontario sought to have the Ontario Court strike out the band's statement of claim against it. Ontario argued that only the band's federal court action against the federal Crown ought to proceed. The basis of its contention was that, as a result of the *Indian Act*, there was a *prima facie* privity of contract between the band and the federal Crown.

¹²⁵ (1984), 45 O.R. (2d) 760 (H.C.J.) [hereinafter *Gardner*].

¹²⁶ *An Act for the Settlement of Questions Between the Governments of Canada and Ontario Respecting Indian Lands*, S.O. 1891, c. 3; and *An Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario Respecting Indian Lands*, *supra* note 81.

¹²⁷ *The Beds of Navigable Waters Act*, S.O. 1911, c. 6; and *An Act to Confirm the Title of the Government of Canada to Certain Lands and Indian Lands*, S.O. 1915, c. 12. The latter directly contravenes the agreement between Ontario and Canada established in the 1891 statutes, *ibid*. See also the discussion of the effects of these statutes in *Ontario and Minnesota Power Co. v. The King*, [1925] A.C. 196 (P.C.); A. Emerson, *Research Report on Policy of the Government of Ontario Re: Headland to Headland Question, Treaty #3, 1873-1978* (Toronto: Office of Indian Resource Policy, Ministry of Natural Resources, 1978); and R.H. Bartlett, *Aboriginal Water Rights in Canada* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1988) at 103-09.

¹²⁸ At that time, the Crown in right of Canada could only be sued in the federal courts, while the Crown in right of Ontario could only be sued in the Ontario courts. Section 17(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7 now provides that the Federal Court, Trial Division possesses "concurrent original jurisdiction in all cases where relief is claimed against the Crown," thereby allowing both federal and provincial Crowns to be co-defendants in one action in that court.

White J. determined that the band could continue the actions concurrently in the federal and Ontario courts. He based his decision on the following: (1) statutory requirements in existence at the time, (2) his finding that the band had a justiciable claim against the province, and (3) his finding that the province, having promised to uphold the band's interests by agreement with the federal Crown, should have more concern for the band's loss of rights:

[T]he plaintiffs have been deprived of a valuable right which, in part, they paid for by surrendering their aboriginal rights to the Crown in right of Canada. It is unseemly that the Province of Ontario, which in an agreement with the Dominion of Canada, promised to uphold that right, is not solicitous of that right. Perhaps, the Province of Ontario should have viewed any imperfection in the plaintiffs' pleading with a more appropriate measure of forbearance.¹²⁹

The *Gardner* case did not determine Ontario's obligations under the terms of the treaty. The sole matter in issue was Ontario's application to strike out the band's statement of claim. *Gardner* did recognize, however, that Ontario, by virtue of its actions in accepting and later repudiating the protection of the band's rights under the treaty, may possess obligations towards the band based upon its enactment of legislation protecting Aboriginal interests.¹³⁰

C. Cree Regional Authority and Delgamuukw

The notion of provincial fiduciary responsibilities towards First Nations was raised again in *Cree Regional Authority v. Robinson*¹³¹ and in the trial judgment in *Delgamuukw v. British Columbia*.¹³² In the *Cree Regional Authority* case, the central issue to be judicially determined was the obligation of the federal administrator of the *James Bay and Northern Quebec Native Claims Settlement Act*¹³³ in conducting an environmental assessment of the Great Whale Hydroelectric Project in Northern Quebec. In its judgment, the trial division of the Federal Court implied that provincial Crowns may hold fiduciary obligations toward Native peoples. It determined that in *R. v. Sparrow*,¹³⁴ the

¹²⁹ *Gardner*, *supra* note 125 at 775-76.

¹³⁰ See the further discussion on this point in Part V, below.

¹³¹ *Supra* note 4.

¹³² (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) [hereinafter *Delgamuukw*, BCSC].

¹³³ S.C. 1976-77, c. 32.

¹³⁴ *Supra* note 5.

Supreme Court of Canada's discussion of fiduciary duties did not distinguish between federal and provincial Crowns. This led the court to find that "the provincial authorities are also responsible for protecting the rights of the Native population."¹³⁵

In the British Columbia Supreme Court's judgment in *Delgamuukw v. British Columbia*, the Gitksan and Wet'suwet'en hereditary chiefs had commenced an action seeking a declaration that they possessed jurisdiction over, and ownership of, their traditional lands. Alternatively, they maintained that they possessed Aboriginal rights to use the land. The claim was founded on the occupation, use, and enjoyment of the land by the plaintiffs, their people, and ancestors since time immemorial; the terms of the *Royal Proclamation, 1763*; and the further confirmation of their rights by the *Constitution Act, 1982*.

Although he denied the plaintiffs' claims, McEachern C.J.B.C., as he then was, held that the Crown had a fiduciary duty to allow the plaintiffs to use unoccupied or vacant Crown land for subsistence purposes until the land was dedicated to another purpose.¹³⁶ Since that duty could only be enforced against the province through the operation of section 109 of the *British North America Act, 1867*, he determined that the province was also bound by the fiduciary duty to the plaintiffs.¹³⁷ On appeal, the British Columbia Court of Appeal varied the trial judgment in *Delgamuukw* without comment upon this particular issue.¹³⁸

D. Bear Island

The Supreme Court of Canada's decision in *Bear Island*¹³⁹ is also noteworthy for its inference of provincial fiduciary responsibility to First Nations. The pivotal issue was whether or not the Teme-Augama Anishnabai people adhered to the Robinson-Huron Treaty, 1850, either expressly or by implication.¹⁴⁰ The Court's decision suggested that

¹³⁵ *Cree Regional Authority*, *supra* note 4 at 106.

¹³⁶ *Delgamuukw*, BCSC, *supra* note 132 at 482.

¹³⁷ *Ibid.* at 536.

¹³⁸ (1993), 104 D.L.R. (4th) 470 [hereinafter *Delgamuukw*, BCCA].

¹³⁹ *Supra* note 7.

¹⁴⁰ *Ibid.* This issue is far more complicated than this presentation suggests. For further elaboration of the issues in *Bear Island* at the pre-Supreme Court of Canada level, see K. McNeil, "The Temagami Indian Land Claim: Loosening the Judicial Strait-jacket" in M. Bray & A. Thomson, eds., *Temagami: A Debate on Wilderness* (Toronto: Dundurn, 1990) 185. Commentary on the Supreme Court of Canada's decision may be found in McNeil, *supra* note 102.

Ontario was bound by fiduciary obligations to the Teme-Augama Anishnabai derived from the Robinson-Huron Treaty, 1850. While it vaguely stated that "the Crown ... breached its fiduciary obligations to the Indians,"¹⁴¹ without determining which emanations of the Crown held and breached those obligations, it also explained that the matters involving the breach of duty "currently form the subject of negotiations between the parties."¹⁴² The Court's statement is particularly intriguing in light of the fact that the only parties involved in the negotiations referred to were the Temagami people and the province of Ontario. The federal Crown was not involved. By virtue of this circumstance—of which the Court was eminently aware at the time of its decision—the logical inference to be made is that the Court held Ontario responsible for the fiduciary obligations owed to the Temagami people.

Indeed, it is difficult to fathom why the province would be involved in negotiations over the Crown's breach of duty to the Temagami people in the absence of the federal Crown's participation if it was not, itself, bound by a fiduciary duty to the Temagami people. Of more general applicability is the fact that there was nothing unique about Ontario's role in the *Bear Island* scenario, which resulted in the Supreme Court's inference of Ontario's fiduciary obligations to the Temagami people.

The events in *Bear Island* (pursuant to which the court found that the Crown had breached its fiduciary responsibilities) are akin to other situations in which lands surrendered by Aboriginal peoples under treaties negotiated by the *federal* Crown accrue, under section 109 of the *British North America Act, 1867*, to the provinces in which the lands are situated. The conclusions from the discussion of *St. Catherine's Milling*¹⁴³ and the trilogy of decisions¹⁴⁴ regarding federal and provincial obligations to First Nations suggest that the equitable basis of finding a provincial fiduciary duty is concerned primarily with whether the province reaped benefits under the treaty.¹⁴⁵ In the *Bear Island* scenario, Ontario did reap a benefit by obtaining the beneficial interest in the Indian land surrendered under the Robinson-Huron Treaty, 1850 and situated within its boundaries.

¹⁴¹ *Bear Island*, *supra* note 7 at 575.

¹⁴² *Ibid.*

¹⁴³ *Supra* note 6.

¹⁴⁴ *Robinson Treaties Annuities*, *supra* note 16; *Seybold*, *supra* note 17; and *Treaty #3 Annuities*, *supra* note 18.

¹⁴⁵ See Part II.C., above.

Based upon these observations, it cannot be claimed that the Supreme Court of Canada's conclusions regarding Ontario's fiduciary duty to the Temagami people ought to be restricted to the situation arising in *Bear Island*. The *Bear Island* decision did not, moreover, define or limit Ontario's fiduciary obligation. Accordingly, the Supreme Court's inference of provincial fiduciary responsibilities belonging to Ontario may support the notion of general provincial fiduciary responsibilities to Aboriginal peoples living within the provinces' jurisdictional boundaries.

E. *Summary and Conclusions*

It is beyond dispute that the relationship between the Crown and Aboriginal peoples in Canada far predates the separation of legislative and executive powers established in the *British North America Act, 1867*. While the bulk of this paper has focused upon positive legal rationales for the entrenchment of fiduciary obligations upon the federal and provincial Crowns, there is a far more fundamental, and generally neglected, rationale for these conclusions—the Aboriginal understanding of the Crown-Native relationship, as reflected, in part, in Aboriginal understandings of “the Crown.”

IV. ABORIGINAL UNDERSTANDINGS OF “THE CROWN”

Traditionally, Aboriginal peoples' reference point for the basis of the Crown's fiduciary duties to First Nations in Canada has always been “the Crown.” It has not been the Crown in right of Britain, the Crown in right of Canada, or the Crown in right of a particular province. This understanding stems from the wording of treaties and of other agreements between the Crown and Native peoples, as well as the explanations provided to the First Nations by the Crown's own representatives. Based upon the accounts of the history and background to many Indian land treaties, no differentiation between the personifications of the Crown were made evident to the Native peoples.¹⁴⁶ From the First Nations' standpoint, therefore, when the

¹⁴⁶ See, for example, Price, *supra* note 28; Fumoleau, *supra* note 28; J.D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: University of Saskatchewan Native Law Centre, 1985); F. Jennings, *The Ambiguous Iroquois Empire* (New York: W.W. Norton, 1984) [hereinafter *Ambiguous Iroquois Empire*]; F. Jennings, *Empire of Fortune*, (New York: W.W. Norton, 1988) [hereinafter *Empire of Fortune*]; and A. Morris, *The Treaties of Canada with the Indians of*

Crown dealt with Aboriginal peoples and undertook certain responsibilities towards them, it did so as a unified entity.

Other considerations that have affected the constitutional understanding of the Crown and its responsibilities to First Nations from the time of contact—including the *British North America Act, 1867*'s division of the Canadian Crown into federal and provincial Crowns, and the change in the constitutional understanding of the Crown from "single and indivisible" to "separate and divisible"¹⁴⁷—were entirely external to Aboriginal understandings of the Crown. First Nations were never involved in the effectuation of these changes. Moreover, they were not consulted about them and their effects upon the Crown-Native relationship.

Owing to the situation of the First Nations when these changes were taking place, they cannot be expected to have known or fully comprehended the intended effect of these changes without having been informed of them and their effects. In any event, in accordance with the general principles of fiduciary doctrine, neither were the Aboriginal peoples responsible for discovering the changes in the understanding of the Crown nor was the nature and extent of the Crown's fiduciary duty owed to them lessened in any respect by these changes.¹⁴⁸

The conflict between Aboriginal and non-Aboriginal understandings of the Crown is illustrated by the Supreme Court of Canada's decision in *Mitchell*.¹⁴⁹ The Manitoba government had rebated the Peguis Indian Band for monies the band had paid under an invalid sales tax imposed on the sale of electricity on Indian reserves. Meanwhile, one of the band's creditors had obtained a garnishing

Manitoba and the North-West Territories (Toronto: Willing & Williamson, 1880).

¹⁴⁷ See description, *supra* note 105.

¹⁴⁸ A fundamental premise of fiduciary doctrine insists that beneficiaries need not inquire into the actions of their fiduciaries, but may rely entirely upon the latter's honesty, integrity, and fidelity to their best interests. This notion is discussed in L.I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" [forthcoming]. See also *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co.*, [1958] S.C.R. 314 at 328, *per* Rand J., dissenting; *Carl B. Potter Ltd. v. Mercantile Bank of Canada*, [1980] 2 S.C.R. 343 at 352; and M.V. Ellis, *Fiduciary Duties in Canada* (Toronto: De Boo, 1988) at 2-22, where he comments that judicial findings that place an obligation upon beneficiaries to ensure their fiduciaries' fidelity are "repugnant to the basic duty of utmost good faith owed by the trustee."

¹⁴⁹ *Supra* note 10. See also the discussion of *Mitchell* from an administrative law perspective in H.W. MacLauchlan, "Developments in Administrative Law: The 1989-90 Term" (1991) 2 Supreme Court L.R. (2d) 1 at 13-18.

order,¹⁵⁰ under the Manitoba *Garnishment Act*,¹⁵¹ against the rebate. In accordance with the order, the government paid the garnished amount into court. The band sought to have the garnishing order set aside and the monies paid out of court on the basis that the order was inconsistent with sections 89(1) and 90(1)(b) of the *Indian Act*.¹⁵² The band maintained, moreover, that the Manitoba *Garnishment Act* was not a provincial law applicable to Indians under section 88 of the *Indian Act* and, therefore, was not applicable to the matter in issue.¹⁵³

The broad issue before the Supreme Court of Canada was whether the monies paid to the band could be considered the personal property of a band situated on a reserve and thereby not subject to garnishment under section 89(1) of the *Indian Act*. For the purposes of section 89(1), the definition of personal property situated on a reserve included monies "given to Indians or to a band under treaty or agreement between a band and Her Majesty" under section 90(1)(b) of the *Act*. In order to determine if the rebate came under section 90(1)(b), the Court was faced with determining which emanations of the Crown were contained within the phrase "Her Majesty," as it was used in section 90(1)(b).

In principle, all of the members of the Supreme Court of Canada agreed that the use of the phrase "Her Majesty" in federal legislation could refer to both federal and provincial Crowns. In the particular instance of section 90(1)(b), however, La Forest J.'s majority decision held that "Her Majesty" referred only to the federal Crown. Dickson C.J.C., dissenting, insisted that the use of "Her Majesty" in section 90(1)(b) referred to both federal and provincial Crowns.

While La Forest J.'s assessment was based upon an adherence to the intentions of Parliament in enacting the *Indian Act*, Dickson C.J.C. concentrated upon Aboriginal understandings of the phrase "Her Majesty," as mandated by the Supreme Court of Canada's decision in

¹⁵⁰ A garnishing order is authorized by statute and allows a debtor's money, property, or receivables, which are in the possession of, under the control of, or owed to a third party, to be applied in payment of the debtor's indebtedness to one or more creditors.

¹⁵¹ R.S.M. 1970, c. G20.

¹⁵² R.S.C. 1970, c. I-6. Under the current *Act*, R.S.C. 1985, c. I-5, these provisions retain the same numbering as under the previous *Act*.

¹⁵³ Section 88 allows for provincial laws of general application to be rendered applicable to status Indians, as defined in sections 6 to 7 of the current *Act*, by referential incorporation, except when they are inconsistent with the terms of Indian treaties, the *Indian Act*, or other federal legislation.

Nowegijick.¹⁵⁴ Relying upon *Nowegijick*'s determination that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian,"¹⁵⁵ Dickson C.J.C. held that the definition of "Her Majesty" in section 90(1)(b) of the *Indian Act* ought to concur with Aboriginal interpretations of the phrase, which he found included both federal and provincial Crowns:

[T]he Indians' relationship with the Crown or Sovereign has never depended upon the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations.¹⁵⁶

The basis of Dickson C.J.C.'s conclusion may be found in the historic relationship between the Crown and First Nations in Canada:

That relationship began with pre-confederation contact between historic occupiers of North American lands (the aboriginal peoples) and the European colonizers (since 1763, "the Crown"), and it is this relationship between aboriginal peoples and the Crown that grounds the distinctive fiduciary obligation on the Crown.¹⁵⁷

Due to the pre-Confederation origins of the Crown-Native fiduciary relationship, Dickson C.J.C. held that Aboriginal understandings of "Her Majesty" or "the Crown" must also be rooted in pre-Confederation realities.¹⁵⁸ Therefore, although the constitutional division of powers upon Confederation may have necessitated the creation of the federal and provincial Crowns in Canada, that change did not affect Aboriginal understandings of the Crown. Similarly, it did not affect the fulfilment of the Crown's duty to the First Nations.¹⁵⁹

Dickson C.J.C.'s adherence to the notion that the provinces share in the Crown's fiduciary duty to First Nations is reflected in his comments relating to the divisibility of the Crown *vis-à-vis* Aboriginal views of the Crown.¹⁶⁰ It is reinforced by his statement that it is possible to "over-emphasize the extent to which aboriginal peoples are affected only by the decisions and actions of the federal Crown."¹⁶¹ His

¹⁵⁴ See *supra* note 83.

¹⁵⁵ *Mitchell*, *supra* note 10 at 98. Note also the reference to the problems in the interpretation of Indian treaties in the *Report of the Select Committee on Aborigines, 1837*, *supra* note 84 at 80.

¹⁵⁶ *Mitchell*, *ibid.* at 108-09.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ See *supra* notes 106 and 107 and accompanying text.

¹⁶⁰ See *Mitchell*, *supra* note 10 at 108-09.

¹⁶¹ *Ibid.*

discussion of the incidental effects doctrine¹⁶² is also suggestive of provincial fiduciary obligations. Finally, his review of the *Guerin*¹⁶³ decision demonstrates that the findings in that case do not prohibit a determination that the Crown's fiduciary duty is shared by the provinces.¹⁶⁴

La Forest J.'s majority judgment in *Mitchell* explicitly rejected Dickson C.J.C.'s characterization of Aboriginal understandings of the Crown as not reflecting modern circumstances:

With deference, I question his conclusion that it is realistic, in this day and age, to proceed on the assumption that from the aboriginal perspective, any federal-provincial divisions that the Crown has imposed upon itself are simply internal to itself, such that the Crown may be considered what one might style an "indivisible entity."¹⁶⁵

His rationale for not holding that section 90(1)(b) of the *Indian Act* also encompassed the provincial Crowns is based upon his assertion that to include the provinces would grant the First Nations an advantage which was not justifiable in light of the Crown's historic protection of Indian lands and property, as codified in sections 87 and 89 of the *Indian Act*. Traditionally, only Indian property situated on a reserve was held to be free from taxation or distraint.¹⁶⁶ The *situs*, or location, of the property was, and still is, the determining factor regarding the property's protection under the *Indian Act*. Section 90(1)(b) statutorily deems any personal property that was given to Indians or an Indian band by Her Majesty as being situated on a reserve and therefore protected. La Forest J. deemed, however, that the *Indian Act*'s protection of Indian property was limited to the personal property promised to Indians in treaties and ancillary agreements by the Crown, in accordance with the

¹⁶² This doctrine states that laws in relation to a matter within the competence of one level of government may validly affect a matter within the competence of a second level: see, for example, *Alberta Government Telephones v. Canada* (*Canadian Radio-television & Telecommunications Commission*), [1989] 2 S.C.R. 225 at 260.

¹⁶³ *Supra* note 1.

¹⁶⁴ *Mitchell*, *supra* note 10 at 209: "On its facts, *Guerin* only dealt with the obligation of the federal Crown arising upon surrender of land by Indians" [emphasis in original]. See also the discussion in Rotman, *supra* note 10; B. Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*" in Hawkes, ed., *supra* note 108, 59 at 84: "Although there is no case law on this point, and the Supreme Court in *Guerin* was only dealing with a claim against the federal government, the judgments do not imply a limitation of the duty to the Crown in right of Canada alone."

¹⁶⁵ *Mitchell*, *ibid.* at 144.

¹⁶⁶ See sections 87 and 89 of the *Indian Act*.

latter's historic undertakings.¹⁶⁷ He held that if anything other than a continuation of the Crown's historic practices was envisaged by sections 87 and 89 of the *Indian Act*, those sections would have expressly stated such an intention.¹⁶⁸

La Forest J.'s interpretation of section 90(1)(b) in *Mitchell* may be seen to adhere to the frozen rights theory, which states that rights exist only in the form that they were exercisable in at a certain point in time, and they are not capable of modification or change. However, this theory was explicitly rejected by the Supreme Court of Canada in *Sparrow*.¹⁶⁹ The majority decision in *Sparrow*, which, ironically, was delivered jointly by Dickson C.J.C. and La Forest J., explained that:

[A]n existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. ... [T]he phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. ... Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.¹⁷⁰

What is intriguing about La Forest J.'s decision in *Mitchell* is that, despite his emphasis upon the historic origins of the Crown's protection of Indians' personal property, he ignored historic Aboriginal understandings of the Crown. Not only are his findings incongruous, but they also contradict two Supreme Court of Canada precedents. His position regarding the Crown's protection of Indians' personal property ignored the Supreme Court's rejection of the frozen rights theory in *Sparrow*, which was rendered less than one month before *Mitchell*.

¹⁶⁷ See La Forest J.'s discussion in *Mitchell*, *supra* note 10 at 127-36.

¹⁶⁸ *Ibid.* at 140: "As I see it, if Parliament had intended to cast aside these traditional constraints on the Crown's obligations to protect the property of Indians, it would have expressed this in the clearest of terms."

¹⁶⁹ *Supra* note 5.

¹⁷⁰ *Ibid.* at 1091-93. See also B. Slattery, *supra* note 3 at 782, who stated that the word "existing" in section 35(1) suggests that Aboriginal and treaty rights "are affirmed in a contemporary form rather than in their primeval simplicity and vigour." Slattery's statement was approved by the Supreme Court in *Sparrow*, *ibid.* at 1092.

The Court's rejection of the frozen rights theory in *Sparrow* is also consistent with the precedent it had established in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 343-44, where the majority dismissed the notion that a "frozen concepts" theory applied to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, by holding that the *Charter's* guarantee of rights was not confined to the status of those rights when the *Charter* came into effect. Note, as well, the Supreme Court of Canada's rejection of frozen rights theory in the Aboriginal rights context in *Simon v. R.*, [1985] 2 S.C.R. 387 at 399-400. See also B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83) 8 Queen's L.J. 232 at 262: "[T]he law should be regarded as always speaking, and as applying to new circumstances as they arise."

Moreover, his determination that Aboriginal characterizations of the Crown, as an indivisible entity, does not reflect modern circumstances runs contrary to the precedent established in *Nowegijick*, which held that Aboriginal interpretations of words and legal concepts in Indian treaties and statutes relating to Indians are to be preferred over more legalistic and technical constructions.¹⁷¹

Modern Aboriginal understandings of the Crown, as represented in treaties and through the historical intercourse of governmental authorities and First Nations in Canada, are founded on understandings passed from generation to generation, and dating back to the various bases of the Crown's fiduciary obligations. They consistently regard the Crown as a *unified whole* with whom treaties were signed and compacts made.¹⁷² La Forest J.'s characterization of Aboriginal understandings of the Crown in *Mitchell*, on the other hand, reflects the common law's tendency to attempt to understand Aboriginal conceptions exclusively by analogy with common law ideas rather than by viewing them on their own terms.¹⁷³

The problems associated with attempts to understand Aboriginal conceptions exclusively by reference to common law ideas are reflected by the growing trend in Canadian Aboriginal rights jurisprudence to describe Aboriginal rights as *sui generis*.¹⁷⁴ The notion that Aboriginal rights do not necessarily correspond, however, to rights that are comprehensible or recognizable only at common law is not an entirely recent phenomenon. It may be traced back to the early nineteenth century, at which time it occupied a primary role in one of the United States Supreme Court's earliest decisions on Aboriginal rights, *Johnson and Graham's Lessee v. M'Intosh*.¹⁷⁵ The case centred around competing claims of ownership of former Indian land. Chief Justice John Marshall ultimately ruled in favour of the defendant, who had purchased title

¹⁷¹ See *supra* note 83. It should be noted that while La Forest J. agreed with *Nowegijick's* interpretive principles as they applied to Indian treaties, he held that "somewhat different considerations must apply in the case of statutes relating to Indians": *Mitchell*, *supra* note 10 at 142-43.

¹⁷² See, for example, Price, *supra* note 28; Fumoleau, *supra* note 28; Morris, *supra* note 146; and H. Cardinal, *The Unjust Society* (Edmonton: Mel Hurtig, 1969).

¹⁷³ See Price, *ibid.*; Fumoleau, *ibid.*; Hurley, *supra* note 34; *Ambiguous Iroquois Empire*, *supra* note 146; *Empire of Fortune*, *supra* note 146; and Morris, *ibid.*

¹⁷⁴ *Sui generis* has been defined as "[o]f their own kind or class": see *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West, 1979) at 1286. The concept of describing Aboriginal rights as *sui generis* is discussed in greater detail in J.J. Borrows & L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make A Difference?" [forthcoming].

¹⁷⁵ 8 Wheat. 543 (U.S. 1823) [hereinafter *Johnson*].

from the United States government, and against the plaintiff, the successor-in-title of a colonist who had purchased the land from its original Indian owners. In rendering his decision, Marshall C.J. did not dispute the validity of the defendant's title under Indian law. He held, however, that it was unenforceable by American courts since it was the creature of a separate legal system and thereby governed by its laws:

If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages ... still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and ... the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. ... The plaintiffs do not exhibit a title which can be sustained in the courts of the United States.¹⁷⁶

The special, *sui generis* nature of aboriginal rights was later recognized by the Privy Council in *Amodu Tijani v. The Secretary, Southern Nigeria*.¹⁷⁷ In that case, Viscount Haldane, commenting upon the nature of aboriginal land tenure in West Africa, issued a warning about the judiciary's interpretation of rights that were not formulated within the confines of the common law:

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.¹⁷⁸

In Canada, the courts have overtly described Indian treaties,¹⁷⁹ the Crown-Native fiduciary relationship,¹⁸⁰ Aboriginal title,¹⁸¹ and

¹⁷⁶ *Ibid.* at 593 and at 605.

¹⁷⁷ [1921] 2 A.C. 399 [hereinafter *Amodu Tijani*].

¹⁷⁸ *Ibid.* at 402-03.

¹⁷⁹ See *Simon v. R.*, *supra* note 170 at 404: "An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law;" and *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1039.

¹⁸⁰ See *Guerin*, *supra* note 1 at 384-85.

¹⁸¹ See, for example, *Guerin*, *ibid.* at 382; *Paul v. Canadian Pacific Ltd.*, *supra* note 7 at 678-79; *Roberts v. Canada*, *supra* note 7 at 336-38; *Sparrow*, *supra* note 5 at 1108; *Mitchell*, *supra* note 10 at 108-09; *Apsassin*, *supra* note 4 at 78 and at 83; and *Skerryvore Ratepayers' Ass'n v. Shawanaga Indian Band* (1993), 16 O.R. (3d) 390 (C.A.) at 400. Refer also to the High Court of Australia's decision in *Mabo v. Queensland [No.2]* (1992), 175 C.L.R. 1, especially at 59, per Brennan J.

Aboriginal property rights¹⁸² as *sui generis*. More recently, the dissenting judgment of Lambert J.A. in *Delgamuukw v. British Columbia* stated that "all aboriginal rights are *sui generis*."¹⁸³ In making this statement, Lambert J.A. expanded upon the sentiments expressed by Viscount Haldane in *Amodu Tijani*:

I am satisfied that a jurisprudential analysis of the concepts underlying "rights" in common law or western legal thought is of little or no help in understanding the rights now held by aboriginal peoples and now recognized and affirmed by the common law and by the Constitution. ... And it is not only in relation to aboriginal title that trying to describe the title in the terminology of common law tenures is both unnecessary and misleading: trying to describe aboriginal rights in terms of rigorous western jurisprudential analysis may well be equally unnecessary and misleading.¹⁸⁴

All of these cases recognize that Aboriginal conceptions and understandings may not always correspond to their common law counterparts.¹⁸⁵ It should not be surprising, then, that Aboriginal understandings of the Crown differ from that held by the common law.

If the common law's view of the Crown differs from First Nations' traditionally-held conceptions, it is incumbent upon the Crown to ensure that the former is made evident to the First Nations. This notion is both consistent with the interpretive principles enunciated in *Nowegijick*¹⁸⁶ and the requirements of fiduciary doctrine. Regardless, any change in the understanding of the Crown may only affect the remedies available for a breach of the Crown's fiduciary duties, rather

¹⁸² These rights include, but are not restricted to, Aboriginal cultural property and the right to hunt and fish: see *Sparrow*, *supra* note 5 at 1112: "Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin* ... referred to as the '*sui generis*' nature of aboriginal rights."

¹⁸³ *Delgamuukw*, *BCCA*, *supra* note 138 at 644.

¹⁸⁴ *Ibid.*

¹⁸⁵ See the discussion in Borrows & Rotman, *supra* note 174. Some of the sources that discuss or contemplate differences between Aboriginal and non-Aboriginal world views and ideological conceptions include: Little Bear, *supra* note 28; M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. 3; R. Ridington, "Cultures in Conflict: The Problem of Discourse" in W.H. New, ed., *Native Writers and Canadian Writing* (Vancouver: University of British Columbia Press, 1990) 273; R.A. Williams Jr., "Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context" (1990) 24 Ga. L. Rev. 1019; and "Aboriginal Concepts of Justice" in Manitoba, Aboriginal Justice Inquiry, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba: Public Inquiry into the Administration of Justice and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 1991) (Commissioners: A.C. Hamilton & C.M. Sinclair) 17.

¹⁸⁶ *Supra* note 83.

than the nature and extent of those duties or the legal requirement that they be fulfilled. The passage of time does not forgive a fiduciary's breach of duty, although, in certain circumstances, it may prevent the bringing of an action for breach due to a lapse of statutory limitations or laches.¹⁸⁷

V. THE NEXUS BETWEEN GOVERNMENTAL POWER AND FIDUCIARY RESPONSIBILITY

The principle of dividing obligations between the federal and provincial Crowns is not unique to the Crown-Native fiduciary relationship. Another example is the explicit sharing of legislative power—and consequently legislative responsibility—between the federal and provincial Crowns relating to agriculture and immigration under section 95 of the *British North America Act, 1867*.¹⁸⁸ The relationship between power and responsibility¹⁸⁹ was expressed by the Supreme Court of Canada in *Sparrow*, where the Court stated, in relation to the nexus between section 91(24) of the *British North America Act, 1867* and section 35(1) of the *Constitution Act, 1982*, that “federal power must be reconciled with federal duty.”¹⁹⁰

Due to the absence of provincial participation in the majority of the events giving rise to the Crown's fiduciary duties towards First Nations, provincial obligations stem primarily from the provincial-federal distribution of legislative and authoritative responsibilities in Canada. This entails an acceptance of both benefits and obligations from the actions of the federal Crown after 1867 and from its predecessors, including the British Crown, prior to 1867. Provincial obligations also arise from direct provincial actions toward and interaction with Aboriginal peoples.

The sharing of legislative responsibility over Aboriginal affairs may be seen, for example, in the ability of provinces to pass legislation

¹⁸⁷ By way of illustration, if it were determined that the French Crown possessed fiduciary obligations to First Nations in Canada by virtue of its historic relationship with them, its loss of sovereignty over Canada in 1760-61 would not terminate its liability for any breach of those obligations, but, quite obviously, would severely limit the range of remedies that could be awarded against it.

¹⁸⁸ It should be noted that the doctrine of paramountcy is explicitly included so that provincial legislation that is repugnant to federal law is rendered null and void to the extent of the repugnancy.

¹⁸⁹ See *supra* note 109 and accompanying text.

¹⁹⁰ *Sparrow*, *supra* note 5 at 1109.

affecting Aboriginal peoples through section 88 of the *Indian Act*.¹⁹¹ Even though legislative jurisdiction over "Indians, and Lands reserved for the Indians" is an exclusive federal power under section 91(24) of the *British North America Act, 1867*,¹⁹² section 88 of the *Indian Act* allows for provincial laws of general application to be applied to status Indians¹⁹³ by referential incorporation, subject to the terms of Indian treaties, the *Indian Act* itself, or other federal legislation. In light of the effects of section 35(1) of the *Constitution Act, 1982*, however, the constitutional validity of section 88 is questionable.¹⁹⁴

When provinces intrude upon the federal Crown's section 91(24) legislative sphere, they cannot do so without affecting the nature and scope of their own obligations to Native peoples. As Brian Slattery explains: "[S]o long as the Provinces have powers and rights enabling them to affect adversely Aboriginal interests protected by the relationship, they hold attendant fiduciary obligations."¹⁹⁵ Provinces thereby acquire some measure of the federal Crown's fiduciary responsibilities when they pass legislation referentially under section 88 of the *Indian Act*, play an active role in the formulation of land

¹⁹¹ Section 88 reads:

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.

¹⁹² The application of section 88 is a complicated matter. For further consideration of case law dealing with the effect of section 88, refer to *R. v. Sutherland*, [1980] 2 S.C.R. 451 ("pith and substance" rule); *Krueger and Manuel v. R.*, *supra* note 84, (whether provincial laws are of general application and/or impair the status and capacity of Aboriginal peoples); *Four B Manufacturing v. United Garment Workers of America*, *supra* note 35, (whether provincial laws are of general application and/or impair the status and capacity of Aboriginal peoples); *Dick v. R.*, [1985] 2 S.C.R. 309; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 (provincial laws may not interfere with treaty rights); Slattery, *supra* note 3 at 775-81; Slattery, *supra* note 107 at 282-86; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 at 418-23 and at 435-45; and B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308 at 371-80.

¹⁹³ "Status Indians" is defined in sections 6 and 7 of the *Indian Act*.

¹⁹⁴ See Slattery, note 107 at 284-86.

¹⁹⁵ *Ibid.* at 274. See also Slattery, *supra* note 3 at 755:

The federal Crown has primary responsibility toward native peoples under section 91(24) of the *Constitution Act, 1867*, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.

agreements concerning the establishment of Indian reserves, or actively participate in the negotiation of Indian treaties and agreements.

The provinces have, for example, passed provincial legislation that directly affects status Indians, including game and wildlife laws. Ontario played an active role in formulating land agreements regarding the establishment of Indian reserves, such as when it became involved in the implementation of Treaty #3 and Treaty #9 reserves. Its role in providing for the establishment of reserves under Treaty #3 is illustrated by the sixth clause of *An Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario Respecting Indian Lands*, which states

[t]hat any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario.¹⁹⁶

Similarly, Quebec's role in negotiating the *James Bay and Northern Quebec Agreement*¹⁹⁷ and in enacting the provincial legislation necessary

¹⁹⁶ *Supra* note 81. Note also the obligations of Ontario and Quebec in the 1912 Ontario and Quebec Boundary Extension Acts: *Ontario Boundaries Extension Act*, *supra* note 81; *An Act to Express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province*, S.O. 1912, c. 3; *Quebec Boundaries Extension Act*, *supra* note 81; and *An Act Respecting the Extension of the Province of Quebec by the Annexation of Ungava*, S.Q. 1912, c. 7, which provide in section 2(a) of the federal Ontario Act and section 2(c) of the federal Quebec Act

[t]hat the province of ... will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders.

These provincially-obtained surrenders were subject, however, to the approval of the Governor in Council (sections 2(b) and 2(d) respectively) and the "trusteeship of the Indians in the said territory, and the management of ... lands ... reserved for their use, shall remain in the government of Canada" (sections 2(c) and 2(e) respectively).

¹⁹⁷ *James Bay and Northern Quebec Agreement* (Editeur officiel du Quebec, 1976) along with its implementing legislation, the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32. Similar situations include Quebec's role in the *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18 and Ontario's part in negotiating with the Nishnawbe-Aski Nation (NAN) to recognize NAN self-government. Regarding the latter, see the Memorandum of Understanding dated 24 February 1986 between Ontario, the federal Crown, and NAN to enter into negotiations for the purpose of recognizing NAN self-government within the context of Canadian Confederation. This was followed by an Addendum to the Memorandum of Understanding signed on 1 December 1989 and an Interim Measures Agreement dated 12 June 1990 regarding future development adjacent to NAN reserve lands and lands claimed as NAN lands.

See also Morse, *supra* note 164 at 65:

The Ontario government subsequently obtained a guaranteed role in [Indian treaty] negotiations, first with Treaty No. 9 and its adhesions as well as in the Williams Treaty of 1923. However, this was not truly due to any constitutional imperative, but rather it reflected a federal willingness to include the province and a desire to shift some of the financial burdens onto Ontario's shoulders.

for its implementation¹⁹⁸ demonstrates active provincial participation in the negotiation of Indian treaties and agreements.

The line between federal and provincial jurisdictional boundaries is becoming increasingly blurred due to the effects of the *Constitution Act, 1982*. For this reason, it is likely that provinces will continue to encroach even further upon the federal Crown's section 91(24) jurisdiction over "Indians, and Lands reserved for the Indians" without reproach. As Dickson C.J.C. noted in *Mitchell*, the "fluidity of responsibility across lines of jurisdiction accords well with the fact that the newly entrenched s. 35 of the *Constitution Act, 1982*, applies to all levels of government in Canada."¹⁹⁹ However, if there is to be a point beyond which provincial action that is consistent with or in fulfilment of its obligations to First Nations is deemed to be *ultra vires*, some judicial definition of that line and of provincial fiduciary responsibilities to First Nations is necessary. Otherwise, instances that approach or even cross that line will be difficult, if not impossible, to regulate.²⁰⁰

VI. CONCLUSION

With the passage of the *Constitution Act, 1982*, provincial governments now have a constitutional responsibility to act in a manner consistent with the furtherance of the Aboriginal and treaty rights guaranteed in section 35(1).²⁰¹ In light of the *Sparrow* decision, this arguably entails an obligation to actively and purposively promote or further the rights protected within section 35(1).²⁰² This latter notion has since been affirmed by the Federal Court of Appeal in *Eastmain Band*.²⁰³

A duty to act purposively, as indicated in *Sparrow*, does not require the Crown to seek prior court approval of legislative or policy

¹⁹⁸ See *An Act respecting hunting and fishing rights in the James Bay and New Quebec Territories*, S.Q. 1978, c. 92; *The Cree Villages Act*, S.Q. 1978, c. 88; and *An Act respecting the land regime in the James Bay and New Quebec Territories*, S.Q. 1978, c. 93.

¹⁹⁹ *Supra* note 10 at 109.

²⁰⁰ Of course, there is always the possibility that agreements between the federal and provincial governments may resolve this problem before it arises and without the need for judicial intervention, as with previous intergovernmental agreements discussed above.

²⁰¹ Note Dickson C.J.C.'s comments in *Mitchell*, *supra* note 10 at 109.

²⁰² See *Sparrow*, *supra* note 5 at 1106: "The nature of s. 35(1) itself suggests that it be construed in a purposive way."

²⁰³ *Supra* note 4.

initiatives that affect Indians *qua* Indians. It does insist, however, that in light of the historic relationship between the Crown and Aboriginal peoples, the Crown must maintain its honour, integrity, and avoid sharp practice in all of its dealings with them.²⁰⁴

Under the rubric of section 35(1), and *Sparrow's* suggestions as to its proper method of interpretation, a province may exempt Aboriginal peoples from certain provincial laws or regulations—what may otherwise appear to be facially-neutral legislation—due to the differential impact that those laws or regulations may have upon First Nations.²⁰⁵ This type of activity, however, *prima facie* amounts to legislation in respect of Indians *qua* Indians, which falls under the federal government's section 91(24) jurisdiction. Prior to the existence of the *Constitution Act, 1982*, there is little doubt that such provincial activity would have been declared *ultra vires*, and thereby rendered void.

After the enactment of the *Constitution Act, 1982*, the situation changed dramatically. When a provincial legislative initiative exempts Aboriginal peoples in recognition of their Aboriginal and treaty rights under section 35(1), it will be validated by section 52(1) of the *Constitution Act, 1982*.²⁰⁶ Section 52(1) proclaims the Constitution of Canada—including the purposive application of section 35(1) rights—to be the supreme law of Canada. The extent to which a province may act, however, in accordance with the furtherance of section 35(1) rights, before it infringes upon the federal Crown's exclusive jurisdiction over "Indians, and Lands reserved for the Indians" under section 91(24), is a point of contention that has yet to be resolved.²⁰⁷

In light of the judicial entrenchment of the Crown's fiduciary obligations in *Guerin*,²⁰⁸ the constitutional responsibility of the federal and provincial Crowns to purposively act to further the Aboriginal and treaty rights contained within section 35(1) of the *Constitution Act, 1982*, the nexus between governmental power and responsibility, the link between the division or sharing of power and resultant benefits, the

²⁰⁴ This is emphasized through its reliance upon the precedent established in *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.).

²⁰⁵ See, for example, the Ontario Ministry of Natural Resources' Interim Enforcement Policy, dated 28 May 1991, which details the province's relaxed regulation of Aboriginal hunting and fishing rights in Ontario.

²⁰⁶ Slattery, *supra* note 107 at 284, note 75, corroborates the notion that a province may pass legislation directed at Aboriginal peoples if the effect of the legislation is to grant exemptions to them in recognition of their Aboriginal and treaty rights.

²⁰⁷ See *supra* notes 199 and 200 and accompanying text.

²⁰⁸ *Supra* note 1.

inferences of provincial duties owed to First Nations in the *St. Catherine's Milling*²⁰⁹ and trilogy cases,²¹⁰ and the more recent judicial suggestions regarding provincial fiduciary responsibilities owed to Aboriginal peoples, the notion that provincial Crowns owe fiduciary obligations to First Nations is ready for explicit judicial recognition. While Canadian Aboriginal rights jurisprudence has yet to authoritatively endorse the existence of provincial fiduciary responsibilities towards First Nations, the strong inferences of provincial liability in *Bear Island*²¹¹ and *Cree Regional Authority*,²¹² for example, indicate that Canadian courts may soon be prepared to move in that direction.

²⁰⁹ *Supra* note 6.

²¹⁰ *Robinson Treaties Annuities*, *supra* note 16; *Seybold*, *supra* note 17; and *Treaty #3 Annuities*, *supra* note 18.

²¹¹ *Supra* note 7.

²¹² *Supra* note 4.

