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Fiduciary Obligations and Aboriginal Peoples

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CHAPTER SIXTEEN

Fiduciary Obligations and Aboriginal Peoples

The relationship between the Crown and the Aboriginal peoples of Canada, who include the Indian, Inuit, and Métis peoples, is unique in Canadian law. As the original inhabitants of Canada, it has long been recognized that the Aboriginal peoples have their own status and special rights. These rights arise in part from the occupation and use of lands by the Indians and Inuit as organized societies before French and British colonization. Rights stemming from this source are known as Aboriginal rights. In many parts of the country, these rights have been partially replaced by treaty rights. Special protection has also been accorded to Aboriginal rights by a variety of constitutional documents, including the Royal Proclamation of 1763, the Rupert's Land and North-Western Territory Order of 1870, the Manitoba Act, 1870, and the Constitution Act, 1930. More recently, the Constitution Act, 1982 has provided general constitutional protection for these rights in the following section:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Since at least 1763, the Crown has taken responsibility for the protection of Aboriginal peoples and their rights, especially vis-à-vis European settlers. The preamble to the Aboriginal provisions in the Royal Proclamation of 1763 stated:

1 The Constitution Act, 1982 (Schedule B to the Canada Act, 1982, c. 11 (UK)), s. 35(2) provides: “In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.”


3 RSC 1985, app. II, no. 1.

4 Ibid., no. 9.

5 32 & 33 Vict., c. 3 (Can.).

6 20 & 21 Geo. V, c. 26 (UK).


And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having being ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.9

The Proclamation went on to reserve those unceded lands for the Indians, and to prohibit colonial governors from surveying or granting them and British subjects from settling on or purchasing them. To prevent the “great Frauds and Abuses [that] have been committed in purchasing Lands of the Indians,” the Crown placed itself between the Indians and the settlers by providing that “if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose.”10 Only after Indian lands had been purchased by the Crown would they be available for grant to settlers.

The Royal Proclamation of 1763 was issued directly from London by King George III. The British Crown thus accepted responsibility for Aboriginal affairs, and retained control over relations with the Indian nations with whom the Crown was “connected” and who lived under the Crown’s “protection” (in the words of the Proclamation). In 1860, authority over Aboriginal affairs was transferred to the province of Canada.11 When the Dominion of Canada was created in 1867, jurisdiction over “Indians, and Lands reserved for the Indians” was given to the Canadian Parliament by s. 91(24) of the Constitution Act, 1867.12 This provision has been interpreted to include jurisdiction over the Inuit,13 but whether it also extends to the Métis is still an unresolved question.14 The British government nonetheless retained the power to intervene through the reservation and disallowance powers,15 and of course the British Parliament kept overriding legislative powers in relation to non-constitutional matters until enactment of the Statute of Westminster, 1931,16 and over constitutional matters until enactment of the Canada Act, 1982.17

Evidence that the British government did not intend to divest itself completely of responsibility for Aboriginal affairs in 1867 can be found in the order in council of June

9 Supra note 3, at 4-5.
10 Ibid., at 6.
12 30 & 31 Vict., c. 3 (UK).
15 Constitution Act, 1867, supra note 12, ss. 55-57.
16 22 Geo. V, c. 4 (UK).
23, 1870, which transferred Rupert's Land and the North-Western Territory to Canada on condition that, among other things,

Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government. [Emphasis added.]\(^\text{18}\)

However, in actual practice, it appears that this power to intervene was not exercised, and no doubt lapsed by 1931 with the enactment of the Statute of Westminster 1931.\(^\text{19}\)

Some of the constitutional documents we have been discussing contain language that suggests that the Crown (originally British, subsequently Canadian) stands in a trust-like position in relation to the Aboriginal peoples. The Royal Proclamation of 1763, for example, reserved lands "under our Sovereignty, Protection, and Dominion, for the use of the said Indians" (emphasis added).\(^\text{20}\) In an 1869 Joint Address, the Senate and House of Commons of Canada requested the transfer of Rupert's Land and the North-Western Territory to Canada on the undertaking that "it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer,"\(^\text{21}\) and that commitment formed part of the basis for the actual transfer in 1870.\(^\text{22}\) However, until the decision of the Supreme Court of Canada in Guerin v. The Queen, [1984] 2 SCR 335 (reproduced, in part, in section II.A, below), it was not clear whether commitments like these created a fiduciary relationship that could result in Crown liability in appropriate circumstances or merely gave rise to moral or political obligations that were unenforceable in the courts.\(^\text{23}\)

### I. POLITICAL TRUSTS

The concept of an unenforceable "political trust" can be found in the common law. In Civilian War Claimants v. The King, [1932] AC 14, the House of Lords held that money paid to the British government by Germany pursuant to the Treaty of Versailles at the end of World War I was not subject to an enforceable trust or agency in favour of the British civilians who had suffered the damage that that money was intended to compensate. Lord

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\(^{18}\) Rupert's Land and North-Western Territory Order of 1870, supra note 4, Term 14.

\(^{19}\) See R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta, [1982] QB 892 (CA); Kent McNeil, Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations (Saskatoon: University of Saskatchewan Native Law Centre, 1982), at 34-35.

\(^{20}\) Supra note 3, at 5.

\(^{21}\) Rupert's Land and North-Western Territory Order of 1870, supra note 4, schedule B, at 16.

\(^{22}\) See McNeil, supra note 19, at 13-26. For a discussion of whether the Rupert's Land and North-Western Territory Order of 1870 imposed fiduciary obligations on the federal government, see Renée Dupuis and Kent McNeil, Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec (Ottawa: Royal Commission on Aboriginal Peoples, 1995), at 25-29.

\(^{23}\) See Leonard Ian Rotman, Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada (Toronto: University of Toronto Press, 1996), esp. at 73-87.
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Atkin said, at 27, that “[t]here is nothing, so far as I know, to prevent the Crown acting as agent or trustee if it chooses deliberately to do so.” However, their Lordships found that there was no indication that the Crown had intended to accept either of those roles. Relying on Rustomjee v. The Queen (1876), 2 QBD 69 (CA), they decided that the Crown’s duty to distribute the money to the civilian claimants was a duty to dispense justice that could not be enforced in the courts. Whatever responsibility the Crown had was a responsibility of its advisers that was owed solely to Parliament.

The political trust doctrine was applied more recently in Tito v. Waddell (No. 2), which involved a claim by indigenous people for breach of fiduciary obligations by the Crown.

Tito v. Waddell (No. 2)
[1977] 3 All ER 129 (Ch.)

[This case involved a claim by the Banabans, the indigenous people of Ocean Island in the Pacific, against the British Crown for damages relating to the destruction of their homeland through phosphate mining. Among other things, the Banabans alleged that the Crown owed a fiduciary duty to them, arising from a trust, and that the Crown had breached this duty. In the course of a lengthy judgment dealing with complex factual and legal issues that do not need to be described here, MEGARRY V-C commented generally (at 216-17) on the potential for the Crown to be a trustee.]

I propose to turn at once to the position of the Crown as trustee, leaving on one side any question of what is meant by the Crown for this purpose; and I must also consider what is meant by “trust.” The word is in common use in the English language, and whatever may be the position in this court, it must be recognised that the word is often used in a sense different from that of an equitable obligation enforceable as such by the courts. Many a man may be in a position of trust without being a trustee in the equitable sense; and terms such as “brains trust,” “anti-trust,” and “trust territories,” though commonly used, are not understood as relating to a trust as enforced in a court of equity. At the same time, it can hardly be disputed that a trust may be created without using the word “trust.” In every case one has to look to see whether in the circumstances of the case, and on the true construction of what was said and written, a sufficient intention to create a true trust has been manifested.

When it is alleged that the Crown is a trustee, an element which is of special importance consists of the governmental powers and obligations of the Crown; for these readily provide an explanation which is an alternative to a trust. If money or other property is vested in the Crown and is used for the benefit of others, one explanation can be that the Crown holds on a true trust for those others. Another explanation can be that, without holding the property on a true trust, the Crown is nevertheless administering that property in the exercise of the Crown’s governmental functions. This latter possible explanation, which does not exist in the case of an ordinary individual, makes it necessary to scrutinise with greater care the words and circumstances which are alleged to impose a trust.
I. Political Trusts

Megarry V-C went on to discuss the Rustomjee and Civilian War Claimants cases, above, as well as Kinloch v. Secretary of State for India in Council (1882), 7 App. Cas. 619, another House of Lords' decision applying the political trust doctrine. Referring to Kinloch, he said, at 220-21:

That case, of course, concerned facts which were very different from the facts of the case before me. Yet it supports certain principles or considerations which are of relevance and importance. First, the use of a phrase such as "in trust for," even in a formal document such as a Royal Warrant, does not necessarily create a trust enforceable by the courts. As Lord O'Hagan said [in Kinloch, at 630]: "There is no magic in the word 'trust.'" Second, the term "trust" is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction, but also other relationships such as the discharge, under the direction of the Crown, of the duties or functions belonging to the prerogative and the authority of the Crown. Trusts of the former kind, so familiar in this Division, are described by Lord Selborne LC as being "trusts in the lower sense"; trusts of the latter kind, so unfamiliar in this Division, he called "trusts in the higher sense."

I pause at that point. This classification of trusts seems to have made little impact on the books: see, e.g., Lewin on Trusts [16th ed. (1964), at 10 and 13], Underhill on Trusts and Trustees [12th ed. (1970), at 51] and Halsbury's Laws of England [38 Halsbury's Laws (3d ed.), at 810]. There is, indeed, a certain awkwardness in describing as a trust a relationship which is not enforceable by the courts, though the so-called trusts of imperfect obligation perhaps provide some sort of parallel. Certainly in common speech in legal circles "trust" is normally used to mean an equitable relationship enforceable in the courts and not a governmental relationship which is not thus enforceable. I propose to use the word "trust" simpliciter (or for emphasis the phrase "true trust") to describe what in the conventional sense is a trust enforceable in the courts, and to use Lord Selborne LC's compound phrase "trust in the higher sense" to express the governmental obligation that he describes.

I return to the principles or considerations which the Kinloch case appears to support. The third is that it seems clear that the determination whether an instrument has created a true trust or a trust in the higher sense is a matter of construction, looking at the whole of the instrument in question, its nature and effect, and, I think, its context. Fourth, a material factor may be the form of the description given by the instrument to the person alleged to be the trustee. An impersonal description of him, in the form of a reference not to an individual but to the holder of a particular office for the time being, may give some indication that what is intended is not a true trust, but a trust in the higher sense.

On the burden of proof, Megarry V-C commented as follows (at 222) on a proposition presented by counsel for the attorney general in Tito:

This was that if the Crown was a trustee at all, it would always be a trustee in the higher sense unless there was enough to show that it was intended to be a trustee in...
the lower sense. The burden, said counsel, was thus in effect on counsel for the plaintiffs to show that there was a true trust. Another way of putting much the same point is to emphasise the possible explanations that there are for a transaction. In the case of an individual, there will often be only two feasible explanations, either that he holds on a true trust, or else that he holds on no trust at all, but at most subject to a mere moral obligation. In the case of the Crown, there is a third possible explanation, namely, that there is a trust in the higher sense, or governmental obligation. Though this latter type of obligation is not enforceable in the courts, many other means are available of persuading the Crown to honour its governmental obligations, should it fail to do so ex mero motu. This is accordingly no mere moral obligation; and it can provide a satisfactory and probable explanation of a transaction which has been conducted with formalities which suggest that more than a mere moral obligation was intended. Without putting matters on the basis of any "burden of proof," the existence of this alternative explanation when the alleged trustee is the Crown means that the courts will be ready to adopt it unless there is a sufficient indication that instead a true trust was intended.

[On the facts, Megarry V-C concluded (at 226) that "the surrounding circumstances, as well as the terms of the documents, do very little to support the concept of any true trust." He therefore concluded that the Crown was not a trustee and did not owe fiduciary obligations to the Banabans. Instead, he found, at 237, that the Crown’s obligations were “governmental” in nature, arising from a political trust or “trust in the higher sense,” and were therefore unenforceable in the courts, even though “there have been grave breaches of those obligations.”]

The political trust doctrine presented a potential barrier to Aboriginal peoples in Canada who claimed that the Crown owed a fiduciary duty to them. In Guerin v. The Queen (1982), 143 DLR (3d) 416, the Federal Court of Appeal relied on the doctrine to deny a claim against the Crown by the Musqueam Nation in British Columbia. On appeal, however, the Supreme Court of Canada reconsidered the issue and reversed the Federal Court of Appeal’s judgment in what is still the leading decision on the federal Crown’s fiduciary obligations to the Aboriginal peoples.24

24 The decision of the Supreme Court of Canada in Guerin v. The Queen, [1984] 2 SCR 335 (reproduced in part, below) did not, however, entirely terminate the application of the political trust doctrine to Aboriginal claims. In R v. Vincent, [1993] 2 CNLR 165, the Ontario Court of Appeal applied Rustomjee v. The Queen (1876), 2 QBD 69 (CA) and Civilian War Claimants v. The King, [1932] AC 14 to deny Aboriginal peoples the benefit of the customs exemption they were supposed to receive from the Jay Treaty, 1794, entered into by the British Crown and the United States. Lacourciere JA, for the court, wrote, at 176: “In an international treaty with a sovereign state, the Crown cannot be the fiduciary or agent of a subject, nor can a subject be the beneficiary of a trust.”
II. THE CROWN’S OBLIGATIONS TO THE ABORIGINAL PEOPLES

In our parliamentary system, there are three branches of government: the executive, the legislature, and the judiciary. In applying fiduciary law to the Crown–Aboriginal relationship, the Supreme Court had to decide which of these branches are subject to fiduciary obligations. The court began by applying fiduciary principles to the executive branch—specifically, the federal Department of Indian Affairs—in the Guerin case.

A. Obligations Owed by the Executive

Guerin v. The Queen
[1984] 2 SCR 335

[Guerin involved a claim by the Musqueam Nation against the Crown in right of Canada in relation to a surrender of a portion of their reserve, which is located in the city of Vancouver. A “reserve” is defined in the Indian Act, RSC 1985, c. I-5, s. 2(1), in part, as “a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.” Reserve lands cannot be sold, conveyed, or leased by a band for whom they have been set apart, except by way of surrender of their interest to the Crown.

In 1957, the Shaughnessy Heights Golf Club offered to lease 160 acres of the Musqueam Reserve for a 75-year term. The offer was made to the district superintendent of the Indian Affairs branch, who presented it at a Musqueam Band Council
meeting in April of that year. However, copies of the Shaughnessy offer were not given to the council members, nor were all the proposed terms revealed to them. Acting on the information they were given, the band council passed a resolution at the meeting that approved the lease of the lands in principle. At a subsequent band council meeting in September, attended by representatives of the golf club, the council negotiated an annual rent of $29,000 instead of the proposed figure of $25,000, but this was still substantially less than rent amounting to 5 percent of the value of the land, which was what the council had asked for. The council agreed to the lesser amount because its members were led to believe by the Indian Affairs officials who were present that their demand that the rent be renegotiable in 10 years and every 5 years thereafter was acceptable. Council members also objected to any ceiling on future rent increases and were told that their concern would be conveyed to the Department of Indian Affairs.

The September band council meeting was followed by a “surrender meeting” of the band members in October. According to the trial judge’s factual findings, which the Supreme Court accepted, at that meeting the members assumed or understood that, aside from the first period, the renegotiation periods would be every 10, not 15, years, and the golf club’s proposed 15 percent limitation on rent increases would not be included in the lease. Also, they were not told that a term of the lease would allow the golf club to remove any buildings and other improvements from the land during the lease and up to six months after its termination. Moreover, two other terms that were never presented to the band council or band members subsequently appeared in the lease. The first provided that, failing agreement on future rent increases, the matter would be determined by arbitration on the basis of the rental value of the land in uncleared, unimproved condition and used as a golf course. Second, the golf club, not the Crown, was given the right to terminate the lease at the end of any 15-year period by giving 6 months’ notice.

On the inaccurate and incomplete information provided to them by the Indian Affairs officials, the band members voted overwhelmingly to approve a surrender of 162 acres of their reserve to the Crown “in trust to lease” so that it could be leased to the golf club for 75 years. On January 22, 1958, the Crown and the golf club signed the lease. After the surrender meeting, the band council and band members were not consulted respecting the final terms of the lease, nor were they given a copy of it until 12 years later. According to one Indian Affairs official who testified at trial, the terms bore little resemblance to those discussed with the band members at the surrender meeting, and the trial judge agreed. He found that they would not have accepted the surrender if they had been aware of the terms that would actually appear in the lease.

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28 The band council, which is either elected or chosen according to the custom of the band, is the governing body of an Indian band under the Indian Act.

29 This was in accordance with the surrender provision in the Indian Act, RSC 1952, c. 149, s. 39(1), now RSC 1985, c. 1-5, s. 39(1).

30 Guerin v. The Queen, supra note 24, per Wilson J, at 348, and Dickson J, at 370-71.
In three separate judgments, eight members of the Supreme Court of Canada unanimously restored the trial judge’s decision awarding damages of $10,000,000 to the Musqueam. Estey J, writing his own judgment, found the Crown liable on the basis of agency. Dickson J (as he then was), delivering a judgment for himself, Beetz, Chouinard, and Lamer JJ, based liability on breach of a fiduciary duty by the Crown. Wilson J, along with Ritchie and McIntyre JJ, also found the Crown to be liable, but unlike Dickson J, she decided that liability arose from breach of an express trust that had been created at the time of the surrender, prior to which the Crown had nonetheless owed fiduciary obligations to the Musqueam Nation. Portions of Dickson J’s judgment follow.

DICKSON J (at 375-89):

IV Fiduciary Relationship

The issue of the Crown’s liability was dealt with in the courts below on the basis of the existence or non-existence of a trust. In dealing with the different consequences of a “true” trust, as opposed to a “political” trust, Le Dain J noted that the Crown could be liable only if it were subject to an “equitable obligation enforceable in a court of law.” I have some doubt as to the cogency of the terminology of “higher” and “lower” trusts, but I do agree that the existence of an equitable obligation is the sine qua non for liability. Such an obligation is not, however, limited to relationships which can be strictly defined as “trusts.” As will presently appear, it is my view that the Crown’s obligations vis-à-vis the Indians cannot be defined as a trust. That does not, however, mean that the Crown owes no enforceable duty to the Indians in the way in which it deals with Indian land.

In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

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

An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band’s behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the Indian Act. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. In order to explore the character of this obligation, however, it is first
necessary to consider the basis of aboriginal title and the nature of the interest in land which it represents.

(a) The Existence of Indian Title

In Calder v. Attorney General of British Columbia, [1973] SCR 313, this Court recognized aboriginal title as a legal right derived from the Indians’ historic occupation and possession of their tribal lands. With Judson and Hall JJ writing the principal judgments, the Court split three–three on the major issue of whether the Nisga Indians’ aboriginal title to their ancient tribal territory had been extinguished by general land enactments in British Columbia. The Court also split on the issue of whether the Royal Proclamation of 1763 was applicable to Indian lands in that province. Judson and Hall JJ were in agreement, however, that aboriginal title existed in Canada (at least where it had not been extinguished by appropriate legislative action) independently of the Royal Proclamation. Judson J stated expressly that the Proclamation was not the “exclusive” source of Indian title (pp. 322-23, 328). Hall J said (at p. 390) that “aboriginal Indian title does not depend on treaty, executive order or legislative enactment.”

In Johnson v. M’Intosh [8 Wheat. 543 (1823)] Marshall CJ, although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians’ rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected. Marshall CJ explained this principle as follows, at pp. 573-74:

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans would interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them. In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. [Dickson J’s emphasis.]

The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 AC 399. That principle
supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason *Kinloch v. Secretary of State for India in Council*, supra; *Tito v. Waddell (No. 2)*, supra, and the other “political trust” decisions are inapplicable to the present case. The “political trust” cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 AC 401, at pp. 41-11 (the *Star Chrome* case). It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation.

(b) The Nature of Indian Title

In the *St. Catherine’s Milling* case [*St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46], the Privy Council held that the Indians had a “personal and usufructuary right” in the lands which they had traditionally occupied. Lord Watson said that “there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished” (at p. 55). He reiterated this idea, stating that the Crown “has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden” (at p. 58). This view of aboriginal title was affirmed by the Privy Council in the *Star Chrome* case. In *Amodu Tijani*, supra, Viscount Haldane, adverting to the *St. Catherine’s Milling* and *Star Chrome* decisions, explained the concept of a usufructuary right as “a mere qualification of or burden on the radical or final title of the Sovereign ...” (p. 403). He described the title of the Sovereign as a pure legal estate, but one which could be qualified by a right of “beneficial user” that did not necessarily take the form of an estate in land. Indian title in Canada was said to be one illustration “of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle.” Chief Justice Marshall took a similar view in *Johnson v. M’Intosh*, supra, saying, “All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy ...” (p. 588). ...
St. Catherine’s Milling on the ground that the statutory provisions in accordance with which the reserve in question in Giroux had been created conferred beneficial ownership on the Indian Band which occupied the reserve. In Cardinal v. Attorney General of Alberta, [1974] SCR 695, Laskin J, dissenting on another point, accepted the possibility that Indians may have a beneficial interest in a reserve. The Alberta Court of Appeal in Western International Contractors Ltd. v. Sarcee Developments Ltd., [1979] 3 WWR 631, accepted the proposition that an Indian Band does indeed have a beneficial interest in its reserve. In the present case this was the view as well of Le Dain J in the Federal Court of Appeal. See also the judgment of Kellock J in Miller v. The King, [1950] SCR 168, in which he seems implicitly to adopt a similar position. None of these judgments mentioned the Star Chrome case, however, in which the Indian interest in land specifically set aside as a reserve was held to be the same as the “personal and usufructuary right” which was discussed in St. Catherine’s Milling.

It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it as a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown’s original purpose in declaring the Indians’ interest to be inalienable otherwise than to the Crown was to facilitate the Crown’s ability to represent the Indians in dealings with third parties. The nature of the Indians’ interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians’ behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

(c) The Crown’s Fiduciary Obligation

The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery. In the present appeal its relevance is based on the requirement of a “surrender” before Indian land can be alienated.

The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided
further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine's Milling*, *supra*, at p. 54, this policy with respect to the sale or transfer of the Indians’ interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions in the present Act being ss. 37-41.

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that “great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians ....” Through the confirmation in the *Indian Act* of 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, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians’ best interests really lie. This is the effect of s. 18(1) of the Act.

[Section 18(1) reads:

18(1) Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.]

This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown’s obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 UTLJ 1, at p. 7, that “the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion.” Earlier, at p. 4, he puts the point in the following way:

[Where there is a fiduciary obligation] there is a relation in which the principal’s interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law’s blunt tool for the control of this discretion.

I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of
another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary’s strict standard of conduct.

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed. See, e.g. Laskin v. Bache & Co. Inc. (1971), 23 DLR (3d) 385 (Ont. CA), at p. 392; Goldex Mines Ltd. v. Revill (1974), 7 OR 216 (Ont. CA), at p. 224.

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the “political trust” cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians’ behalf does not of itself remove the Crown’s obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians’ interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown’s obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.

Section 18(1) of the Indian Act confers upon the Crown a broad discretion in dealing with surrendered land. In the present case, the document of surrender, set out in part earlier in these reasons, by which the Musqueam Band surrendered the land at issue, confirms this discretion in the clause conveying the land to the Crown “in trust to lease ... upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people.” When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians’ behalf.

I agree with Le Dain J that before surrender the Crown does not hold the land in trust for the Indians. I also agree that the Crown’s obligation does not somehow crystallize into a trust, express or implied, at the time of surrender. The law of trusts is a highly developed, specialized branch of the law. An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here. Indeed, there is not even a trust corpus. As the Smith decision [Smith v. The Queen, [1983] 1 SCR 554] makes clear, upon unconditional surrender the Indians’ right in the land disappears. No property interest is transferred which could constitute the trust res, so that even if the other indicia of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. No property interest is transferred which could constitute the trust res, so that even if the other indicia of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender.
Nor does surrender give rise to a constructive trust. As was said by this Court in *Pettkus v. Becker*, [1980] 2 SCR 834, at p. 847, “The principle of unjust enrichment lies at the heart of the constructive trust.” See also *Rathwell v. Rathwell*, [1978] 2 SCR 436. Any similarity between a constructive trust and the Crown’s fiduciary obligation to the Indians is limited to the fact that both arise by operation of law; the former is an essentially restitutionary remedy, while the latter is not. In the present case, for example, the Crown has in no way been enriched by the surrender transaction, whether unjustly or otherwise, but the fact that this is so cannot alter either the existence or the nature of the obligation which the Crown owes.

The Crown’s fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny that the obligation is trust-like in character. As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach. The fiduciary relationship between the Crown and the Indians also bears a certain resemblance to agency, since the obligation can be characterized as a duty to act on behalf of the Indian Bands who have surrendered lands, by negotiating for the sale or lease of the land to third parties. But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown’s authority to act on the Band’s behalf lack a basis in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown’s principal. I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians’ interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.

The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown’s discretion *vis-à-vis* the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary. The *Indian Act* makes specific provision for such narrowing in ss. 18(1) and 38(2). A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary’s discretion. A failure to adhere to the imposed conditions will simply itself be a *prima facie* breach of the obligation. In the present case both the surrender and the Order in Council accepting the surrender referred to the Crown’s leasing the land on the Band’s behalf. Prior to the surrender the Band had also been given to understand that a lease was to be entered into with the Shaughnessy Heights Golf Club upon certain terms, but this understanding was not incorporated into the surrender document itself. The effect of these so-called oral terms will be considered in the next section.

*(d) Breach of the Fiduciary Obligation*

The trial judge found that the Crown’s agents promised the Band to lease the land in question on certain specified terms and then, after surrender, obtained a lease on different terms. The lease obtained was much less valuable. As already mentioned, the surrender document did not make reference to the “oral” terms. I would not wish to say that those terms had nonetheless somehow been incorporated as conditions into
the surrender. They were not formally assented to by a majority of the electors of the Band, nor were they accepted by the Governor in Council, as required by subss. 39(1)(b) and (c). I agree with Le Dain J that there is no merit in the appellants’ submission that for purposes of s. 39 a surrender can be considered independently of its terms. This makes no more sense than would a claim that a contract can have an existence which in no way depends on the terms and conditions that comprise it.

Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown’s conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown’s agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band’s counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.

While the existence of the fiduciary obligation which the Crown owes to the Indians is dependent on the nature of the surrender process, the standard of conduct which the obligation imports is both more general and more exacting than the terms on any particular surrender. In the present case the relevant aspect of the required standard of conduct is defined by a principle analogous to that which underlies the doctrine of promissory or equitable estoppel. The Crown cannot promise the Band that it will obtain a lease of the latter’s land on certain stated terms, thereby inducing the Band to alter its legal position by surrendering the land, and then simply ignore that promise to the Band’s detriment. See, e.g., Central London Property Trust Ltd. v. High Trees House Ltd., [1947] KB 130; Robertson v. Minister of Pensions, [1949] 1 KB 227 (CA).

In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed the Band. It must make good the loss suffered in consequence.

The Guerin decision rejected the application of the political trust doctrine to a surrender of reserve lands and held that the executive branch of the federal government does have legally enforceable obligations to Indian bands in that context. However, it also left many questions unanswered. Does the Crown have a fiduciary duty prior to a surrender (as Wilson J thought) and, if so, what is the extent of that duty? Does the Crown owe fiduciary obligations to the Aboriginal peoples generally, given that only Indians have

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reserves? If so, in what contexts do those obligations arise? And what exactly is meant by “the Crown”? Does placement of the obligations on the Crown, which is represented by the executive, mean that the other branches of government have no fiduciary role? Is the federal Crown alone bound by these fiduciary obligations, or do they apply to the provincial Crowns as well? We will see in the cases that follow that some of these questions have been answered since Guerin, while others remain unresolved.

Blueberry River Indian Band v. Canada
(Department of Indian Affairs and Northern Development)
[1995] 4 SCR 344

[Like Guerin, the Blueberry River case involved a surrender of reserve lands in British Columbia, this time by the Beaver Indian Band (the band) for whom this reserve near Fort St. John had been established pursuant to Treaty 8. In 1940, the band surrendered the mineral rights on its reserve to the Crown, “in trust to lease.” In 1945, the band surrendered the reserve generally to the Crown, this time “in trust to sell or lease.” From the Canadian government’s perspective, the 1945 surrender was desirable because it made the agricultural lands on the reserve available for grant to veterans returning from World War II. As band members made their living by hunting and trapping and were thus not using the lands for farming, it was thought that a reserve closer to their winter trap lines would be more suitable for them. Part of the $70,000 that the Department of Indian Affairs (DIA) received in 1948 when it sold the reserve lands to the Director, the Veterans’ Lands Act (DVLA) was in fact used to purchase other lands in 1950 for reserves nearer the band’s trap lines. Contrary to DIA policy, however, the transfer of the lands to the DVLA did not contain a reservation of mineral rights.

Between 1948 and 1956, the lands of the original reserve were sold and transferred to veterans, again without any reservation of mineral rights. Oil and gas were discovered on those lands in 1976, producing revenue for the veterans and their assigns estimated at $300 million. A concerned DIA official brought the matter to the attention of the Blueberry River and Doig River Indian bands (the bands), into which the Beaver Indian Band had by then been divided. He took them to see a lawyer and legal proceedings were commenced against the Crown for breach of its fiduciary obligations.

Two judgments were delivered by the Supreme Court of Canada, both of which found the Crown liable on the basis of the principles laid down in Guerin. McLachlin J (as she then was) (Cory and Major JJ concurring) wrote the main judgment, but

Gonthier J disagreed with some of her reasons; given that La Forest, L'Heureux-Dubé, and Sopinka JJ concurred with Gonthier J, his judgment is the majority decision on those points.

McLACHLIN J summarized the facts and then proceeded, as follows (at 369-72 and 373):]

II. Analysis

(1) Pre-Surrender Duties and Breaches

The Bands argue that the Crown was under a fiduciary obligation prior to the 1945 surrender of the land to ensure that the Band did not enter into the surrender improvidently. This raises the issue of the nature of the duty owed by the Crown when a band wishes to surrender its reserve. The Bands admit that in 1945 they wished to surrender the Fort St. John reserve in order to obtain other lands closer to its trap lines, and the remaining cash lump sum. They contend that the Crown should not have allowed them to make this surrender since, viewed in the long term, surrender was not in their best interest.

(a) Whether the Indian Act Imposed a Duty on the Crown to Prevent the Surrender of the Reserve

The first issue is whether the Indian Act imposed a duty on the Crown to refuse the Band’s surrender of its reserve. The answer to this question is found in Guerin v. The Queen, [1984] 2 SCR 335, where the majority of this Court, per Dickson J (as he then was), held that the duty on the Crown with respect to surrender of Indian lands was founded on preventing exploitative bargains.

The Bands contend that the Indian Act imposed a duty on the Crown to refuse to allow the Band to surrender its lands in light of its interest in the land and the paternalistic scheme of the Indian Act. When a reserve is granted to a band, as was done here in 1916, title does not pass to the band. Rather the Crown holds the fee simple title. The Crown thus possesses power with respect to those lands and must, it is argued, exercise that power as a fiduciary on behalf of the band. This is reinforced by the paternalistic tone of the Indian Act, which it is argued imposes a duty upon the Crown to protect the Indians from themselves and prevent them from making foolish decisions with respect to their land. This is why, it is submitted, title remains in the Crown. The Crown, on the other hand, paints the Band as an independent agent with respect to the surrender of its lands.

My view is that the Indian Act’s provisions for surrender of band reserves strike a balance between the two extremes of autonomy and protection. The band’s consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown’s decision for that of the band, but to prevent exploitation. As Dickson J characterized it in Guerin (at p. 383):
The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.

It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band’s decision was foolish or improvident—a decision that constituted exploitation—the Crown could refuse to consent. In short, the Crown’s obligation was limited to preventing exploitative bargains.

Subject to the issue of the value of the reserve and the matter of mineral rights, which I deal with later, the evidence does not support the view that the surrender of the Fort St. John reserve was foolish, improvident or amounted to exploitation. In fact, viewed from the perspective of the Band at the time, it made good sense. The measure of control which the Act permitted the Band to exercise over the surrender of the reserve negates the contention that absent exploitation, the Act imposed a fiduciary obligation on the Crown with respect to the surrender of the reserve.

(b) Whether the Circumstances of the Case Gave Rise to a Fiduciary Duty on the Crown with Respect to the Surrender

If the Indian Act did not impose a duty on the Crown to block the surrender of the reserve, the further question arises whether on the particular facts of this case a fiduciary relationship was superimposed on the regime for alienation of Indian lands contemplated by the Indian Act.

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second “peculiarly vulnerable” person: see Frame v. Smith, [1987] 2 SCR 99; Norberg v. Wynrib, [1992] 2 SCR 226; and Hodgkinson v. Simms, [1994] 3 SCR 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

The evidence supports the view that the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. It does not support the contention that the Band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown. ...

I conclude that the evidence does not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band.

[McLachlin J went on to conclude that failure to comply with some technicalities of the surrender provisions in the Indian Act did not invalidate the 1945 surrender, and
(2) Post-Surrender Duties and Breaches Regarding Surface Rights

The 1945 surrender conveyed the Band’s lands to the Crown “in trust to sell or lease the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people” (emphasis added). The Crown concedes that this surrender imposed a fiduciary duty on the Crown with respect to the subsequent sale or lease of the lands: Guerin, supra. The only issue is whether the Crown breached that duty when in 1948 it sold the lands to the DVLA for $70,000.

The duty imposed upon the Crown by the terms of surrender (converted to a statutory duty by s. 54 of the Act) was broad. It extended not only to the monetary aspects of the transaction, but to whether the arrangement would be conducive to the welfare of the Indians in the broader sense. The Bands argue that the Crown breached this duty by: (a) failing to consider leasing rather than selling the land; (b) selling the land under value; and (c) not restoring the reserve to the Band after surrender in view of its impoverished situation. I will consider each allegation in turn.

(a) Failure to Consider Leasing Rather than Sale of the Surface Rights

The trial judge held that the Crown considered the best interests of the Band in disposing of the land and that, viewed from the perspective of the time, the sale of the land to the Department of Veterans Affairs was in fact in the best interests of the Band. He held that the Band was interested in obtaining reserves nearer to its hunting and trapping grounds. If the surface rights had been leased rather than sold, the Band might not have had enough money up front to purchase replacement lands.

[McLachlin J reviewed the evidence on this issue and concluded:]

In the face of this evidence, it cannot be said that Addy J erred in concluding that the sale of the land to the DVLA was not in breach of the Crown’s fiduciary duty. A number of options—lease, partial sale and outright sale—were considered. The interests and wishes of the Band were given utmost consideration throughout. The choice that was made—to sell the land—possessed the advantage of allowing the Band to get other lands nearer its trap lines. At the time, that was a defensible choice. Indeed, it can be argued that the sale of the surface rights was the only alternative that met the Band’s apparent need to obtain land nearer its trap lines. In retrospect, with the decline of trapping and the discovery of oil and gas, the decision may be argued to have been unfortunate. But at the time, it may be defended as a reasonable solution to the problems the Band faced.
(b) Sale at Undervalue

The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J.C. Shepherd, The Law of Fiduciaries (1981), at pp. 157-59; and A.H. Oosterhoff, Text, Commentary and Cases on Trusts (4th ed. 1992). The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.

More problematic is the trial judge’s conclusion that the Crown failed to discharge the onus of showing the price of $70,000 to be reasonable. While the DIA received a higher appraisal, there were also appraisals giving lower value to the land. In fact, there appears to have been no alternate market for the land at the time, which might be expected to make accurate appraisal difficult. The evidence reveals the price was arrived at after a course of negotiations conducted at arm’s length between the DIA and the DVLA.

This evidence does not appear to support the trial judge’s conclusion that the Crown was in breach of its fiduciary obligation to sell the land at a fair value. In finding a breach despite this evidence, the trial judge misconstrued the effect of the onus on the Crown. The Crown adduced evidence showing that the sale price lay within a range established by the appraisals. This raised a prima facie case that the sale price was reasonable. The onus then shifted to the Bands to show it was unreasonable. The Bands did not adduce such evidence. On this state of the record, a presumption of breach of the Crown’s fiduciary duty to exact a fair price cannot be based on a failure to discharge the onus upon it. I note that the trial judge made no finding as to the true value of the property, nor any finding that it was significantly greater than $70,000, deferring this to the stage of assessment of damages.

I conclude that the trial judge erred in concluding that the Crown breached its fiduciary duty to the Band by selling the land for $70,000.

(c) Failure to Restore the Surface Rights to the Band After the 1945 Surrender

The Bands argue that they should have been given their reserve back because of their apparent impoverishment between 1945 and 1961. The Crown, in the Bands’ submission, should have realized that the surrender had been a mistake. Instead of confirming the mistake by selling the land to the DVLA, it should have cancelled the surrender and transferred the land back to the Band.

There can be no doubt that the Band lived in abject poverty and ill-health between 1945 and 1961. The problem the Bands’ argument faces is that their condition appears to have been unrelated to possession of the Fort St. John reserve. In fact, the Band did not make significant use of the reserve from 1916 to 1945, one of the primary reasons behind the move to surrender it and purchase more suitable property. Nor did the Band make much use of the land from 1945 to 1950 when alternative lands were purchased, despite the fact that it was entitled to use the land during this
period. Finally, the purchase of new lands in 1950 did not, by the Bands’ own admission, alleviate the situation.

Accepting that the Band was living in poverty, one cannot infer that the solution was to cancel the 1945 surrender or refuse to sell the Fort St. John reserve land. The Crown cannot be said to have breached the fiduciary duty it owed the Band after surrender of the Fort St. John reserve by failing to restore the land to the Indians.

(d) Conclusions on Post-Surrender Duty and Breach with Respect to
Surface Rights

I conclude that the Bands have not established breach of fiduciary duty with respect to the sale of the surface rights.

(3) Post-Surrender Duties and Breaches Regarding Mineral Rights

The Band surrendered “Petroleum and Natural Gas and the mining rights in connection therewith” in the Fort St. John reserve to the Crown in 1940, “in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people.” Section 54 of the 1927 Indian Act required the Crown to hold these lands for the purpose specified in the surrender—for lease for the benefit of the Band. The right to explore for minerals was leased in 1940 for $1,800. In 1948, by means which to this day remain the subject of debate, the mineral rights were transferred to the DVLA and hence to the veterans who took up the Fort St. John land. When oil and gas were discovered on the lands in 1976, it was not the Indians, but the veterans and their assigns, who obtained the revenues that flowed from the mineral rights.

To this résumé must be added two additional uncontested facts. First, at the time the mineral rights passed to the DVLA, and hence to the veterans, the Indians were unsophisticated and may not have fully understood the concept of different interests in land and how they might be lost. Second, they were never advised of the transfer of the mineral rights to the DVLA. They discovered it only in 1977, when an employee of the DIA brought to their attention that oil and gas had been discovered on their former lands and queried how the mineral rights had come to be transferred from the Band to the veterans.

The trial judge held that the mineral rights were not severable from the surface rights and consequently passed to the DVLA with the general surrender of the reserve in 1945. He failed to consider whether the earlier surrender of the mineral rights raised special considerations and imposed special obligations on the Crown. He further held that the Crown acted properly with respect to the mineral rights because they were not considered valuable at the time. In my view, he erred on both counts.

[McLachlin J went on to deal at length with the effect of the 1940 and 1945 surrenders on the mineral rights. As Gonthier J, for the majority, disagreed with her on this, the portions of his judgment, summarizing her opinion and stating his own position, are reproduced below.

McLachlin J then turned to the following issue, at 396-400 and 401:]
(c) Did the Transfer of the Mineral Rights in 1948 Constitute a Breach of Fiduciary Duty?

Until 1948 the DIA held the surface rights and the mineral rights in trust for the Indians, pursuant to the surrenders of 1945 and 1940 respectively. In 1948, after concluding negotiations for the reserve, it assigned the land to the DVLA. The assignment did not reserve out mineral rights despite the fact that the Crown had no right to sell them under the terms of the 1940 surrender and s. 54 of the Act, and despite the fact that they had not been mentioned in the negotiations leading to the sale and appear to have played no role in determining the price paid. Since the transfer to the DVLA did not reserve out the mineral rights, and since the DIA had always held legal title to both the mineral rights and the surface rights, the transfer must be taken to have legally passed the mineral rights as well as the surface rights: Attorney-General of British Columbia v. Attorney-General of Canada (1889), 14 AC 295 (PC). So the DVLA, without ever having sought them, found itself in possession of the mineral rights. The DVLA in turn passed the mineral rights on to the veterans as they met the terms of their agreements for sale, in the form of original Crown grants, pursuant to s. 5(2) of The Veterans' Land Act, 1942 (later RS C 1952, c. 280, s. 5(3)).

Years later, wonderment persisted as to why the mineral rights had been passed to the DVLA. The wonderment was understandable given the well-known policy of the DIA to reserve out mineral rights and the fact that the only interest of the DVLA was to obtain land for agricultural purposes, not to enrich veterans through procuring mineral rights for them. The best explanation of how the mineral rights came to be transferred to the DVLA appears to lie in simple inadvertence....

There exist two grounds for arguing that transfer of the minerals to the DVLA in 1948 constituted a breach of fiduciary duty by the Crown. The first argument is that the transfer breached the 1940 surrender of the minerals, which restricted the DIA to leasing them for the benefit of the Band. A fiduciary is at very least bound to adhere to the terms of the instrument which bestows his powers and creates the trust.

In any event, even if one were to accept for the sake of the argument that the 1945 surrender revoked the 1940 surrender of mineral rights, the 1945 surrender still imposed an obligation on the Crown to lease or sell in the best interests of the Band. This would leave for consideration the argument that the Crown breached its fiduciary obligations by transferring the mineral rights to the DVLA in 1948, because transfer rather than reservation for future leasing was contrary to the best interests of the Indians.

The trial judge rejected this argument on the ground that it was not foreseeable in 1948 that the mineral rights could have any value....

The finding of the trial judge that the Crown could not have known in 1948 that the mineral rights might possess value flies in the face of the evidence on record. Accordingly, this is one of those rare cases where departure from a trial judge's finding may be warranted.

The Crown's own prior experience sufficed to establish that the mineral rights had actual and potential value. After taking the surrender in 1940, it issued a permit for prospecting for oil and gas on the property. The 1940 permit alone was worth $1,800, a not insignificant sum given that the annual interest of 5 percent on the $70,000 purchase price for the surface rights yielded about $3,500.
Moreover, the Crown had much earlier realized the potential value of mineral rights and routinely excluded them from its grants. ...

If more were required, events close in time to 1948 reveal that these particular mineral rights might have considerable value, if only from the point of view of revenues from exploration rights.

The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": Fales v. Canada Permanent Trust Co., [1977] 2 SCR 302, at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.

(d) Conclusions on Post-Surrender Duty and Breach with Respect to Mineral Rights

I conclude that the 1940 surrender of the mineral rights imposed a fiduciary duty to the Band with respect to the mineral rights under the terms of the 1940 surrender, and that the DIA breached this duty by conveying the mineral rights to the DVLA.

[Finally, McLachlin J dealt with the issue whether the claim was barred by applicable limitation periods. She found that the claim was barred with respect to breaches of fiduciary duty that occurred more than 30 years before the action was brought. However, as the Indian Act, RSC 1927, c. 98, s. 64 gave the DIA the power to revoke sales of surrendered reserve lands if made in error, the DIA could have revoked "the inadvertent, erroneous grant [in 1948] of the mineral rights to the DVLA up to the time they were transferred to veterans" (404). Failure to do so when it became aware of the error and the potential value of the mineral rights constituted a breach of the Crown’s fiduciary obligations. She wrote, at 405-6:]

In my view, the DIA was under a duty to use this power to rectify errors prejudicing the interests of the Indians as part of its ongoing fiduciary duty to the Indians. The fiduciary duty associated with the administration of Indian lands may have terminated with the sale of the lands in 1948. However, an ongoing fiduciary duty to act to correct error in the best interests of the Indians may be inferred from the exceptional nature of s. 64. That section gave the DIA the power to revoke erroneous grants of land, even as against bona fide purchasers. It is not unreasonable to infer that the enactors of the legislation intended the DIA to use that power in the best interests of the Indians. If s. 64 above is not enough to establish a fiduciary obligation to correct the error, it would certainly appear to do so, when read in the context of jurisprudence on fiduciary obligations. Where a party is granted power over another’s interests, and where the other party is correspondingly deprived of power over them, or is “vulnerable,” then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other: Frame v. Smith, supra, per Wilson J; and
Hodgkinson v. Simms, supra. Section 64 gave to DIA power to correct the error that had wrongly conveyed the Band’s minerals to the DVLA. The Band itself had no such power; it was vulnerable. In these circumstances, a fiduciary duty to correct the error lies.

I conclude that the Crown, having first breached its fiduciary duty to the Indians by transferring the minerals to the DVLA, committed a second breach by failing to correct the error on August 9, 1949 when it learned of the error’s existence and the potential value of the mineral rights.

As the bands could recover the value of mineral rights transferred by the DVLA within the 30-year limitation period, the case was sent back to trial to assess those damages.

In the course of her discussion of the limitation issue, McLachlin J made significant findings on the range of the Crown’s fiduciary duty within federal government departments, at 403-4:

I earlier concluded that the Crown breached its fiduciary duty to the Band by inadvertently transferring the mineral rights to the DVLA, which in turn transferred them to the veterans who ultimately took up the reserve land. The Crown argues that since the inadvertent transfer was made in March 1948, the action for this breach is barred by the 30-year limitation period.

Against this, the Bands argue that the 1948 transfer to the DVLA was not a transfer at all, but merely an administrative allocation within the bosom of the unified Crown. Thus, the Crown’s fiduciary duty continued, although it was transferred for administrative purposes to the DVLA after 1948. Consequently, the cause of action did not arise until the land was alienated from the DVLA to the veterans.

I cannot accept this argument. Although the transfer was from one Crown entity to another, it remained a transfer and an alienation of title. First, the transfer converted the Band’s interest from a property interest into a sum of money, suggesting alienation. Second, the continuing fiduciary duty proposed for the DVLA is problematic from a practical point of view. Any duty would have applied, at least in theory, both to the mineral rights and the surface rights. Each sale to a veteran would have required the DVLA to consider not only those matters he was entitled to consider under his Act, but sometimes conflicting matters under the Indian Act. This would have made the sale in 1948 pointless from the DVLA’s point of view and have rendered it impossible to administer. Moreover, it is not clear that the DVLA had any knowledge of the fiduciary obligations which bound the DIA. In fact, the DVLA and the DIA acted at arm’s length throughout, as was appropriate given the different interests they represented and the different mandates of their statutes. In summary, the crystallization of the property interest into a monetary sum and the practical considerations negating a duty in the DVLA toward the Band negate the suggestion that the 1948 transfer changed nothing and that the real alienation came later.
[Gonthier J agreed with McLachlin J’s disposition of the case, but gave somewhat different reasons.

GONTHIER J (at 354-65):

I. Introduction

I have had the benefit of reading the reasons of my colleague, McLachlin J. While I agree with her analyses of the surrender of the surface rights in Indian Reserve 172 (“IR 172”), and the application of the British Columbia Limitation Act, RSBC 1979, c. 236, and with her ultimate disposition of the case, I find that I cannot agree with her conclusion that the 1945 surrender of IR 172 to the Crown did not include the mineral rights in the reserve. In my view, the 1945 agreement constituted a complete surrender to the Crown of the surface and mineral rights in the St. John Indian Reserve, in trust, “to sell or lease.” The Beaver Band’s intention at the time of the 1945 surrender, and the terms of the surrender instrument, bear this out. Moreover, while I agree with my colleague that in dealing with the mineral rights subsequent to the 1945 surrender, the Department of Indian Affairs (“DIA”) committed a breach of fiduciary duty, my reasons are somewhat different. I set them out below.

II. The Effect of the 1945 Surrender of IR 172 on the 1940 Surrender of the Mineral Rights in IR 172

McLachlin J’s position, in brief, is that since there had already been a surrender of the mineral rights in IR 172 for “lease” in 1940, these mineral rights could not have been included in the 1945 surrender. The basis of her position lies in the Indian Act, RSC 1927, c. 98 scheme governing the transfer of reserve lands to the Crown. Once such lands are surrendered, they become “Indian lands” under the Act. Section 2(e) of the Act defines “Indian lands” as follows:

“Indian lands” means any reserve or portion of a reserve which has been surrendered to the Crown.

It is therefore clear that “Indian lands” must constitute a “reserves or portion of a reserve.” “Reserve” is defined in s. 2(j) of the Act:

“reserve” means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein.

McLachlin J argues that when the Band surrendered the mineral rights in IR 172 to the Crown in 1940, this severed the mineral rights from the “reserve.” The mineral rights thus constituted “Indian lands” under s. 2(e) of the Act, because they were a “portion of a reserve” which had been “surrendered.” Therefore, the 1945 agreement could not have included the Band’s rights over the minerals, since the surrendered “reserve,” as defined in s. 2(j) of the Act, was composed of only those portions of IR
172 which had not yet been surrendered. Furthermore, because the parties did not comply with certain administrative procedures associated with the resurrender of reserve lands (i.e., the execution of a formal revocation document prior to resurrender), McLachlin J rejects the notion that the 1945 agreement constituted a revocation of the 1940 surrender of mineral rights for "lease," and a resurrender of those same rights "to sell or lease." She concludes that the 1940 surrender was unaffected by the 1945 agreement, and that s. 54 of the Act prevented the DIA from selling the mineral rights since it was required to continue to lease the mineral rights according to the 1940 terms. ...

In my view, the debate as to the juridical nature of the 1940 surrender is academic in the circumstances of this case, and the matter need not be determined here. Whether or not the 1940 surrender was actually governed by the 1927 Act, there has been no challenge to its legitimacy in this appeal. Nor should there be, since the Band gave its full and informed consent, the Crown fulfilled its fiduciary duty in relation to the surrender, and the parties complied with the statutory surrender procedures. My conclusion that the mineral rights in IR 172 were surrendered as part of the 1945 agreement rests on reasoning unrelated to the scope of the statutory surrender regime, and therefore holds even if the mineral rights had attained the status of "Indian lands" through the 1940 dealings. This is because the ultimate issue to be determined in this case is the impact of the 1945 surrender of IR 172 on the earlier 1940 surrender of the mineral rights in IR 172, regardless of the latter's effectiveness. The 1927 Act is entirely silent on the subjects of surrender variation, surrender revocation, and resurrender, yet no one would seriously suggest that this silence renders all surrenders, including the 1940 agreement, permanent and irrevocable. In fact, the DIA developed its own administrative procedures for the revocation of a surrender, in order to facilitate resurrender and fill the void left by the statute. It is this statutory void which must be addressed here, and I do not think that the analysis is advanced by a finding one way or the other as to whether "Indian lands" are in dispute.

To explain the impact of the 1945 surrender of IR 172 "to sell or lease" on the 1940 surrender of the mineral rights in IR 172 for "lease," both the appellants and the Crown have advanced different common law property concepts in support of their competing positions. The Crown's position, which is essentially that of the trial judge, Addy J, is that the mineral rights were transferred in the 1945 surrender through the operation of the legal presumption that a general conveyance of land passes all interests except those specifically reserved in the deed of transfer. The appellants, whose position is adopted by my colleague McLachlin J, prefer the common law principle nemo dat quod non habet—a person cannot give what she does not possess. According to the reasons of McLachlin J, the Band could not surrender the mineral rights in IR 172 in 1945, since these rights had already been surrendered in 1940.

In my view, principles of common law property are not helpful in the context of this case. Since Indian title in reserves is sui generis, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band, in relation to their dealings with IR 172. For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of
the Band. Unless some statutory bar exists (which, as noted above, is not the case here), then the Band members’ intention should be given legal effect.

An intention-based approach offers a significant advantage, in my view. As McLachlin J observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical approach operates to the benefit of the aboriginal peoples. However, one can well imagine situations where that same approach would be detrimental, frustrating the well-considered plans of the aboriginals. In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the sui generis nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.

While McLachlin J dedicates a considerable portion of her reasons to an analysis of the Band’s intention, the fact remains that under her approach, the Band’s intention in 1945 is irrelevant. Even if McLachlin J were to agree with my conclusion that the Band intended to surrender the mineral rights as part of the 1945 agreement, she would be forced to the conclusion that the mineral rights were not part of the 1945 surrender because of her findings in relation to the 1927 Act, the operation of nemo dat quod non habet, and the administrative procedures adopted by the DIA for surrender revocation. Although McLachlin J and I might disagree on the Band’s intention in this case, since I prefer to rely on the factual findings of the trial judge, I think that in principle an intention-based approach is preferable to my colleague’s more technical reasoning. ...

The Band understood that by agreeing to the 1945 surrender, they would be transferring all their rights in IR 172 to the Crown in trust, and that the Crown would either sell or lease those rights for the benefit of the Band. The sale or lease of IR 172 by the Crown would provide the funds necessary for the Band to purchase alternate reserve sites better suited to their traditional hunting and gathering activities. The Band neither expected nor intended to hold rights over IR 172 once the 1945 surrender was completed. This was entirely appropriate, as my colleague McLachlin J points out, because IR 172 was virtually useless to the Band at the time. ...

Given the Band’s intention vis-à-vis the 1945 surrender, and the terms of that surrender, Stone JA, in the court below, concluded:

It would seem to me that the overall effect of the 1945 transaction was essentially the same as might have been achieved by first cancelling the 1940 surrender with consent of the Indians followed by the acceptance of that cancellation by the Governor in Council. According to the Trial Judge’s finding the Indians agreed to the release of their rights in IR 172; their consent was reflected in the language of the formal surrender instrument and the surrender was afterwards accepted by the Governor in Council. ([1993] 3 FC 28, at pp. 122-23.)
He therefore construed the 1945 surrender as a revocation of the 1940 agreement, and a transfer of IR 172, including the mineral rights, to the Crown “to sell or lease.”

Although the “revocation-resurrender” description offered by Stone JA is one plausible construction of the 1945 agreement, I think that the true nature of the 1945 dealings can best be characterized as a variation of trust in Indian land. In 1940, the Band transferred the mineral rights in IR 172 to the Crown in trust, requiring the Crown to lease those rights for the benefit of the Band. The 1945 agreement was also framed as a trust, in which the Band surrendered all of its rights over IR 172 to the Crown “to sell or lease.” The 1945 agreement subsumed the 1940 agreement, and expanded upon it in two ways: first, while the 1940 surrender concerned mineral rights only, the 1945 surrender covered all rights in IR 172, including both mineral rights and surface rights; and second, while the 1940 surrender constituted a trust for “lease,” the 1945 surrender gave the Crown, as trustee, the discretion “to sell or lease.”

This two-pronged variation of the 1940 trust agreement afforded the Crown considerably greater power to act as a fiduciary on behalf of the Band. Of course, under the terms of the trust, and because of the Crown’s fiduciary role in the dealings, the DIA was required to exercise its enlarged powers in the best interests of the Band.

I should add that my reasons should not be interpreted to equate a trust in Indian land with a common law trust. I am well aware that this issue was not resolved in Guerin v. The Queen, [1984] 2 SCR 335, and I do not wish to pronounce upon it in this case. However, this Court did recognize in Guerin that “trust-like” obligations and principles would be relevant to the analysis of a surrender of Indian lands. In this case, both the 1940 and 1945 surrenders were framed as trusts, and the parties therefore intended to create a trust-like relationship. Thus, for lack of a better label, I think that it is appropriate to refer to these surrenders as trusts in Indian land.

I should also add that I would be reluctant to give effect to this surrender variation if I thought that the Band’s understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band’s understanding and intention. However, neither of these situations arises here. As the trial judge found, the consequences of the 1945 surrender were fully explained to the Indians by the local agent of the DIA during the negotiations. There was also substantial compliance with the technical surrender requirements embodied in s. 51 of the 1927 Indian Act, and as McLachlin J concludes, the evidence amply demonstrates the valid assent of the Band members to the 1945 agreement. Moreover, by the terms of the surrender instrument, the DIA was required to act in the best interests of the Band in dealing with the mineral rights. In fact, the DIA was under a fiduciary duty to put the Band’s interests first. I therefore see nothing during the negotiations prior to the 1945 surrender, or in the terms of the surrender instrument, which would make it inappropriate to give effect to the Band’s intention to surrender all their rights in IR 172 to the Crown in trust “to sell or lease.” In fact, the guiding principle that the decisions of aboriginal peoples should be honoured and respected leads me to the opposite conclusion.

I therefore conclude that under the 1945 agreement, both the surface rights and the mineral rights in IR 172 were surrendered to the Crown in trust “to sell or lease.”
III. Breach of Fiduciary Duty by the DIA Subsequent to the 1945 Surrender

The terms of the 1945 surrender transferred IR 172 to the Crown “in trust to sell or lease the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people.” By taking on the obligations of a trustee in relation to IR 172, the DIA was under a fiduciary duty to deal with the land in the best interests of the members of the Beaver Band. This duty extended to both the surface rights and the mineral rights.

In my view, it is critical to the outcome of this case that the 1945 agreement was a surrender in trust, to sell or lease. The terms of the trust agreement provided the DIA with the discretion to sell or lease, and since the DIA was under a fiduciary duty vis-à-vis the Band, it was required to exercise this discretion in the Band’s best interests. Of equal importance is the fact that the 1945 surrender gave the DIA a virtual carte blanche to determine the terms upon which IR 172 would be sold or leased. The only limitation was that these terms had to be “conducive” to the “welfare” of the Band. Because of the scope of the discretion granted to the DIA, it would have been open to the DIA to sell the surface rights in IR 172 to the Director, The Veterans’ Land Act (“DVLA”), while continuing to lease the mineral rights for the benefit of the Band, as per the 1940 surrender agreement.

Why this option was not chosen is a mystery. As my colleague McLachlin J observes, the DIA had a long-standing policy, pre-dating the 1945 surrender, to reserve out mineral rights for the benefit of the aboriginal peoples when surrendered Indian lands were sold. This policy was adopted precisely because reserving mineral rights was thought to be “conducive to the welfare” of aboriginal peoples in all cases. The existence and rationale of this policy (the wisdom of which, though obvious, is evidenced by the facts of this case) justifies the conclusion that the DIA was under a fiduciary duty to reserve, for the benefit of the Beaver Band, the mineral rights in IR 172 when it sold the surface rights to the DVLA in March 1948. In other words, the DIA should have continued to lease the mineral rights for the benefit of the Band as it had been doing since 1940. Its failure to do so can only be explained as “inadvertence.”

The DIA’s failure to continue the leasing arrangement could be excused if the Department had received a clear mandate from the Band to sell the mineral rights. As I stated above, the Band’s intention leads me to the conclusion that both the surface and mineral rights in IR 172 were included in the 1945 surrender. However, the 1945 surrender was “to sell or lease.” At no time during the negotiations leading to the 1945 agreement was the sale of the mineral rights discussed specifically. The authorization given encompassed leasing as well as selling. There was therefore no clear authorization from the Band which justified the DIA in departing from its long-standing policy of reserving mineral rights for the benefit of the aboriginals when surface rights were sold. This underscores the critical distinction between the Band’s intention to include the mineral rights in the 1945 surrender, and an intention of the Band that the mineral rights must be sold and not leased by the Crown. Given these circumstances, the DIA was under a fiduciary duty to continue the leasing arrangement which had been established in the 1940 surrender. It was a violation of the fiduciary duty to sell the mineral rights to the DVLA in 1948.
[Gonthier J went on to agree with McLachlin J that the DIA had a fiduciary duty to use its statutory authority to revoke the sale of the mineral rights to the DVLA before the transfer of the lands to the veterans. The bands were therefore entitled to recover any losses resulting from breach of that duty, to the extent that those losses were not barred by the applicable limitation period.]

The Guerin and Blueberry River cases both involved the Crown’s fiduciary obligations in the context of surrenders of Indian reserve lands. Fiduciary obligations are also owed when the Crown exercises statutory authority to expropriate reserve lands.33

Osoyoos Indian Band v. Oliver (Town)  
[2001] 3 SCR 74634

[In 1925, the province of British Columbia built a concrete-lined irrigation canal across the Osoyoos First Nation’s reserve in the Okanagan Valley. The Osoyoos First Nation did not surrender the land on which the canal was built, nor was the land formally expropriated by the Crown. In 1957, the Canadian government by order in council transferred the land to the province pursuant to s. 35(3) of the Indian Act, RSC 1952, c. 149,35 and the province gave the town of Oliver authority to operate and maintain the canal. In 1994, the Osoyoos First Nation passed a taxation bylaw pursuant to s. 83 of the Indian Act, RSC 1985, c. I-5, imposing property taxes on its reserve lands. For this bylaw to apply to the land on which the irrigation canal had been built, the land had to be part of the reserve. This raised the issue of the effect of the 1957 order in council. Specifically, did the order vest the fee simple in the land in the Crown in right of British Columbia or did it merely give the province a lesser interest such as an easement without extinguishing the Osoyoos First Nation’s interest in the land?]

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33 In addition to Osoyoos Indian Band v. Oliver (Town), [2001] 3 SCR 746, see Kruger v. The Queen (1985), 17 DLR (4th) 591 (leave to appeal refused, [1985] 2 SCR viii), where the Federal Court of Appeal accepted that the federal Crown owed a fiduciary duty to the Penticton Indian Band in the context of expropriation of part of their reserve for an airport. The majority nonetheless held that the duty had been fulfilled on the facts. See also Canadian Pacific Ltd. v. Paul, [1988] 2 SCR 654; Hopton v. Pamajewon (1993), 16 OR (3d) 390 (CA). The Kruger case also addressed the controversial issue of the Crown’s conflict of interest in this kind of situation: see discussion in Rotman, supra note 23, at 273-80. On this, see also Eastmain Band v. Canada (Federal Administrator), [1993] 3 CNLR 55 (FCA); Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344, reproduced, in part, above; Wewaykun Indian Band v. Canada, [2002] 4 SCR 245, reproduced, in part, below.

34 For commentary on Osoyoos, see Leonard I. Rotman, “Crown-Native Relations as Fiduciary: Reflections Almost Twenty Years After Guerin” (2003), 22 Windsor Yearbook of Access to Justice 363-96.

35 Section 35 permits the provinces, with the consent of the governor in council, to expropriate reserve lands by using any statutory authority they have to take lands without the consent of the owner. Section 35(3) provides that, where the governor in council’s consent has been given, “the Governor in Council may, in lieu of the province ... taking or using the lands without the consent of the owner, authorize a transfer or grant of such lands to the province.”
Iacobucci J (McLachlin CJ, Binnie, Arbour, and LeBel JJ concurring) held that the province had acquired only an easement in the nature of a right-of-way, and so the Osoyoos First Nation had the authority to tax the land. Gonthier J (L'Heureux-Dubé, Major, and Bastarache JJ concurring) dissented. The dissenting justices interpreted the order in council as giving the province full fee simple ownership of the land in question, thereby removing it from the reserve and placing it beyond the taxation authority of the Osoyoos First Nation.

On the issue of the Crown’s fiduciary obligations in the context of a unilateral taking of reserve lands, IACOBUCCI J stated (at 771-73):

4. The Content of the Crown’s Fiduciary Duty in the Context of Section 35

[51] The intervener the Attorney General of Canada submits that when Canada’s public law duty conflicts with its statutory obligation to hold reserve lands for the use and benefit of the band for which they were set apart, then a fiduciary duty does not arise. The Attorney General argues that the existence of a fiduciary duty to impair minimally the Indian interest in reserve lands is inconsistent with the legislative purpose of s. 35 which is to act in the greater public interest and that the opening phrase of s. 18(1) of the Indian Act, “Subject to the provisions of this Act …,” effectively releases the Crown from its fiduciary duty in respect of s. 35 takings. In addition, the Attorney General contends that a fiduciary obligation to impair minimally the Indian interest in reserve lands is inconsistent with the principles of fiduciary law which impose a duty of utmost loyalty on the fiduciary to act only in the interests of the person to whom the duty is owed. Thus, the Attorney General submits that the holding in Guerin, supra, that the surrender of an Indian interest of land gives rise to a fiduciary duty on the part of the Crown to act in the best interests of the Indians does not extend to the context of expropriation, and that the duty of the Crown to the band in the case of an expropriation of reserve land is similar to its duty to any other land holder—to compensate the band appropriately for the loss of the lands.

[52] In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.

[53] This two-step process minimizes any inconsistency between the Crown’s public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. At this stage, no fiduciary duty exists. However, once the general
decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable.

[54] The duty to impair minimally Indian interests in reserve land not only serves to balance the public interest and the Indian interest, it is also consistent with the policy behind the rule of general inalienability in the Indian Act which is to prevent the erosion of the native land base: Oapaneseht Indian Band v. Canada, [1997] 2 SCR 119, at para. 52. The contention of the Attorney General that the duty of the Crown to the band is restricted to appropriate compensation cannot be maintained in light of the special features of reserve land discussed above, in particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced.

[55] As the Crown's fiduciary duty is to protect the use and enjoyment of the Indian interest in expropriated lands to the greatest extent practicable, the duty includes the general obligation, wherever appropriate, to protect a sufficient Indian interest in expropriated land in order to preserve the taxation jurisdiction of the band over the land, thus ensuring a continued ability to earn income from the land. Although in this case the taxation jurisdiction given to bands came after the Order in Council of 1957, the principle is the same, namely that the Crown should not take more than is needed for the public purpose and subject to protecting the use and enjoyment of Indians where appropriate.

The Osoyoos decision demonstrates the Supreme Court's reliance on the Crown's fiduciary obligations for the purpose of interpreting statutory takings of reserve land narrowly so as to preserve the land base of First Nations. In a significant earlier decision, Semiahmoo Indian Band v. Canada, [1998] 1 CNLR 250, the Federal Court of Appeal held that the Crown, in acquiring reserve land under threat of expropriation for the alleged purpose of expanding a customs facility, had breached its fiduciary duty because it did not protect the band from exploitation and did not reconvey the land to the band when it became clear that the land was not needed for that purpose. Importantly, the remedy the court imposed for the failure to reconvey was a constructive trust, combined with compensation for lost use of the land during the time it had been held by the Crown.

B. Obligations Owed by Parliament and Provincial Legislatures

Before recognition and affirmation of Aboriginal and treaty rights by s. 35(1) of the Constitution Act, 1982, those rights were subject to the doctrine of parliamentary supremacy and could thus be infringed or extinguished by federal legislation. As Sparrow reveals, s. 35(1) changed this by imposing a constitutional obligation on the Parliament of Canada to honour the Crown's fiduciary obligations and respect those rights.

36 See text accompanying note 7, supra.
R v. Sparrow
[1990] 1 SCR 1075\(^{38}\)

The Sparrow case arose when Mr. Sparrow, a member of the Musqueam Nation (the First Nation on whose behalf the Guerin action, above, had been brought), was charged under regulations made pursuant to the Fisheries Act, RSC 1970, c. F-14 (now RSC 1985, c. F-14) with fishing with a drift net that exceeded the length permitted by the Musqueams' Indian food fishing licence. Sparrow admitted the facts but contended that he had been exercising an existing Aboriginal right to fish that was recognized and affirmed by s. 35(1) of the Constitution Act, 1982, and that the net length restriction was inconsistent with his constitutional rights and therefore inapplicable to him.

Sparrow is a landmark case in Aboriginal rights law in Canada because in it, for the first time, the Supreme Court interpreted and applied s. 35(1). Briefly, in a unanimous judgment delivered by Dickson CJ and La Forest J, the court found that Sparrow did have an existing Aboriginal right to fish. However, to invoke the protection of s. 35(1), Sparrow also had to prove that this right had been infringed. If that could be established, the burden would then shift to the Crown to show, if it could, that the infringement was justified. This would involve proving, first of all, that there was a valid legislative objective behind the infringing legislation. Second, the court stated that “the honour of the Crown is at stake in dealings with aboriginal peoples [and thus] ... [t]he special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified” (at 1114). To justify the infringement, the Crown would therefore have to prove it had respected that relationship and met its responsibilities. According to the court, questions to be addressed in determining this include whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures [in the context of fishing] being implemented (at 1119).

Where an Aboriginal right to fish for food is concerned, the court said that respect for that right means that it has to be given priority over commercial and sports fishing.\(^{39}\) As the evidence led at trial was insufficient to determine whether the fish net

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restriction infringed Sparrow’s Aboriginal right, and if so whether the infringement could be justified, the court ordered a new trial to decide these issues.

For our purposes, the following excerpts are the most relevant parts of the Sparrow decision, because they relate to the issue of fiduciary obligations.

DICKSON CJ and La FOREST J (at 1103-9):

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; see Johnson v. M’Intosh (1823), 8 Wheaton 543 (USSC); see also the Royal Proclamation itself (RSC, 1985, App. II, No. 1, pp. 4-6); Calder [Calder v. Attorney-General of British Columbia, [1973] SCR 313], per Judson J at p. 328, Hall J at pp. 383, 402. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see Canadian Pacific Ltd. v. Paul, [1988] 2 SCR 654). As MacDonald J stated in Pasco v. Canadian National Railway Co., [1986] 1 CNLR 35, at p. 37 (BCSC): “We cannot recount with much pride the treatment accorded to the native people of this country.”

For many years, the rights of the Indians to their aboriginal lands—certainly as legal rights—were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement’s The Law of the Canadian Constitution (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the Statement of the Government of Canada on Indian Policy (1969), although well meaning, contained the assertion (at p. 11) that “aboriginal claims to land … are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community.” In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see The Quebec Boundaries Extension Act, 1912, SC 1912, c. 45. It took a number of judicial decisions and notably the Calder case in this Court (1973) to prompt a reassessment of the position being taken by government. …

It is clear, then, that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada’s aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least,
provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event, flow from the Guerin case [Guerin v. The Queen, [1984] 2 SCR 335], but for a proper understanding of the situation, it is essential to remember that the Guerin case was decided after the commencement of the Constitution Act, 1982. In addition to its effect on aboriginal rights, s. 35(1) clarified other issues regarding the enforcement of treaty rights (see Sanders, “Pre-existing Rights: The Aboriginal Peoples of Canada,” in Beaudoin and Ratushny, eds., The Canadian Charter of Rights and Freedoms, 2nd ed., especially at p. 730).

In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in “An Essay on Constitutional Interpretation” (1988), 26 Osgoode Hall LJ 95, says the following about s. 35(1), at p. 100:

... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of “recognized and affirmed” that, in our opinion, gives appropriate weight to the constitutional nature of these words.

In Reference re Manitoba Language Rights, [1985] 1 SCR 721, this Court said the following about the perspective to be adopted when interpreting a constitution, at p. 745:

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the Constitutional Act, 1982 declares, the “supreme law” of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

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

In Nowegijick v. The Queen, [1983] 1 SCR 29, at p. 36, the following principle that should govern the interpretation of Indian treaties and statutes was set out:

... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

In R v. Agawa [(1988), 28 OAC 201], Blair JA stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16:
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The second principle was enunciated by the late Associate Chief Justice MacKinnon in *R v. Taylor and Williams* (1981), 34 OR (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian rights "in a vacuum." The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:

"The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."

This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see *Guerin v. the Queen*, [1984] 2 SCR 335....

In *Guerin*, supra, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R v. Taylor and Williams* (1981), 34 OR (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship....

In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the Charter, it is true that s. 35(1) is not subject to s. 1 of the Charter. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in
Nowegijick, supra, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by Guerin v. The Queen, supra.

From the last paragraph of the above excerpt it seems that the Supreme Court, while describing the Crown–Aboriginal relationship as trust-like, has accepted Dickson J’s fiduciary classification of the Crown’s obligations in Guerin. Moreover, those obligations have been extended far beyond the narrow context of a surrender of reserve lands, as the court found the government’s “responsibility to act in a fiduciary capacity with respect to aboriginal peoples [to be a] general guiding principle for s. 35(1).” Given the definition of “aboriginal peoples of Canada” in s. 35(2), to whom then is the responsibility owed? What aspects of the relationship between the Aboriginal peoples and the Crown are subject to fiduciary obligations?

Regarding the meaning of “the Crown,” we saw in Guerin that this term encompasses the executive branch of the federal government, because the persons who committed the breach of the fiduciary obligations in that case were employees of the Department of Indian Affairs. In Blueberry River, however, the court was unwilling to extend the obligations to the Director, The Veterans’ Land Act. In Sparrow, on the other hand, it was not executive action that was being challenged, but federal regulations, made by the governor in council acting legislatively under authority delegated by the Canadian Parliament in the Fisheries Act. Yet the Supreme Court said (at 1008) that the government’s fiduciary responsibility is “a general guiding principle for s. 35(1)” and (at 1114) that “[t]he special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified” (emphasis added).

Guerin, Blueberry River, Osoyoos, and Sparrow all involved federal fiduciary obligations to the Aboriginal peoples. Federal responsibility, at least where Indians and Inuit are concerned, is usually related to s. 91(24) of the Constitution Act, 1867, which gave Parliament exclusive jurisdiction over “Indians, and Lands reserved for the Indians.” In Guerin, Dickson J held that obligations respecting surrenders of reserve lands are rooted in Aboriginal title and the restriction on alienation of that title other than by surrender to

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41 See supra note 1 and accompanying text.

42 This question is examined in more detail under sections III and IV, below.

43 See supra notes 13-14 and accompanying text.

44 Parliament's authority to enact the Indian Act, RSC 1985, c. I-5, for example, is clearly derived from s. 91(24); see Attorney General of Canada v. Lovell; Isaac v. Bédard, [1974] SCR 1349; Mitchell v. Peguis Indian Band, supra note 8, per Dickson CJ, at 105. In the latter case, at 126, La Forest J referred to the federal Crown's "obligations to native peoples, be it pursuant to its treaty commitments, or its responsibilities flowing from s. 91(24) of the Constitution Act, 1867."
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the Crown. Due to s. 91(24), the federal Crown has exclusive authority to accept surrenders of aboriginal title,\footnote{See Delgamuukw v. British Columbia, supra note 40, per Lamer CJ, at 1117-18. In Mitchell v. Peguis Indian Band, supra note 8, at 124, La Forest J said that “Indian treaties are matters of federal concern.” (It is through treaties that Aboriginal title has been surrendered historically.) See also Dominion of Canada v. Province of Ontario, [1910] AC 637 (PC), at 644, where the federal government was said to have “acted upon the rights conferred by the Constitution” when it signed a land surrender treaty in 1873 in Ontario; Roberts v. Canada, [1989] 1 SCR 322, at 339-40, where the law of Aboriginal title was held to be “federal common law.” However, federal authority in this regard does not prevent the province where the lands are located from participating in the process and approving the surrender agreement, which is why British Columbia is involved in land-claim negotiations taking place at present in that province.} even though the benefit of surrenders within a province will go to the province in situations where the provincial Crown holds the underlying title to the lands.\footnote{See generally, Leonard L. Rotman, “Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility” (1994), 32 Osgoode Hall Law Journal 735-83.} However, we know from Sparrow that federal responsibility extends beyond surrenders of land. The federal Crown's fiduciary obligations arise from a historical relationship and apply particularly in situations where the Crown has discretionary power that can be exercised to the detriment of the Aboriginal peoples.\footnote{See Dick v. The Queen, [1985] 2 SCR 309; Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), [2002] 2 SCR 146.} Where the federal government is concerned, the main constitutional source of that power is s. 91(24).

The provinces do not have any broad authority over Aboriginal peoples like that conferred on Parliament by s. 91(24). However, this does not mean that provincial governments do not owe fiduciary obligations to the Aboriginal peoples.\footnote{See R v. Badger, supra note 40; R v. Côté, supra note 40; Haida Nation v. British Columbia (Minister of Forests), [2004] 3 SCR 511.} Provincial legislation can have an impact on the Aboriginal peoples covered by s. 91(24), as long as it does not single them out for special treatment.\footnote{Sec Dick v. The Queen, [1985] 2 SCR 309; Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), [2002] 2 SCR 146.} To the extent that the provinces have discretionary power over the Aboriginal peoples, they are also subject to fiduciary obligations.\footnote{Sec St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (PC).}

C. Fiduciary Obligations, the Courts, and Quasi-Judicial Federal Boards

Quebec (Attorney General) v. Canada (National Energy Board) [1994] 1 SCR 159

[National Energy Board arose out of a decision by the National Energy Board (NEB) to grant Hydro-Québec licences to export electricity to New York and Vermont. The Grand Council of the Crees (of Quebec) and the Cree Regional Authority (herein referred to collectively as the Crees) opposed the licences because they were concerned about the impact on their Aboriginal rights of future construction of hydroelectric generating facilities in northern Quebec to meet Hydro-Québec's obligations...}
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under the export contracts. The Crees made numerous submissions at the public hearing held by the NEB before it made its decision to grant the licences. In court, the Crees challenged the validity of the licences on the grounds, inter alia, that the NEB owed them a fiduciary duty that had not been fulfilled in the exercise of its decision-making power and that the board's decision affected their Aboriginal rights and therefore had to meet the Sparrow justification test. Iacobucci J, delivering the unanimous decision of the court, dealt with these contentions in the following passage.

IACOBUCCI J (at 182-86):

C. Fiduciary Duty

The appellants claim that, by virtue of their status as aboriginal peoples, the Board owes them a fiduciary duty extending to the decision-making process used in considering applications for export licences. The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown, as recognized by this Court in R v. Sparrow [[1990] 1 SCR 1075], extends to the Board, as an agent of government and creation of Parliament, in the exercise of its delegated powers. The duty applies whenever the decision made pursuant to a federal regulatory process is likely to affect aboriginal rights.

The appellants characterize the scope of this duty as twofold. They argue that it includes the duty to ensure the full and fair participation of the appellants in the hearing process, as well as the duty to take into account their best interests when making decisions. The appellants argue that such an obligation imports with it rights that go beyond those created by the dictates of natural justice, and that in this case, at a minimum, the Board should have required disclosure to the appellants of all information necessary to the making of their case against the applications. The respondents to this appeal, on the other hand, dispute both the existence of a duty, and, if it does exist, that the Board failed to meet it.

It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: Guerin v. The Queen, [1984] 2 SCR 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 SCR 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial: Committee for Justice and
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Liberty v. National Energy Board, [1978] 1 SCR 369, at p. 385. While this characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.

It is for this reason that I do not find helpful the authorities cited to me by the appellants as indicative of this evolving trend: Gitludahl v. Minister of Forests [[1994] 4 CNLR 43 (BC SC)] and Dick v. The Queen [[1993] 1 CNLR 50 (FCTD)]. Those cases were concerned, respectively, with the decision-making of the Minister of Forests, and the conduct of the Crown when adverse in interest to aboriginal peoples in litigation. The considerations which may animate the application of a fiduciary duty in these contexts are far different from those raised in the context of a licence application before an independent decision-making body operating at arm’s length from government.

Therefore, I conclude that the fiduciary relationship between the Crown and the appellants does not impose a duty on the Board to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of fiduciary duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.

Moreover, even if this Court were to assume that the Board, in conducting its review, should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, I am satisfied that, for the reasons set out above relating to the procedure followed by the Board, its actions in this case would have met the requirements of such a duty. There is no indication that the appellants were given anything less than the fullest opportunity to be heard. They had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by the respondent Hydro-Québec. This argument must therefore fail for the same reasons as the arguments relating to the nature of the review conducted by the Board.

D. Aboriginal Rights

This Court, in R v. Sparrow, supra, recognized the interrelationship between the recognition and affirmation of aboriginal rights constitutionally enshrined in s. 35(1) of the Constitution Act, 1982, and the fiduciary relationship which has historically existed between the Crown and aboriginal peoples. It is this relationship that indicates that the exercise of sovereign power may be limited or restrained when it amounts to an unjustifiable interference with aboriginal rights. In this appeal, the appellants argue that the decision of the Board to grant the licences will have a negative impact on their aboriginal rights, and that the Board was therefore required to meet the test of justification as set out in Sparrow.

It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the Constitution Act, 1982. Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the National Energy Board Act, could have the effect of
interfering with the existing aboriginal rights of the appellants so as to amount to a *prima facie* infringement of s. 35(1).

The respondents in this appeal argue that it cannot. They assert that, with the signing by the appellants of the James Bay and Northern Quebec Agreement, incorporated in the *James Bay and Northern Quebec Native Claims Settlement Act*, SC 1976-77, c. 32 ("the James Bay Act"), the appellants ceded and renounced all aboriginal rights except as set out in the Agreement. Since the act of granting a licence neither requires nor permits the construction of the new production facilities which the appellants claim will interfere with their rights, and since the Agreement itself provides for a participatory review process to authorize the construction of such facilities, Hydro-Québec and the Attorney General of Quebec argue that no *prima facie* infringement results from the decision of the Board.

The evaluation of these competing arguments requires an examination and interpretation of the Agreement as embodied in the *James Bay Act*. The appellants, however, requested that this question be determined without reference to the Agreement or to the Act, since its interpretation and application form the subject of other legal proceedings involving the parties to this appeal. The appellants accordingly placed no reliance on this document in their assertion of a breach of aboriginal rights.

In my view, it is not possible to evaluate realistically the impact of the decision of the Board on the rights of the appellants without reference to the *James Bay Act*. The respondents assert that the rights of the appellants are limited to those set out in this document. The validity of this assertion cannot be tested without construing the provisions of the Agreement.

Moreover, even assuming that the decision of the Board is one that has, *prima facie*, an impact on the aboriginal rights of the appellants, and that the appellants are correct in arguing that, for the Board to justify its interference, it must, at a minimum, conduct a rigorous, thorough, and proper cost-benefit review, I find, for the reasons expressed above, that the review carried out in this case was not wanting in this respect.

Iacobucci J disposed of the appeal by upholding the NEB's decision to grant the licences on the grounds that the NEB had exercised its jurisdiction properly by giving the Crees a full and fair opportunity to be heard and by reaching its conclusions on the basis of sufficient evidence. Is this decision consistent with the "general guiding principle for s. 35(1)" set out in *Sparrow*? Does it provide the federal government with a way of avoiding its fiduciary obligations to the Aboriginal peoples?

### III. FIDUCIARY OBLIGATIONS AND ABORIGINAL TITLE TO LAND

We saw from Dickson J's judgment in *Guerin* that Aboriginal title is derived from the Aboriginal peoples' historical occupation of their traditional lands. The nature of Aboriginal title and the Crown's obligation to respect it were elaborated on in the *Delgamuukw* decision.
III. Fiduciary Obligations and Aboriginal Title to Land

Delgamuukw v. British Columbia
[1997] 3 SCR 1010

In Delgamuukw v. British Columbia, the Gitksan and Wet'suwet'en nations claimed ownership and jurisdiction (changed during the course of the litigation to Aboriginal title and self-government) over their traditional territories—an area of 58,000 square kilometres in north-west British Columbia. While avoiding any decision on the merits because of problems with the pleadings and with the trial judge's treatment of the plaintiffs' oral histories (the case was sent back to trial for these reasons, but has not in fact been retried), the Supreme Court established a number of important principles relating to content and proof of Aboriginal title and the constitutional protection accorded to that title as an Aboriginal right recognized and affirmed by s. 35(1) the Constitution Act, 1982. The issue of the Crown's fiduciary obligations came up in the context of infringement of Aboriginal title and the application of the justificatory test laid down in the Sparrow decision. Lamer CJ, Cory, McLachlin, and Major JJ concurring, delivered the leading judgment. La Forest J, L'Heureux-Dubé J concurring, wrote a separate judgment.

LAMER CJ [at 1107-14]:

(f) Infringements of Aboriginal Title: The Test of Justification

(i) Introduction

The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., Sparrow) and provincial (e.g., Côté ... [R v. Côté, [1996] 3 SCR 139]) governments. However, s. 35(1) requires that those infringements satisfy the test of justification. In this section, I will review the Court's nascent jurisprudence on justification and explain how that test will apply in the context of infringements of aboriginal title.

(ii) General Principles

The test of justification has two parts, which I shall consider in turn. First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial. I explained in Gladstone [R v. Gladstone, [1996] 2


SCR 723] that compelling and substantial objectives were those which were directed at either one of the purposes underlying the recognition and affirmation of aboriginal rights by s. 35(1), which are (at para. 72):

... the recognition of the prior occupation of North America by aboriginal peoples or...

the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.

I noted that the latter purpose will often "be most relevant" (at para. 72) at the stage of justification. I think it important to repeat why (at para. 73) that is so:

Because ... distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. [Emphasis added; "equally" emphasized in original.]

The conservation of fisheries, which was accepted as a compelling and substantial objective in Sparrow, furthers both of these purposes, because it simultaneously recognizes that fishing is integral to many aboriginal cultures, and also seeks to reconcile aboriginal societies with the broader community by ensuring that there are fish enough for all. But legitimate government objectives also include "the pursuit of economic and regional fairness" and "the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" (para. 75). By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component (Adams ... [R v. Adams, [1996] 3 SCR 101]) would fail this aspect of the test of justification.

The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. What has become clear is that the requirements of the fiduciary duty are a function of the "legal and factual context" of each appeal (Gladstone, supra, at para. 56). Sparrow and Gladstone, for example, interpreted and applied the fiduciary duty in terms of the idea of priority. The theory underlying that principle is that the fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first. However, the fiduciary duty does not demand that aboriginal rights always be given priority. As was said in Sparrow, supra, at pp. 1114-15:

The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. [Emphasis added.]

Other contexts permit, and may even require, that the fiduciary duty be articulated in other ways (at p. 1119):
Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

*Sparrow* did not explain when the different articulations of the fiduciary duty should be used. Below, I suggest that the choice between them will in large part be a function of the nature of the aboriginal right at issue.

In addition to variation in the form which the fiduciary duty takes, there will also be variation in degree of scrutiny required by the fiduciary duty of the infringing measure or action. The degree of scrutiny is a function of the nature of the aboriginal right at issue. The distinction between *Sparrow* and *Gladstone*, for example, turned on whether the right amounted to the exclusive use of a resource, which in turn was a function of whether the right had an internal limit. In *Sparrow*, the right was internally limited, because it was a right to fish for food, ceremonial and social purposes, and as a result would only amount to an exclusive right to use the fishery in exceptional circumstances. Accordingly, the requirement of priority was applied strictly to mean that (at p. 1116) “any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.”

In *Gladstone*, by contrast, the right to sell fish commercially was only limited by supply and demand. Had the test for justification been applied in a strict form in *Gladstone*, the aboriginal right would have amounted to an exclusive right to exploit the fishery on a commercial basis. This was not the intention of *Sparrow*, and I accordingly modified the test for justification, by altering the idea of priority in the following way (at para. 62):

... the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

After *Gladstone*, in the context of commercial activity, the priority of aboriginal rights is constitutionally satisfied if the government had taken those rights into account and has allocated a resource “in a manner respectful” (at para. 62) of that priority. A court must be satisfied that “the government has taken into account the existence and importance of [aboriginal] rights” (at para. 63) which it determines by asking the following questions (at para. 64):

Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are ... questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through
reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users.

(iii) Justification and Aboriginal Title

The general principles governing justification laid down in Sparrow, and embellished by Gladstone, operate with respect to infringements of aboriginal title. In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

The manner in which the fiduciary duty operates with respect to the second stage of the justification test—both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take—will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.

The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority that I laid down in Gladstone which should apply. What is required is that the government demonstrate (at para. 62) "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of aboriginal title in the land. By analogy with Gladstone, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining
reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive. This is an issue that may involve an assessment of the various interests at stake in the resources in question. No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here.

Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in Sparrow. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: Guerin. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in Sparrow and which I repeated in Gladstone. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: Guerin. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation for infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.
It appears from the Sparrow, Gladstone, and Delgamuukw decisions that the fiduciary relationship between the Crown and Aboriginal peoples is very different from other fiduciary relationships. According to the Supreme Court, both Parliament and the provincial legislatures can infringe the constitutional rights of Aboriginal peoples and respect the Crown's fiduciary obligations to those peoples at the same time. On the other hand, Guerin and Blueberry River reveal that executive acts will be scrutinized carefully to ensure that the Crown's fiduciary obligations are met.

An issue left unresolved by the Delgamuukw decision was whether the Crown owes fiduciary obligations to Aboriginal peoples in situations where they claim Aboriginal title to land, but that title has not yet been recognized by a court or by a treaty or land claims agreement. In particular, do provincial governments owe any duty to consult with Aboriginal peoples before authorizing resource development, such as logging or mining, on lands that are subject to unproven Aboriginal title claims? This issue was addressed in Haida Nation (below) and Taku River Tinglit First Nation v. British Columbia (Project Assessment Director), [2004] 3 SCR 550. In the latter case, the Supreme Court applied the principles set out in Haida Nation and found that the Crown in right of British Columbia had met its duty to consult and accommodate in relation to construction of a road to provide access to a mine site.

Haida Nation v. British Columbia (Minister of Forests)
[2004] 3 SCR 511

[The Haida Nation claims Aboriginal title to the whole of Haida Gwaii (the Queen Charlotte Islands) and the surrounding waters. The existence of this title has not yet been affirmed by a court decision or by a treaty or agreement with the Crown. Parts

53 R v. Gladstone, supra note 39, applied in Delgamuukw, excerpted above. See also Gladstone v. Canada (Attorney General), [2005] 1 SCR 325, where a claim was made by two members of the Heiltsuk Nation to interest on the value of herring spawn that had been seized by fisheries officers in violation of the Heiltsuks' constitutional right to collect herring spawn on kelp. The court dismissed the claim, in part because it held that a fiduciary relationship did not exist in the context.


of the islands have nonetheless been logged, and are still being logged, pursuant to provincial cutting licences, without the consent of the Haida Nation. Among these licences is a Tree Farm Licence (TFL), originally issued to MacMillan Bloedel Limited in 1961, and subsequently replaced and transferred in 1999 to Weyerhaeuser Company Limited. In 2000, the Haida Nation began this lawsuit, challenging the validity of the replacements of the licence and of its transfer to Weyerhaeuser. Among other things, the Haida alleged breach of fiduciary obligations by the Crown in right of British Columbia, arising in particular from failure by the province to consult with them before replacing and transferring the TFL.

McLachlin CJ wrote the unanimous judgment of the Supreme Court. She decided that the province does have a legally enforceable duty to consult with the Haida Nation, and possibly accommodate their interests, before authorizing logging operations on Haida Gwaii, and that this duty has been breached. However, because the Haida Nation’s Aboriginal title has not yet been established, the provincial Crown does not owe them fiduciary obligations in this context. Instead, the duty to consult is based on a broader concept of the honour of the Crown.

After stating the facts, McLACHLIN CJ continued (at 518-20):

[6] This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land—title which they are in the process of trying to prove—and object to the harvesting of the forests on Block 6 as proposed in TFL 39. In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

[7] The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida’s claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

[8] The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

[9] The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: [2001] 2 CNLR 83, 2000 BCSC 1280. The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: (2002), 99 BCLR (3d) 209, 2002 BCCA 147, with supplementary reasons (2002), 5 BCLR (4th) 33, 2002 BCCA 462.
I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people’s concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown’s appeal and allow the appeal of Weyerhaeuser.

This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate. ...

After deciding that the Haida Nation’s remedies were not limited to a potential interlocutory injunction, McLachlin CJ discussed the duty to consult and accommodate (at 522-26, 528-36).

B. The Source of a Duty to Consult and Accommodate

The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example R v. Badger, [1996] 1 SCR 771, at para. 41; R v. Marshall, [1999] 3 SCR 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”: Delgamuukw, supra, at para. 186, quoting Van der Peet, ... R v. Van der Peet, [1996] 2 SCR 507, at para. 31.

The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: Wewaykum Indian Band v. Canada, [2002] 4 SCR 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown’s other, broader obligations. However, the duty’s fulfilment requires that the Crown act with reference to the Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in Wewaykum, at para. 81, the term “fiduciary duty”
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does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

... “fiduciary duty” as a source of plenary Crown liability covering all aspects of the Crown–Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group’s best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

[19] The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of “sharp dealing” (Badger, at para. 41). Thus in Marshall, supra, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that “nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi’kmaw people to secure their peace and friendship ....”

[20] Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: R v. Sparrow, [1990] 1 SCR 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982. Section 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfil its promises” (Badger, supra, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

[21] This duty to consult is recognized and discussed in the jurisprudence. In Sparrow, supra, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson CJ and La Forest J wrote that one of the factors in determining whether limits on the right were justified is “whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.”

[22] The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in R v. Nikal, [1996] 1 SCR 1013, where Cory J wrote: “So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement” (para. 110).

[23] In the companion case of R v. Gladstone, [1996] 2 SCR 723, Lamer CJ referred to the need for “consultation and compensation,” and to consider “how the government has accommodated different aboriginal rights in a particular fishery ..., how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users” (para. 64).
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[24] The Court’s seminal decision in Delgamuukw, supra, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation” on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

[25] Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

C. When the Duty to Consult and Accommodate Arises

[26] Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants’ inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

[27] The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable ....

[32] The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982. This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peo-
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bles, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people. As stated in Mitchell v. MNR, [2001] 1 SCR 911, 2001 SCC 33, at para. 9, “[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation ...” (emphasis added).

[33] To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the “meaningful content” mandated by the “solemn commitment” made by the Crown in recognizing and affirming Aboriginal rights and title: Sparrow, supra, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable. ...

[35] But, when precisely does a duty to consult arise? The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see Halfway River First Nation v. British Columbia (Ministry of Forests), [1997] 4 CNLR 45 (BCSC), at p. 71, per Dorgan J.

[36] This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in Marshall, supra, at para. 112, one cannot “meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope.” However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

[37] There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong prima facie case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty ....
D. The Scope and Content of the Duty to Consult and Accommodate

[39] The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

[40] At all stages, good faith on both sides is required. The common thread on the Crown’s part must be “the intention of substantially addressing [Aboriginal] concerns” as they are raised (Delgamuukw, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see Halfway River First Nation v. British Columbia (Ministry of Forests), [1999] 4 CNLR 1 (BCCA), at p. 44; Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management) (2003), 19 BCLR (4th) 107 (BCSC). Mere hard bargaining, however, will not offend an Aboriginal people’s right to be consulted.

[41] Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. “‘Consultation’ in its least technical definition is talking together for mutual understanding”: T. Isaac and A. Knox, “The Crown’s Duty to Consult Aboriginal People” (2003), 41 Alta. L Rev. 49, at p. 61.

[42] At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

[43] Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what
is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[46] Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice’s *Guide for Consultation with Maori* (1997) provides insight (at pp. 21 and 31):

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed …

… genuine consultation means a process that involves …:

- gathering information to test policy proposals
- putting forward proposals that are not yet finalised
- seeking Maori opinion on those proposals
- informing Maori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Maori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

[47] When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government’s proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R v. Marshall*, [1999] 3 SCR 533, at para. 22: “… the process of accommodation of the treaty right may best be resolved by consultation and negotiation.”

[48] This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take …

[After discussing accommodation and rejecting the opinion of the BC Court of Appeal that Weyerhaeuser also had a duty to consult and accommodate, McLachlin CJ dealt with the province’s duty, at 539-40:]
F. The Province’s Duty

[57] The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.

[58] The Province’s argument rests on s. 109 of the Constitution Act, 1867, which provides that “[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada ... at the Union ... shall belong to the several Provinces.” The Province argues that this gives it exclusive right to the land at issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the Constitution Act, 1982. To do so, it argues, would “undermine the balance of federalism” (Crown’s factum, at para. 96).

[59] The answer to this argument is that the Province took their interest in land subject to “any Interest other than that of the Province in the same” (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in St. Catherine’s Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (PC), lands in the Province are “available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title” (p. 59). The Crown’s argument on this point has been canvassed by this Court in Delgamuukw, supra, at para. 175, where Lamer CJ reiterated the conclusions in St. Catherine’s Milling, supra. There is therefore no foundation to the Province’s argument on this point.

[After briefly discussing the standard of judicial review of government efforts to consult and accommodate, McLachlin CJ applied her analysis. She considered its application under three headings: existence of the duty, scope of the duty, and whether the Crown had fulfilled its duty. Under scope of the duty, she used the criteria of the strength of the Aboriginal claim and the seriousness of the potential impact on it. She noted the chambers judge’s finding that “Haida claims to title and Aboriginal rights were supported by a good prima facie case.” McLachlin CJ then addressed the questions of when on the facts the province’s duty to consult arose and whether the Crown had a duty “to go beyond consultation.” She concluded that it was impossible to know whether a need for accommodation arose, as the Crown had “failed to engage in any meaningful consultation.” The Crown therefore had breached its duty to consult. The outcome was that the court dismissed the Crown’s appeal and allowed Weyerhaeuser’s appeal.]

The Supreme Court recently revisited the issue of the Crown’s duty to consult and accommodate in Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 SCR 388. In that case, Binnie J, for a unanimous court, held that the Crown in right of Canada has an obligation to consult with First Nations and accommodate their treaty rights to hunt and trap when it takes up lands governed by a treaty for purposes that interfere with those rights—in this instance, the construction of a winter road. Likewise, the BC Court of Appeal in Halfway River First Nation v. British Columbia (Ministry of Forests),
IV. FURTHER DEVELOPMENT OF THE FIDUCIARY RELATIONSHIP

The law respecting the Crown’s fiduciary obligations to Canada’s Aboriginal peoples is still very much in the developmental stage. The Supreme Court decisions excerpted above have provided some of the doctrinal foundations for this new legal edifice, but the architectural design for the building itself is still sketchy. In the Wewaykum decision (below), the Supreme Court attempted to provide some guidance regarding the circumstances in which fiduciary obligations may be present. More specifically, the court held that fiduciary obligations are present where there is a cognizable Aboriginal interest in relation to which the Crown is exercising discretionary authority.

Wewaykum Indian Band v. Canada
[2002] 4 SCR 245

Wewaykum involved a dispute between two Indian bands, the Wewaykum or Campbell River Band and the Wewaikai or Cape Mudge Band, over entitlement to two Indian reserves on Vancouver Island. Each alleged that they were entitled to the reserve occupied by the other. Their respective claims arose out of errors made by the federal Department of Indian Affairs in designating which reserve had been set aside for which band. While they sought relief against each other for trespass and wrongful possession, their real grievance was with the federal government, which they claimed had breached the Crown’s fiduciary obligations in the context of the creation of the two reserves. Binnie J, delivering the unanimous decision of the court, held that the Crown does owe fiduciary obligations in the context of reserve creation, but decided that those obligations had been met in this case.

After a lengthy recitation of the relevant facts, BINNIE J continued (at 281-98):

M. The Sui Generis Fiduciary Duty

[72] If, as we affirm, neither band emerged from the reserve-creation process with both reserves, the issue arises whether this outcome establishes in the case of either appellant band a breach of fiduciary duty on the part of the federal Crown ....

59 For another case where the court held that the Crown’s fiduciary obligations had been fulfilled in the context of reserve creation, see R v. Lewis, [1996] 1 SCR 921.
This *sui generis* relationship [between the Crown and Aboriginal peoples] had its positive aspects in protecting the interests of aboriginal peoples historically (recall, e.g., the reference in *Royal Proclamation, 1763*, RSC 1985, App. II, No. 1, to the “great Frauds and Abuses [that] have been committed in purchasing Lands of the Indians”), but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct or ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E.J. Weinrib’s statement, quoted in *Guerin, supra*, at p. 384, that: “the hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other’s discretion.” See also: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574, *per* Sopinka J, at pp. 599-600; *Hodgkinson v. Simms*, [1994] 3 SCR 377, *per* La Forest J, at p. 406; *Frame v. Smith*, [1987] 2 SCR 99, *per* Wilson J, dissenting, at pp. 135-36. Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the “honour of the Crown”: *R v. Taylor* (1981), 34 OR (2d) 360 (CA), *per* MacKinnon ACJO, at p. 367, leave to appeal refused, [1981] 2 SCR xi; *Van der Peet, supra, per* Laforest CJ, at para. 24; *Marshall, supra*, at paras. 49-51.

But there are limits. The appellants seemed at times to invoke the “fiduciary duty” as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River [Ross River Dena Council Band v. Canada]*, [2002] 2 SCR 816 (“the lands occupied by the Band”), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.

Since *Guerin*, Canadian courts have experienced a flood of “fiduciary duty” claims by Indian bands across a whole spectrum of possible complaints, for example:

(i) to structure elections (*Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band*, [1997] 1 FC 689 (CA), at para. 60; subsequently dealt with in this Court on other grounds);
(ii) to require the provision of social services (*Southeast Child & Family Services v. Canada (Attorney General)*, [1997] 9 WWR 236 (Man. QB));
(iii) to rewrite negotiated provisions (*BC Native Women’s Society v. Canada*, [2000] 1 FC 304 (TD));
(v) to suppress public access to information about band affairs (*Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1996), 116 FTR 37, aff’d. (1999), 251 NR 220 (FCA); *Montana*
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Band of Indians v. Canada (Minister of Indian and Northern Affairs), [1989] 1 FC 143 (TD); Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs) (1997), 132 FTR 106;

(vi) to require legal aid funding (Ominayak v. Canada (Minister of Indian Affairs and Northern Development), [1987] 3 FC 174 (TD));

(vii) to compel registration of individuals under the Indian Act (rejected in Tuplin v. Canada (Indian and Northern Affairs) (2001), 207 Nfld. & PEIR 292 (PEISCTD));

(viii) to invalidate a consent signed by an Indian mother to the adoption of her child (rejected in G. (A.P.) v. A. (K.H.) (1994), 120 DLR (4th) 511 (Alta. QB)).

[83] I offer no comment about the correctness of the disposition of these particular cases on the facts, none of which are before us for decision, but I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (Lac Minerals, supra, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation ....

N. Application of Fiduciary Principles to Indian Lands

[86] For the reasons which follow, it is my view that the appellant bands’ submissions in these appeals with respect to the existence and breach of a fiduciary duty cannot succeed:

1. The content of the Crown’s fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.

2. Prior to reserve creation, the Crown exercises a public law function under the Indian Act—which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown’s duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.

3. Once a reserve is created, the content of the Crown’s fiduciary duty expands to include the protection and preservation of the band’s quasi-proprietary interest in the reserve from exploitation. ...

4. In this case, as the appellant bands have rightly been held to lack any beneficial interest in the other band’s reserve, equitable remedies are not available either to dispossess an incumbent band that is entitled to the beneficial interest, or to require the Crown to pay “equitable” compensation for its refusal to bring about such a dispossession.
5. Enforcement of equitable duties by equitable remedies is subject to the usual equitable defences, including laches and acquiescence.

[87] I propose to discuss each of these propositions in turn.

1. The content of the Crown’s fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.

[88] In Ross River, supra, the Court affirmed that “[a]lthough this is not at stake in the present appeal, it should not be forgotten that the exercise of this particular power [of reserve creation] remains subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations which arise under s. 35 of the Constitution Act, 1982” (LeBel J, at para. 62). Further, “it must not be forgotten that the actions of the Crown with respect to the lands occupied by the Band will be governed by the fiduciary relationship which exists between the Crown and the Band. It would certainly be in the interests of fairness for the Crown to take into consideration in any future negotiations the fact that the Ross River Band has occupied these lands for almost half a century” (para. 77).

[89] In the present case the reserve-creation process dragged on from about 1878 to 1928, a period of 50 years. From at least 1907 onwards, the Department treated the reserves as having come into existence, which, in terms of actual occupation, they had. It cannot reasonably be considered that the Crown owed no fiduciary duty during this period to bands which had not only gone into occupation of provisional reserves, but were also entirely dependent on the Crown to see the reserve-creation process through to completion.

[90] The issue, for present purposes, is to define the content of the fiduciary duty “with respect to the lands occupied by the Band” (Ross River, supra, at para. 77) at the reserve-creation stage insofar as is necessary for the disposition of these appeals.

[91] The situation here, unlike Guerin, does not involve the Crown interposing itself between an Indian band and non-Indians with respect to an existing Indian interest in lands. Nor does it involve the Crown as “faithless fiduciary” failing to carry out a mandate conferred by a band with respect to disposition of a band asset. The federal Crown in this case was carrying out various functions imposed by statute or undertaken pursuant to federal–provincial agreements. Its mandate was not the disposition of an existing Indian interest in the subject lands, but the creation of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right.

[92] This is not to suggest that a fiduciary duty has no role to play in these circumstances. It is to say, however, that caution must be exercised. As stated, even in the traditional trust context not all obligations existing between the parties to a well-recognized fiduciary relationship are themselves fiduciary in nature: Lac Minerals, supra, per Sopinka J, at pp. 597 et seq. Moreover, as pointed out by La Forest J in McInerney v. MacDonald, [1992] 2 SCR 138, not all fiduciary relationships and not all fiduciary obligations are the same: “[T]hese are shaped by the demands of the situation” (p. 149). Thus, for example, the singular demands of the administration of
justice drive and “shape” the content of the fiduciary relationship between solicitor and client: *R v. Neil*, [2002] 3 SCR 631, 2002 SCC 70. These observations are of particular importance in a case where the fiduciary is also the government, as the Court in *Guerin* fully recognized (p. 385). (In the case of rival bands asserting overlapping claims to s. 35 aboriginal title over the same land, for example, the Crown is caught truly and unavoidably in the middle, but that is not the case here.)

[93] The starting point in this analysis, therefore, is the Indian bands’ interest in specific lands that were subject to the reserve-creation process for their benefit, and in relation to which the Crown constituted itself the exclusive intermediary with the province. The task is to ascertain the content of the fiduciary duty in relation to those specific circumstances.

2. Prior to reserve creation, the Crown exercises a public law function under the Indian Act, which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown’s duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.

[94] Insofar as the appellant bands contend for a broad application of a fiduciary duty at the stage of reserve creation in non-s. 35(1) lands (as distinguished from their other arguments concerning existing reserves and reserve disposition), it is necessary to determine what the imposition of a fiduciary duty adds at that stage to the remedies already available at public law. The answer, I think, is twofold. In a substantive sense the imposition of a fiduciary duty attaches to the Crown’s intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary. In *Blueberry River* McLachlin J (as she then was), at para. 104, said that “[t]he duty on the Crown as fiduciary was ‘that of a man of ordinary prudence in managing his own affairs.’” See also D.W.M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 32-33; *Fales v. Canada Permanent Trust Co.*, [1977] 2 SCR 302, at p. 315. Secondly, and perhaps more importantly, the imposition of a fiduciary duty opens access to an array of equitable remedies, about which more will be said below.

[95] In this case the intervention of the Crown was positive, in that the federal government sought to create reserves for the appellant bands out of provincial Crown lands to which these particular bands had no aboriginal or treaty right. As explained, the people of the Laich-kwil-tach First Nation arrived in the Campbell River area at about the same time as the early Europeans (1840-1853). Government intervention from 1871 onwards was designed to protect members of the appellant bands from displacement by the other newcomers.

[96] When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which
cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 FC 762 (CA). As the Campbell River Band acknowledged in its factum, “[t]he Crown’s position as fiduciary is necessarily unique” (para. 96). In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were “vulnerable” to the adverse exercise of the government’s discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, *prior to reserve creation*, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. As Dickson J said in *Guerin*, supra, at p. 385:

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

[97] Here, as in *Ross River*, the nature and importance of the appellant bands’ interest in these lands prior to 1938, and the Crown’s intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with “ordinary” diligence in what it reasonably regarded as the best interest of the beneficiaries. As the dispute evolved into conflicting demands between the appellant bands themselves, the Crown continued to exercise public law duties in its attempt to ascertain “the places they wish to have” (as stated at para. 24), and, as a fiduciary, it was the Crown’s duty to be even-handed towards and among the various beneficiaries. An assessment of the Crown’s discharge of its fiduciary obligations at the reserve-creation stage must have regard to the context of the times. The trial judge concluded that each of these obligations was fulfilled, and we have been given no persuasive reason to hold otherwise.

3. **Once a reserve is created, the content of the Crown’s fiduciary duty expands to include the protection and preservation of the band’s quasi-proprietary interest in the reserve from exploitation.**

[98] The content of the fiduciary duty changes somewhat after reserve creation, at which time the band has acquired a “legal interest” in its reserve, even if the reserve is created on non-s. 35(1) lands. In *Guerin*, Dickson J said the fiduciary “interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown” (p. 382). These dicta should not be read too narrowly. Dickson J spoke of surrender because those were the facts of the *Guerin* case. As this Court recently held, expropriation of an existing reserve equally gives rise to a fiduciary duty: *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746, 2001 SCC 85. See also *Kruger v. The Queen*, [1986] 1 FC 3 (CA).
At the time of reserve disposition the content of the fiduciary duty may change (e.g. to include the implementation of the wishes of the band members). In Blueberry River, McLachlin J observed at para. 35:

It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident—a decision that constituted exploitation—the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.


It is in the sense of "exploitative bargain," I think, that the approach of Wilson J in Guerin should be understood. Speaking for herself, Ritchie and McIntyre JJ, Wilson J stated that prior to any disposition the Crown has "a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction" (p. 350). The "interests" to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence, as in Guerin itself, is the exploitative bargain (e.g. the lease with the Shaughnessy Heights Golf Club that in Guerin was found to be "unconscionable"). This is consistent with Blueberry River and Lewis.

Wilson J's comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself. (Of course, there will also be cases dealing with the ordinary accountability by the Crown, as fiduciary, for its administrative control over the reserve and band assets.)

The Cape Mudge appellants contend that the Crown breached its fiduciary duty with respect to its two reserves (while attacking the trial judge's rejection of this factual premise) by permitting (or even encouraging) the 1907 Resolution. They have been deprived of their legal interest in Reserve No. 11, they say, by an "exploitative bargain." They gave away 350 acres for nothing.

While the reserves were not constituted, as a matter of law, until 1938, I would be prepared to assume that, for purposes of this argument, the fiduciary duty was in effect in 1907. The Cape Mudge Band argument is nevertheless unconvincing. I do not accept what, with respect, is its shaky factual premise, i.e., that the band "gave away" Reserve No. 11 as opposed to entering a quit claim in favour of a sister band with a superior interest. More importantly, this argument rests on a misconception of the Crown's fiduciary duty. The Cape Mudge forbears, whose conduct is now complained of, were autonomous actors, apparently fully informed, who intended in good faith to resolve a "difference of opinion" with a sister band. They were not dealing with non-Indian third parties (Guerin, at p. 382). It is patronizing to suggest, on the basis of the evidentiary record, that they did not know what they were doing, or to reject their evaluation of a fair outcome. Taken in context, and looking at the substance rather than the form of what was intended, the 1907 Resolution was not in the least exploitative.
While courts applying principles of equity rightly insist on flexibility to deal with the unforeseeable and infinite variety of circumstances and interests that may arise, and which will fall to be decided under equitable rules, it must be said that the bold attempt of the appellant bands to extend their claim to fiduciary relief on the present facts is overly ambitious.

On the other hand, the trial judge and the Federal Court of Appeal adopted, with respect, too restricted a view of the content of the fiduciary duty owed by the Crown to the Indian bands with respect to their existing quasi-proprietary interest in their respective reserves. In their view, the Crown discharged its fiduciary duty with respect to existing reserves by balancing “the interests of both the Cape Mudge Indians and the Campbell River Indians and to resolve their conflict regarding the use and occupation of the [Laich-kwil-tach] reserves … [without favouring] the interests of one band over the interest of the other” (para. 493 FTR and para. 121 NR). With respect, the role of honest referee does not exhaust the Crown’s fiduciary obligation here. The Crown could not, merely by invoking competing interests, shirk its fiduciary duty. The Crown was obliged to preserve and protect each band’s legal interest in the reserve which, on a true interpretation of events, had been allocated to it. In my view it did so.

[Binnie J went on to hold (at the heading after para. 104) that, “as the appellant bands have rightly been held to lack any beneficial interest in the other band’s reserve, equitable remedies are not available either to dispossess an incumbent band that is entitled to the beneficial interest, or to require the Crown to pay ‘equitable’ compensation for its refusal to bring about such a dispossession” (emphasis removed). He also decided that the bands’ claims were barred anyway by laches, acquiescence, and statutory limitation periods.]}

Read together, Wewaykum and Haida Nation appear to be attempts by the Supreme Court to put some limits on the range of fiduciary obligation claims against the Crown, but at the same time to place on the federal and provincial governments obligations of consultation and accommodation in situations where a cognizable Aboriginal interest has been claimed but not yet established. The court’s evident concern is to ensure that Aboriginal peoples are treated fairly, thereby upholding the honour of the Crown.

The courts have been dealing with the application of fiduciary law to the Aboriginal-Crown relationship in other contexts as well. In the following recent Federal Court decision, Teitelbaum J held that, while the Crown in right of Canada is a trustee of money received by it from oil and gas revenues on Indian reserve lands, its duty to invest this money is governed by statute and is satisfied by the payment of interest. See also Samson Indian Nation and Band v. Canada, [2006] 1 CNLR 100 (FCTD).

60 For a very useful, recent survey of the case law, see Reynolds, supra note 25, at 83-125.
[Regarding the Crown’s fiduciary obligations, TEITELBAUM J wrote:] 

[271] In the case at bar, the Crown holds the Indian moneys, pursuant to section 61(1) of the *Indian Act*, for the “use and benefit” of Indians or bands; the funds may only be expended for their “benefit.” At the very least, this gives rise to a fiduciary obligation. However, in my opinion, insofar as Indian moneys are concerned, a trust corpus, or res, exists. The Indian moneys derive from the disposition of an interest in land, in the case at bar, through the 1946 Surrender. In *Guerin*, upon the surrender of the land, the band’s right in the land disappeared; nothing more remained that could constitute the trust corpus. In the instant case, however, the disposition of the plaintiffs’ interest in the land leads to the royalty moneys, which form the trust corpus.

[272] As for the source of this trust, I do not agree with the plaintiffs’ assertion that the trust arises from either the historical relationship between the Crown and aboriginal people, or Treaty 6 [1876] ... .

[274] In my opinion, both the reserve clause in Treaty 6 and Morris’s remarks cannot be relied on as the source of the trust. At the time Treaty 6 was signed, the Indian moneys that are the subject matter of this action did not exist. They came into being subsequent to the execution of the 1946 Surrender of Minerals document. The words contained in that document are sufficient to create a trust: there are certainties of intent, subject-matter, and object. The agreement explicitly contemplates a trust; the subject-matter is the royalty moneys; and the object, or beneficiary, is clearly the plaintiffs.

[275] Having discussed the Crown as a trustee for Indian moneys, I will now examine the nature of its obligations as such.

[276] Many of the duties owed by a trustee are similar to those of a fiduciary. The trustee may not realize a profit from its custody of the trust property, or misuse it in any way. The trustee owes a duty of loyalty and good faith to the beneficiary. The trustee also owes a duty to be evenhanded as between different beneficiaries. However, unlike a fiduciary, a trustee owes a positive duty to invest the corpus—or, put another way, make it productive—when the corpus is a wasting asset, such as money. The trust corpus may not lie fallow. This is the duty to invest.

[277] The standard of care applicable to a trustee carrying out the administration of a trust was set out by Dickson J in *Fales et al. v. Canada Permanent Trust Company*, [1977] 2 SCR 302 at p. 315:

Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs (*Learoyd v. Whiteley* [(1887), 12 App. Cas. 727], at p. 733; *Underhill’s Law of Trusts and Trustees*, 12th ed., art. 49; *Restatement of the Law on Trusts*, 2nd ed., para. 174) and traditionally the standard has been applied equally to professional and non-professional trustees. The standard has been of general application and objective though, at times, rigorous.

[278] Thus, the standard of care, in terms of the duty to invest, is that of reasonable care and skill of an ordinary prudent person.
The plaintiffs contend that the Crown did not fulfill its duty to invest and that the Crown should have either made actual investments in the market with their funds, or tied the interest rate to benchmarks or market indices. The plaintiffs assert that section 61(2) of the Indian Act does not require that Indian moneys be held in the CRF [Consolidated Revenue Fund]. Ermineskin submits that the purpose of section 61(2) is to ensure that, if the Crown does hold Indian moneys in the CRF, then the Crown must pay interest at an appropriate rate, consistent with its duties as trustee or fiduciary regarding those moneys.

I cannot agree with Ermineskin’s submission regarding section 61(2) of the Indian Act. I am satisfied that the legislation informs the Crown’s duties as trustee for Indian moneys. There is no doubt that the royalty moneys are to be held in trust. That language appears in the 1946 Surrender and later in section 4 of the Indian Oil and Gas Act. Although that piece of legislation was enacted in 1974 and royalties had been collected by the Crown long before that date, the Indian Oil and Gas Act found its genesis in the world oil crisis of 1973. Section 4 and the words “in trust” confirm what was an already existing situation and in no way altered the manner in which the funds were to be held and administered.

While section 4 of the Indian Oil and Gas Act confirms the trust, the characterization of Indian moneys as public money within the meaning of section 2 of the Financial Administration Act means that they must be deposited into the CRF, pursuant to section 17. Section 61(2) of the Indian Act mandates that they be paid interest at a rate to be determined by the Governor in Council. There is no choice in whether or not to pay interest: the Crown must do so. However, the Crown also has discretion in fixing the rate.

No legal authority exists that would permit the Minister to purchase investments with Indian moneys, instead of paying a rate of interest. Recall that when the Indian Act was amended in 1951, the power to make investments, under section 92, was specifically removed.

In paying a rate of interest to the Indian moneys pursuant to section 61(2) of the Indian Act, I am satisfied that the Minister has discharged his duty as a trustee to invest the trust corpus. In fixing a rate of interest—or investing—the trustee’s duty is not to maximize profits. If that was the case, then any trustee failing to earn the maximum possible on property entrusted to her, would be liable for breach of trust. Rather, the standard that applies to the duty to invest is that of reasonableness. The trustee must, of course, act prudently. In the case of the Indian moneys, the rate of interest is tied to long-term Government of Canada bonds. The money is not committed to remain in the CRF for any specified period of time and may be withdrawn, subject to the parameters established by section 64 of the Indian Act. I am satisfied that the rate of interest meets the reasonableness standard for assessing a trustee’s conduct.

The plaintiffs also contend that the Crown is in breach of its duty as a trustee not to commingle their money with its own by depositing the Indian moneys into the CRF. I have already found that the Crown may rely on the legislation in carrying out its duties as a trustee. The legislation requires that Indian moneys be deposited into the CRF. While in a sense they are commingled, the Crown keeps accounts for the Indian moneys. As I noted earlier in these Reasons, the Crown reports on the
royalty moneys by reference to “Indian Band Funds—Capital Accounts.” The Crown reports on the interest it pays on the capital and revenue accounts by reference to “Indian Band Funds—Revenue Accounts” (E-796 and E-797, para. 50). The duty to keep trust property separate exists so as to protect the property—perhaps from embezzlement or misappropriation—and prevent it from losing its identity. In the instant case, the trustee is the Crown and the Crown cannot be said to be akin to an ordinary trustee in every possible way. The plaintiffs’ moneys are deposited into the Consolidated Revenue Fund; however, they are reported on and accounted for separately. There is no danger that the moneys are unaccessible or that the Crown will be unable to pay them out. Accordingly, I find there is no breach by the Crown of its duties by depositing the Indian moneys into the CRF.

[285] Since I have found that the Crown may—and indeed must—rely on the legislation, as it informs and defines the Crown’s duty as trustee, I need not review or comment on the wealth of expert evidence presented to me on the industry standards, norms, and practices of commercial trustees.

The Federal Court of Appeal upheld this aspect of Teitelbaum J’s decision in Ermineskin Indian Band and Nations v. Canada; Samson Indian Nation and Band v. Canada, [2007] 2 CNLR 51. Leave to appeal to the Supreme Court of Canada was granted on August 30, 2007.

Another important context in which fiduciary obligations are being raised is in relation to residential schools. While attempts are being made to avoid litigation in resolving many of the more than 10,000 claims that have been made against the federal government and the churches that ran the schools, other cases have gone to court. In the following case, the Supreme Court upheld the trial judge’s conclusion that both the federal government and the United Church of Canada are vicariously liable (75 percent and 25 percent, respectively) for repeated sexual assaults committed against Aboriginal children by an employee in a residential school.61

### Blackwater v. Plint

[2005] 3 SCR 3

[After dealing with the matter of vicarious liability and other issues, McLACHLIN CJ, delivering the unanimous decision of the court, briefly addressed the fiduciary obligations claim:]

[56] Neither the trial judge nor the Court of Appeal found breach of fiduciary duty. The appellant, Mr. Barney, asks that we reverse this decision.

A fiduciary duty is a trust-like duty, involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient’s interest ahead of all other interests: *K.L.B. v. British Columbia*, [2003] 2 SCR 403, 2003 SCC 51, para. 49.

The argument for breach of fiduciary duty is presented on two different bases: one individual, one collective.

The first argument, put on an individual basis, is that the government of Canada and the Church occupied a trust-like relationship with attendant trust-like duties with respect to Mr. Barney and other students at the school. As such, it was required to put their interests first and avoid disloyalty in its conduct toward them.

Assuming such a duty did exist, the trial judge found that it was not breached in this case. He specifically found that neither the Church nor Canada were dishonest or intentionally disloyal. These findings of fact have not been negated. It follows that breach of fiduciary duty toward Mr. Barney and his schoolmates has not been established.

Beneath this specific argument, a second broader argument focusing on Aboriginal children collectively can be discerned. This is the argument that the system of residential schools robbed Indian children of their communities, culture and support and placed them in environments of abuse. This, it is argued, amounted to dishonest and disloyal conduct that violated the government’s fiduciary duty to Canada’s Aboriginal peoples.

This argument cannot be resolved on this appeal. It was not raised below, other than as contextual background to the circumstances and events at the school Mr. Barney attended, AIRS. It was pursued only at this level, and then mainly by interveners. In support of their argument, they submitted studies and writings, none of which were proved in evidence in the courts below and the historic and scientific validity of which the respondents have had no opportunity to challenge. In these circumstances, it would be unfair to rely on this material and inappropriate to deal with the larger argument.

We agree with the courts below that the argument on fiduciary duty presented in this case cannot succeed.

While the court dismissed the fiduciary obligation claims in *Blackwater*, the decision did not rule out such claims in the future. It seems that both individual and collective claims are still possible, if supported by facts and legal arguments presented at trial.

An issue Canadian courts have yet to address involves the connection between the Crown’s fiduciary obligations to the Aboriginal peoples and a possible Aboriginal right of self-government. Although the Supreme Court of Canada has not yet held that the Aboriginal peoples have an inherent right of self-government, in *R v. Pamajewon*, [1996]

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62 The following decisions have, however, considered the scope of the Crown’s fiduciary obligations in the context of band council elections and referendums: *Blackfoot Indian Band v. Canada* (1986), 7 FTC 133; *Six Nations Traditional Hereditary Chiefs v. Canada* (Minister of Indian and Northern Affairs), [1992] 3 CNLR 156 (FCTD).
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2 SCR 821, the court assumed, without deciding, that such a right exists. Moreover, in *Campbell v. British Columbia*, [2000] 4 CNLR 1, Williamson J of the BC Supreme Court decided that the Nisga’a Nation has such a right, now exercisable in accordance with the Nisga’a Treaty (1998). Assuming that Aboriginal peoples generally have this right, are the Crown’s fiduciary obligations and Aboriginal self-government compatible? This question was examined by William R. McMurtry and Alan Pratt in a perceptive article entitled “Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective.” The authors pointed out that *Guerin* actually supports the independent decision-making authority of the Aboriginal peoples, because both Dickson and Wilson JJ held that the Crown had breached its fiduciary duty by not going back to the Musqueam Band for further instructions when the Crown was unable to obtain the leasehold terms that the Musqueams desired. Since then, *Blueberry River* has fortified this perception that the Crown’s fiduciary obligations support rather than undermine self-government. The passages from McLachlin and Gonthier JJ’s judgments, excerpted above, reveal that the Crown had a duty to respect the decisions of the Beaver Band unless, in McLachlin J’s words, “the Band’s decision was foolish or improvident—a decision that constituted exploitation.”

*Guerin* and *Blueberry River* both involved decision making by Indian bands under the statutory authority of the *Indian Act*, now RSC 1985, c. I-5. However, recent jurisprudence on s. 35(1) of the *Constitution Act, 1982* reveals that Aboriginal groups holding communal Aboriginal rights at common law also have decision-making authority with respect to those rights, whether those groups are *Indian Act* bands or not. For example, in *Delgamuukw v. British Columbia*, above, at 1082-83, Lamer CJ said that decisions respecting the use of Aboriginal title land are made by the community holding the title.

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63 In *Pamajewon*, the court nonetheless held that the Shawanaga and Eagle Lake First Nations had failed to establish that they had an Aboriginal right of self-government in relation to high-stakes gambling on their reserves.


65 See, for example, Lacourcière J’s statement in *R v. Vincent*, [1993] 2 CNLR 165 (Ont. CA), at 177: “We agree with the respondent that the fiduciary role of the Crown is incompatible with the free and independent allies status claimed by the Indian tribes.”


Moreover, if the federal or provincial governments want to infringe Aboriginal title, they must respect the Crown’s fiduciary obligations by consulting with the community that holds it. In Delgamuukw, at 1113, Lamer CJ linked the community’s decision-making authority with the duty to consult in the following passage which is worth re quoting:

[A]boriginal title encompasses within it a right to choose to what ends a piece of land can be put. ... This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown’s failure to consult an aboriginal group with respect to the terms by which reserve land is leased may be a breach of its fiduciary duty at common law: Guerin.

The Supreme Court therefore appears to be supportive of the authority of Aboriginal peoples to make their own decisions where their communal rights are concerned.68 This authority can definitely be viewed as an aspect of self-government.69 Moreover, in Guerin and Blueberry River the Supreme Court used the fiduciary relationship to uphold this decision-making authority. It therefore seems that the fiduciary relationship and the right of self-government are not incompatible—in fact, the former can be used to support the latter in appropriate circumstances. This is an area in which one can expect further development in both law and policy as negotiations between Aboriginal peoples and the Canadian, provincial, and territorial governments progress and the inherent right of self-government is implemented.

68 See also R v. Marshall (No. 2), [1999] 3 SCR 533, at 547, where the court held that communal treaty rights “are exercised by the authority of the local community” to which an individual belongs.

69 See Campbell v. British Columbia, [2000] 4 CNLR 1. For further discussion, see McNeil, supra note 64, at 278-91 (Emerging Justice?, at 82-95).
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