MIXED MESSAGES:
THE APPLICATION OF FIDUCIARY PRINCIPLES TO THE CROWN-NATIVE RELATIONSHIP

by

Daniel Robinson
Bachelor of Arts, University College of the Cariboo, 2000

RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

In the
Department
of
Political Science

SIMON FRASER UNIVERSITY

Fall 2004

Approval

Name: **Daniel Robinson**

Degree: **Master of Arts, Department of Political Science**

Title of Project: **Mixed Messages: The Application of Fiduciary Principles to The Crown-Native Relationship**

Examining Committee:

Graduate Chair: **Dr. David Laycock**
Professor, Department of Political Science

Dr. Andrew Heard
Senior Supervisor
Associate Professor, Department of Political Science

Dr. Patrick Smith
Supervisor
Professor, Department of Political Science

Dr. Daniel Cohn
Internal Examiner
Assistant Professor, Department of Political Science

Date Approved: December 6, 2004

SIMON FRASER UNIVERSITY

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ABSTRACT

This paper examines the judiciary's inconsistent application of fiduciary principles to the Crown-Native relationship. With regards to land surrenders it is evident that courts at various levels are willing to interpret the Crown's fiduciary obligations in a manner that is consistent with fiduciary doctrine. This application is contrasted with the courts fiduciary obligation to recognize and protect aboriginal and treaty rights. Regarding these decisions it is clear that the judicial interpretation is more concerned with accommodating aboriginal interests, rather than recognizing these rights in a manner that would be consistent with the principles found in a fiduciary relationship. The reason for this accommodation of aboriginal rights is that the Crown also has an obligation to the interest of the Canadian public good. This inconsistent interpretation of fiduciary principles creates the potential for misrepresented judicial interpretations in future decisions.

ACKNOWLEDGEMENTS

I wish to acknowledge all of my family, friends and professors who helped and supported me throughout my time as a Masters student.

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CHAPTER 1 INTRODUCTION

When examining the application of fiduciary principles to the Crown-Native relationship in Canada, it is evident that these principles have been applied in an inconsistent manner. With regards to land surrenders the courts have interpreted the Crown's fiduciary obligations in a manner consistent with the principles of fiduciary law.[1] This is in contrast with the court's interpretation of the Crown's fiduciary duties associated with the recognition of aboriginal and treaty rights.[2] As a result of dealing with the Crown's obligations to other interests (namely the public good) the judicial interpretation of Crown fiduciary obligations to Native peoples has failed to act solely in the best interests of its beneficiary (in this case Native peoples). Rather than interpreting the relationship on a nation to nation basis, the Canadian judiciary has attempted to accommodate aboriginal interests instead of fully applying fiduciary principles to the relationship.[3] A fiduciary relationship is a relationship where one actor has a duty to act primarily for the benefit of another in matters connected with a specific undertaking.[4] The recognition that fiduciary principles are being applied in an inconsistent manner is

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[1] The term land surrenders refers to the surrendering of reserve land to the Crown. As will be discussed aboriginal interests in land are inalienable except upon surrender to the Crown. Therefore any aboriginal land which is to be used or managed by any interest (Crown or otherwise) must first be surrendered to the Crown by the Indian Band or First Nation in question.

[2] This recognition is acknowledged in s. 35(1) of the *Constitution Act, 1982.*

[3] The term fiduciary principles are in reference to whether the interpretation of the obligations stemming from a fiduciary relationship is constant with the nature of that specific relationship.

[4] Peter D. Maddaugh "Definition of a Fiduciary Duty" in Law Society of Upper Canada; Special Lectures: Fiduciary Duties (Scarborough: A Richard De Boo Publication, 1990), 17.

important because, if the specifics of the relationship are not examined, it is all too easy to assume that the characteristics of the Crown-Native fiduciary relationship are similar to those of other fiduciary relationships and that these characteristics are being applied in a consistent manner.

In addressing the issue of land surrenders, courts at various levels have applied fiduciary principles to their decisions in a consistent manner. This application of fiduciary principles differs entirely with the court's approach to the recognition of aboriginal rights. In regards to the recognition of aboriginal rights, the judicial interpretation of the Crown-Native fiduciary relationship has failed to achieve one of the essential purposes of a fiduciary relationship. One of the main essential purposes of a fiduciary relationship is to protect the integrity of the relationship by ensuring that those who possess the ability to affect the other's interest's act in the best interest of the beneficiary. The problem in the case of the Crown-Native fiduciary relationship is that fiduciary law has traditionally been a part of private law whereas the Crown-Native relationship is a part of public law. The result is that the courts are attempting to interpret a private law concept (a fiduciary relationship) in a public law setting. The challenge that this situation presents is that while the Crown has fiduciary obligations to Native peoples, the Crown also has obligations to other interests in Canadian society. The other most prominent interest that the Crown must take into account is the interest of the Canadian public good. This means that the Crown has the obligation to take into consideration the impact of its decision on the interests of the public good of

Canada.[5] As will be demonstrated in this paper, with aboriginal rights, courts at various levels balance their interpretations between the Canadian public good, and the principles of fiduciary law.

As in other fiduciary relationships, it is important to examine the general approach of the application of fiduciary principles in order to understand how and why the Crown fails to fulfill obligations to Native peoples. The recent academic literature on the subject of fiduciary relationships maintains that the nature of the fiduciary relationship should be based upon the specifics of the relationship at the time it was formed. Based upon this application of fiduciary analysis the nature of the Crown-Native fiduciary relationship would be based upon a nation to nation relationship as it was at the time of contact between the European and Native peoples and arguably as it has been since this time period.[6] However, it is evident that the courts are not interpreting the Crown's fiduciary obligations regarding aboriginal rights in this manner.

The one exception to the court's improper interpretation is the issue of land surrenders. With regards to land surrenders, both the Federal and Supreme Court have interpreted the Crown's fiduciary principles in a manner consistent with situation-specific analysis. Nevertheless upon closer examination it is clear

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[5] For the purposes of this paper the public good can be defined as: the wider public policy interests of Canadian society as a whole.

[6] Based upon this application of fiduciary analysis the Crown-Native fiduciary relationship was formed during the immediate post-contact period. Furthermore the relationship was based upon the mutually recognized and respected sovereign status of the Crown and aboriginal peoples. This application contends that the Treaty of Albany in 1664, the Royal Proclamation of 1763, and the *Indian Act* are all manifestations of the fiduciary relationship, which was crystallized, in the first years of contact.
See Leonard Ian Rotman, Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada (Toronto: University of Toronto Press, 1996), 13.

that in regards to aboriginal rights, the judiciary despite using the rhetoric of fiduciary law has rejected the situation-specific application of fiduciary law. However, it should be noted that while the various levels of courts have not adhered strictly to fiduciary law, they have not rejected it completely either. Instead, through it is interpretations the judiciary has adapted what I shall term a "paradigm of accommodation". This phrase refers to the Canadian courts attempt to address its fiduciary obligations regarding aboriginal rights without fully adhering to fiduciary jurisprudence. This attempt typically consists of the courts recognizing an aboriginal right, but ensuring through the *suis generis* nature of aboriginal law that the public good is also recognized.[7] In short this term refers to the judiciary's attempts to compromise between aboriginal rights and the public good. While aboriginal rights are recognized, courts at all levels are rejecting the notion that aboriginal rights are paramount over the rest of Canadian society. Instead, legal jurisprudence on the subject, has taken a moderate approach by accommodating aboriginal rights by recognizing their existence, on the one hand, but also reinforcing the fact that in certain circumstances the public good is paramount over aboriginal rights on the other. The certain circumstances referred to are the specifics of individual cases. This moderate approach runs contrary to the fiduciary principles found in private law fiduciary relationships were the fiduciary duty is the only duty. Instead the judicial interpretation regarding the constitutional obligations, has the fiduciary recognizing the beneficiary's interest as being equal to or in some cases superseded by the Crown's duty to the public

[7] Thomas Isaac, Aboriginal Law: Cases, Materials and Commentary (3rd ed.; Saskatoon, Purich Publishing, 2004), 222.

good. With respect to aboriginal rights, the judiciary's interpretation of these obligations is focused more on accommodating aboriginal rights while also recognizing other Canadian interests (chiefly the interests of the Canadian public) instead of recognizing fiduciary obligations based upon the historic relationship between the Crown and Native peoples.[8]

This paper is divided into six chapters. The first chapter defines what constitutes a fiduciary relationship. The chapter outlines the fiduciary principles found in a private law context, and explains the application of situation specific analysis to fiduciary relationships. The second chapter provides a review of literature related to the Crown-Native fiduciary relationship. Furthermore the chapter also discusses the application of the functional theory to the Crown-Native relationship.[9] The next three chapters examine the two types of fiduciary obligations that have been recognized by the Canadian courts as existing between the Crown and Native peoples.[10] The two types of obligations are land surrenders (where the Crown interposes itself between native peoples and third parties) and the recognition and protection of aboriginal and treaty rights. The fourth chapter examines the judiciary's interpretation of land surrenders. This

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[8] The "paradigm of accommodation" is in direct contrast with the "paradigm of parallelism". The term "paradigm of parallelism" can be derived from Alan Cairns's book Citizens Plus: Aboriginal Peoples and the Canadian State. This paradigm stresses nation to nation relationships and treaties as an instrument to regulate them. This model stresses the difference between aboriginal "nations" and the rest of Canadian society. Furthermore it suggests a relationship of two separate nations coexisting together but with little or no interdependent relations. In Carins's Citizens Plus, the analysis is focused more on the issue of citizenship and self-government rather than the Crown-Native fiduciary relationship. Nevertheless, the "paradigm of parallelism" is relevant here, as it is the same paradigm that the literature and fiduciary law is advocating when it refers to a fiduciary relationship based upon nation to nation analysis. See: Cairns, Citizens Plus: Aboriginal Peoples and the Canadian State (Vancouver: UBC Press, 2000), 92.

[9] The functional theory is another term for the situation-specific analysis.

[10] It should be noted that all legal decisions examined in this paper are examined because of their impact on the judicial interpretation of the Crown-Native fiduciary relationship.

chapter argues that for the most part, the Federal and Supreme Court interpretations of land surrenders are consistent with the functional application of fiduciary analysis. The fifth chapter examines the judiciary's interpretation of aboriginal and treaty rights.[11] The examination of the interpretation of aboriginal rights is continued in the sixth chapter. However, this chapter focuses mainly on the aspect of consultation and infringement as it relates to aboriginal rights.[12] Both the fifth and sixth chapter argue that with particular regard to aboriginal rights, court interpretations are more concerned with accommodating aboriginal rights rather then fully enforcing the Crown's fiduciary obligations. The final chapter is the conclusion, which examines the implications and potential implications of the interpretation of the Crown's fiduciary obligations.

[11] It should be noted that aboriginal title is considered a subset of aboriginal rights.

[12] While the sixth chapter is a continuation of the fifth, the cases cited in the sixth, are both the best and most recent examples of the "paradigm of accommodation".

CHAPTER 2 FIDUCIARY BACKGROUND

Before discussing the nature of the Crown-Native fiduciary relationship, it is important that one understand the general nature of fiduciary law. The origins of fiduciary law can be found in the discipline of public policy. The purpose of fiduciary law arises from the desire to protect certain types of relationships that are deemed to be socially valuable and necessary.[13] The rationale behind fiduciary responsibility is clear; individuals trust others to act on their behalf or to perform duties for them.[14] This placing of trust by one individual in the honesty, integrity and fidelity of another, and the reliance of the latter for care of that trust, is the basis for the creation of legal mechanisms such as fiduciary law and the law of trusts.[15] The essential purpose of fiduciary laws is to protect the integrity of the relationship by ensuring that those who possess the ability to affect the other's interests are prevented from exploiting the trust of the other for their own gain. In short these laws ensure that the fiduciary acts consistently with reference to the agreed upon undertaking.[16] Traditionally fiduciary law has been a part of private law. However, the Crown-Native fiduciary relationship is an exception as Native law encompasses the legal relationship between aboriginal peoples and

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[13] P.D. Finn, "The Fiduciary Principle" in Equity Fiduciaries and Trusts, ed. T.G. Youdan (Toronto: Carswell, 1989), 24.

[14] Traditionally this relationship consists of two parties: the beneficiary, and the fiduciary. It is the beneficiary who places his trust in the fiduciary.

[15] Leonard I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding," Alberta Law Review 4 (1996): 826.

[16] Maddaugh, op.cit., 32.

the Crown in Canada, which is a part of public law[17]. This combination of private and public law indicates the *suis generis* nature of the Crown-Native fiduciary relationship. Examples of fiduciary relationships within society are trustees, executor and administers, agents, real estate agents, insurance agents, banks, stockbrokers and financial advisors, accountants, medical practitioners, joint venturers, lawyers, company promoters, company directors, and government authorities.[18]

A fiduciary relationship posses three general characteristics:

The fiduciary has scope for the exercise of some discretion or power.

The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[19]

A fiduciary relationship is more than a "trust" relationship; it is a "trust-like" relationship. The difference being that there is no requirement that the fiduciary hold a legal title in the context of that relationship; whereas in a trusteeship this is required. An example demonstrating the difference is the relationship between a doctor and a patient. The patient does not place a legal title in trust with the doctor, yet he does place *his trust* in the doctor to work exclusively in the interest

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[17] Leonard Ian Rotman, Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada (Toronto: University of Toronto Press, 1996), 12.

[18] The Right Honourable Sir Robert E. Megarry, "Historical Development" in Law Society of Upper Canada; Special Lectures: Fiduciary Duties (Scarborough: A Richard De Boo Publication, 1990), 5.

[19] J.R. Maurice Gatreau, "Demystifying the Fiduciary Mystique," The Canadian Bar Review 68 (March 1989): 5.

of the patient. Another difference between trust law and fiduciary law is that the "trust" in trust law is limited in scope to the particulars of that specific contract. In contrast a fiduciary relationship is open-ended and never limited. This means that in a relationship that is considered fiduciary a new fiduciary obligation can arise out of the circumstances of that relationship.[2021] Furthermore these obligations continue until the termination of the relationship, and or the nature of the relationship changes so that it is no longer a fiduciary relationship.[22]

In regards to the application of fiduciary doctrine, the literature surrounding fiduciary law has argued for an analysis that goes beyond that of the "rigid application of a standard formulae, and instead pays due attention to the unique requirements of the particular relationship."[23] In fact it is clear that the literature on this topic has decisively argued that it is impossible to decide whether a relationship is fiduciary simply by determining whether it fit is into an established category of fiduciary relations.[24] It has become increasingly clear that the traditional concept of fiduciary obligations has been replaced with a much more

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[20] Rotman, "Fiduciary Doctrine," 832.

[21] However it should be noted that while new fiduciary duties can arise out of a fiduciary relationship this does not mean that all aspects of a fiduciary relationship are fiduciary in nature. That some fiduciary relationships are fiduciary in nature for only some specific purposes or in respect of some specific property, idea or action, or concerning only one of a number of joint undertakings. See Ronald G. Slaght, "Proving a Breach of Fiduciary Duty" in Law Society of Upper Canada; Special Lectures: Fiduciary Duties (Scarborough: A Richard De Boo Publication, 1990), 40.

[22] An example of this would be when an individual no longer places their trust in the hands of another.

[23] Rotman, "Fiduciary Doctrine," 821.

[24] Gatreau, op.cit., 1-29.

liberal interpretation.[25] The new concept of fiduciary relationships that has been generally accepted is derived from the premise: "It is the nature of the relationship rather than the category of actor involved that gives rise to the duty".[26] This liberal concept of fiduciary relationships is referred to as the "functional theory"[27] and is the same concept that is accepted by the literature that focuses upon the analysis of the Crown-Native fiduciary relationship.[28] This concept is that a fiduciary relationship should be determined by the actual specifics of the relationship based upon the intent of fiduciary doctrine; the intent of the fiduciary doctrine is "a blueprint for the protection and continued efficacy of interdependent societal relations."[29]

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[25] Robert Flannigan, "Fiduciary Obligation in the Supreme Court," Saskatchewan Law Review 54 (1990): 70.

[26] Gatreau, op.cit., 8.

[27] The "functional theory" is elaborated upon more thoroughly in the next chapter.

[28] Rotman, "Fiduciary Doctrine," 850.

[29] Ibid. at 851.

CHAPTER 3 LITERATURE REVIEW

The academic literature surrounding the Crown's fiduciary relationship with First Nations peoples essentially begins with the 1984 *Guerin* decision. The *Guerin* decision was the first court decision that recognized that the Crown's obligations to aboriginal peoples are fiduciary in nature, and therefore legal rather than a political or moral obligation.[30] The origin of this duty was the historical relationship between the Crown and Aboriginal peoples, along with the nature of aboriginal title and in particular the proposition that the aboriginal interest in land is inalienable[31] except upon surrender to the Crown.[32] Because of the *suis generis* nature of the court's decision concerning the Crown's fiduciary obligation, much of the initial literature surrounding this fiduciary relationship, consisted of a cautious examination of the scope, nature and context in which the Crown had a fiduciary obligation to aboriginal peoples.

The examination was cautious, as the dialogue was limited[33] to the issues of aboriginal title and land surrender. However, many of the issues raised by the literature at this time are still relevant today. One theme that the early literature dealt with was the issue of a general fiduciary duty. Hurley's article "The Crown's

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[30] see *R. v. Guerin.*, [1985] 1 C.N.L.R. 120.

[31] The specifics of the case were centered on the Crown's obligations in dealing with surrendered reserve land. As a result, the legal discussion of the Crown's fiduciary obligations was in relation to the issue of land surrenders.

[32] *R. v. Guerin.*, [1985] 1 C.N.L.R. 120.

[33] Because of the *suis generis* nature of the decision.

Fiduciary Duty and Indian Title: *Guerin v. The Queen*"[34] argued for a general fiduciary duty in regards to the protection and disposing of aboriginal title.[35] Darlene Johnston's article "A Theory of Crown Trust Towards Aboriginal Peoples" argued that there would have to be more court decisions before a coherent theory could be formed.[36] Brian Slattery's influential[37] "Understanding Aboriginal Rights" argued that the Crown held a general fiduciary obligation to protect aboriginal peoples and their lands including aboriginal rights.[38]

The other theme that is common among the early literature is the identification of the relationship as being *suis generis* in nature, and that the reason the relationship is fiduciary is because of the historical relationship between the two parties. Bartlett's "The Fiduciary Obligation of the Crown to the Indians" argues that in order to understand the Aboriginal-Crown relationship and the fiduciary obligations owed to Aboriginal peoples one must take into account the historic background of the relationship since the nineteenth century.[39] This argument is reinforced by arguments made by both Hurley and Slattery that the specifics of the fiduciary relationship have been shaped by (in Hurley's case) the nature of aboriginal title and statutory agencies as well as (in Slattery's case) common law principles.

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[34] John Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin v. The Queen,*" McGill Law Journal 30 (1985): 559-602.

[35] Examples of statutory agencies would be the Royal Proclamation of 1763, or the *Indian Act.*

[36] Darlene M. Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples," Ottawa Law Review 18 (1986): 307-332.

[37] It was later cited by the Supreme Court in the *Sparrow* decision.

[38] Brian Slattery, "Understanding Aboriginal Rights" The Canadian Bar Review, 66 (1987): 727-783.

[39] Richard H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians," Saskatchewan Law Review 53 (1989): 301-325.

In this early literature the two themes emerging are the argument for a general duty and an acknowledgement of the role the past plays in determining the nature of the fiduciary relationship. While this literature was concerned with the source and scope of the Crown's fiduciary obligations, this literature still examined the relationship in very broad terms; it did not really deal with the precise nature of the fiduciary relationship other than in the specific context of land surrenders.

The 1990 *Sparrow* decision addressed this criticism of the nature of the Crown's fiduciary obligations by providing another example, other than land surrenders, in which the Crown owed fiduciary obligations to Aboriginal peoples. This example was the Crown's commitment to protecting aboriginal and treaty rights.[40] The *Sparrow* decision made it clear that the Crown's fiduciary duties applied to Crown-Native relations generally and that the duties are a guiding principle in the consideration of aboriginal and treaty rights in section 35 (1) of the *Constitution Act 1982*.[41] As a result of the *Sparrow* decision, the Supreme Court effectively dictated that all future judicial considerations of aboriginal and treaty rights encompassed within Section 35 had to take into account the existence of the Crown's fiduciary obligations.

The *Sparrow* decision ruled that because of the generality of Section 35 (1) the courts should fill in the gaps by inferring a list of suitable criteria in which aboriginal and treaty rights can be infringed upon. The *Sparrow* justificatory test is comprised of these criteria. The court ruled that the *Sparrow* test must be

[40] *R v. Sparrow* [1990] 1 S.C.R. 1075.
[41] Ibid. at 1077.

implemented on a case by case basis.[42] In the case of aboriginal and treaty rights, the Crown's fiduciary obligation is a government obligation to apply constitutionally protected rights in favor of aboriginal people.[43]

The Sparrow decision provided a framework from which the courts could clarify the Crown's fiduciary duties associated with aboriginal rights. However, the subsequent literature surrounding the Crown's fiduciary duties, continued to be highly critical of the courts application (since the *Sparrow* decision) and perception of the Crown's fiduciary duties. Bryant argues that the courts tend to gloss over fiduciary principles and provide little direction as to the nature of it is fiduciary undertaking.[44] Hutchins, Schulze, and Hilling contend that the case law is becoming less specific in regards to the content of the duty even though they

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[42] For the *Sparrow* test to be applied there must be a *valid* legislative objective, an objective which the test determines as to whether it interferes with Section 35(1)'s guarantee of aboriginal and treaty rights. Furthermore the legislative objective is to be obtained in manner which upholds the honor of the Crown, and is in keeping with the political and historical relationship between the Crown and Aboriginal peoples. (upholding the Crown's honor can be done through consultation and compensation) This is determined by a three part approach: 1) Is the limitation imposed by the legislation unreasonable? 2) Does the legislation impose undue hardship on the aboriginal peoples? 3) Does the legislation deny aboriginal peoples their preferred means of exercising their Section 35(1) rights? Furthermore the onus of proving an infringement lies on the individual or group challenging the legislation. It should also be noted that the *Sparrow* test combined with the further jurisprudence of the *Badger , Van Der Peet* and *Delgamuukw* decisions, forms the basis of Supreme Court of Canada decisions dealing with s. 35. The factors that the Supreme Court takes into account in determining whether the burden of justification has been properly discharged are 1) Whether the legislative or administrative objective is of sufficient importance to warrant infringement; 2) Whether the legislative or administrative conduct infringes the treaty right as little as possible; 3) Whether the effects of the infringement outweigh the benefit is derived from the government action; and as third part of the *Sparrow* test, in order for the Crown to justify it is infringement it must prove a) that there is a compelling and substantial government objective and b) that the infringement must be consistent with the Crown's role as a fiduciary. This last aspect includes whether adequate meaningful consultation has taken place and whether aboriginal peoples have been compensated for the infringement.

[43] David W. Elliot, "Aboriginal Peoples in Canada and the United States and the Scope of the Special Fiduciary Relationship," Manitoba Law Journal, 24 (1996): 155.

[44] Michael J. Bryant, "Crown-Aboriginal Relationship in Canada," U.B.C. Law Review 27 (1993): 19-49.

acknowledge the existence of the duty.[45] Similarly Elliot argues that the courts must provide more clarity in regards to their perception of what the Crown's fiduciary obligation entails.[46]Furthermore most recently, Michael acknowledge in 2003, that while the precise nature of the Crown's fiduciary duty is uncertain, the Crown has an obligation to preserve the distinctiveness of aboriginal cultures.[47] He argued that the Crown should create a "protected space" for aboriginal institutions that are necessary for their cultural survival.

At the same time another branch of the post-*Sparrow* literature has consistently criticized court decisions that have limited aboriginal rights and title and therefore the Crown's fiduciary obligations. While this literature is related to the subject of the Crown's fiduciary obligations, however, it does not directly examine the concept of the fiduciary relationship and while it is useful as case examples much of the overall analysis is not always relevant to the questions being examined in this paper.[48]

One author that particularly stands out in the literature surrounding the Crown-Native legal relationship is Leonard Rotman. In his book Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada, the main thesis

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[45] Peter W. Hutchins and David Schulze with Carol Hilling, "When Do Fiduciary Obligations To Aboriginal People Arise?," Saskatchewan Law Review 59 (1985): 97-137

[46] Elliot, op.cit., 137-186. See also: Bob Freedman "Semiahmoo Indian Band v. Canada," Alberta Law Review, 54 (1997): 218-236.

[47] Michael Coyle, "Loyalty and Distinctiveness: A New Approach to the Crown's Fiduciary Duty Toward Aboriginal Peoples" Alberta Law Review, 40 (2003): 841-866.

[48] See: Catherine Bell, "New Directions in the Law of Aboriginal Rights" The Canadian Bar Review, 77 (1998): 36-72., Brian Donovan, "The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of *Delgamuukw*" U.B.C. Law Review, 35 (2001): 43-99., and Lisa Dufraimont, "From Regulation to Recolonization" University of Toronto Faculty of Law Review, 58 (2000): 3-30.

is the argument for the application of Rotman's "functional theory" in addressing the unanswered questions surrounding the development of the Crown-First Nations fiduciary relationship.49 Rotman argues that to determine whether a particular relationship is a fiduciary relationship, one must examine the specific circumstances of that relationship, in order to determine it is precise nature. Rotman argues that by applying his "functional approach" the judiciary's misrepresentation and ambiguity surrounding the Crown-Native relationship can be corrected. Rotman contends that the Crown's fiduciary duty to First Nations peoples applies to virtually every facet of the Crown-Native relationship, and that the basis for this relationship is found in the historical relationship between the two parties, dating back to the time of contact.50 This is a particularly important point when one considers the importance that the specifics of a relationship have in a fiduciary relationship. Given this argument, Rotman's contends "the nature of the Crown's fiduciary obligations is founded on the mutually recognized and respected sovereign status of the Crown and Aboriginal Peoples."51 In short Rotman is arguing that this particular relationship is between two separate and equal actors. In other words the relationship is on a nation to nation basis. Rotman's approach would provide an applicable theory, which examines the actuality of the circumstances rather then whether the circumstances fit a categorical definition of other fiduciary relationships. Rotman asserts the

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[49] Leonard Ian Rotman, Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada (Toronto: University of Toronto Press, 1996), 17-18.
[50] Ibid. at 15.
[51] Ibid. at 12.

reasoning which many courts use in making a decision is based on mistaken understandings of the fiduciary relationship.52

Rotman's contentions are important because his thesis incorporates all of the major criticisms of the Crown-Native fiduciary relationship into his analysis. In other words he pieces together the various criticisms of the Crown-Native relationship and places them together into a general critique of the fiduciary relationship between the two parties. Furthermore as a result of combining these criticisms Rotman's theory goes beyond critiquing a particular aspect of the Crown-Native relationship, but instead provides a new interpretation of why the judiciary is failing to correctly interpret the fiduciary relationship in question. This new interpretation consists of applying fiduciary principles to the relationship based upon contention that the nature of the relationship is based upon two individual sovereign nations. In short, while other authors have analyzed a certain aspect of the Crown-Native fiduciary relationship, Rotman's interpretation of the relationship is the only theory that examines the fiduciary relationship in a general, doctrinal method. A doctrine which argues for a general overarching fiduciary duty based upon the result of the historical relationship between the sovereign parties dating back to the time of contact.[53]

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[52] Ibid. at 11.
[53] Ibid. at 13.

CHAPTER 4 LAND SURRENDERS

This chapter applies fiduciary analysis to the Crown's obligations in regards to land surrenders. It examines the three main cases since *Guerin* that have created precedence regarding fiduciary obligations related to land surrenders. This chapter demonstrates how the courts have interpreted cases relating to land surrenders in a manner that is consistent with the fiduciary analysis found in private law and associated with common law trusts and trust-like principles. Moreover, this chapter examines the objective of the court's interpretation in this specific context. It demonstrates that while the judicial interpretation is not only consistent with fiduciary principles so is the objective of the interpretation. The objective of the interpretation is the exclusive protection of Indian land interests. Of note is the importance that the *Indian Act* plays in ensuring that obligations relating to land surrenders are carried out in a manner consistent with fiduciary doctrine.

4.1 Section A: ***R. v. Guerin***

In the 1984 landmark case of *Guerin v. R.* the Supreme Court of Canada determined that the nature of the Crown's obligation to aboriginal peoples is a fiduciary and therefore legal in nature rather then political and moral. In this particular decision, the majority held that[54] "the nature of Indian title and the

[54] Dickson J. wrote, for the majority.

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 Indian peoples."[55] Dickson determined that Indian title comes from two sources: Indian's historical occupation and possession of the lands, and the Royal Proclamation of October 1763. As well Dickson also stated that Aboriginal title is *suis generis* or unique to aboriginal peoples.[56] Furthermore the majority contended that:

> 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 it is nature completely exhausted by the concept of a personal right. It is true that the *suis generis* 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.... The nature of the Indian's interest is therefore best characterized by its general inalienability coupled with that fact that the Crown is under an obligation to deal with the land on the Indian's behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.[57]

4.2 Section B: ***Blueberry River Indian Band v. Canada***

Following the *Guerin* decision, several decisions expanded upon the Crown-Native legal relationship surrounding land surrenders. In *Blueberry River Indian Band v. Canada* (also known as Apsassin),[58] the Supreme Court of Canada held that the federal government breached its fiduciary duties to the

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[55] *R. v. Guerin.*, [1985] 1 C.N.L.R. 120 at 131.

[56] Thomas Isaac, Aboriginal Law: Cases, Materials and Commentary (2nd ed.; Saskatoon, Purich Publishing, 1999), 230.

[57] *R. v. Guerin.*, [1985] 1 C.N.L.R. 120 at 136.

[58] *Blueberry River Indian Band v. Canada* [1995] 4 S.C.R. 344.

band concerning the surrender of reserve land and related mineral rights. The court determined that the Department of Indian Affairs and Northern Development (DIAND) failed to enforce a statutory power, which, in this case would have lessened the band's loss. As a trustee of the band's land, DIAND was under a fiduciary obligation to deal with the band in the "best interests" of the band. As well the band was entitled to receive compensation based on what a reasonable price would have been for the land.[59] Furthermore the court ruled that the Crown owed the band a fiduciary duty to avoid exploitative bargains in surrender transactions.[60]

In 1916, the Beaver Band surrendered its Aboriginal title in exchange for reserve land in northeastern British Columbia. The band never resided permanently on this reserve and in 1940, sold the mineral rights to the Crown, so that the Crown could lease them out. In 1945, the band surrendered the whole reserve, and the Crown used the money to acquire new reserve land. Between 1948 and 1956 war veterans were allocated the surrendered reserve land through various sales transactions with the Crown. In 1976, an important oil find was made on the surrendered reserve land, which resulted in approximately $300 hundred million of economic value for the veterans who had acquired it. As a result of this discovery, the Blueberry River Indian Band sued the Crown for various fiduciary breaches in the transactions under which it had surrendered the land.[61]

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[59] Isaac, Aboriginal Law: Cases, Materials and Commentary (2nd ed .) 231.
[60] Mainville, op.cit., 56.
[61] *Blueberry River Indian Band v. Canada* [1995] 4 S.C.R. 344 at 55.

The analysis of the court's application of fiduciary principles can be measured by the court's interpretation of the nature of the relationship in question. In regards to the *Blueberry River Indian Band v. Canada* case, the majority's application can be identified as both progressive and conservative. It was progressive in that the majority based their findings on the nature of the relationship between the Blueberry River Indian band and the federal government. Similar to *Guerin*, the majority acknowledged that "trust-like" obligations and principles were relevant to the analysis of a surrender of Indian lands.[62] Like *Guerin*, the discussion centered on the nature of the duty owed by the Crown in regards to Indian bands surrendering reserve land to the Crown for the purpose of selling or leasing. As a result, the framework of the case's discussion was very similar to the content of the court's discussion found in *Guerin*. While the application of fiduciary principles, was shaped around common law trust, and trust-like principles, the majority's reasoning was consistent with the fiduciary principle that the relationship should be based upon the actual specifics of the relationship. The majority's application of this principle is demonstrated in the majority's judgement written by Gonthier:

> In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *suis 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.*[63](emphasis added)

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[62] Ibid. at 13.

[63] Ibid. at 7.

Furthermore, the majority makes it clear in the following quote that given the *suis generis* nature of aboriginal title, the reasoning of the majority was based on the actual specifics of the land surrender in question; "I think that in principle an intention-based approach is preferable to my colleague's more technical reasoning"(referring to the minority's judgement).[64] It is clear from these quotes that at least in theory the majority judgement was made based upon principles that are consistent with fiduciary jurisprudence. For the majority as well as the minority, the ultimate issue in the case as it was in *Guerin* was whether the Crown could have prevented an exploitative bargain.[65] Furthermore, this particular case raised and created precedent when it ruled that the Crown had a post-surrender duty to correct the error of the sale of the mineral rights. For both the minority and the majority opinions in the decision, the issue was whether the Crown acted in the best interests of the band by not attempting to correct it is mistake of allowing the transfer of the surrendered land's mineral rights to the Director of *The Veterans Land Act*; a mistake it realized post-surrender. Both the majority and the minority ruled that the Crown did owe the Blueberry River band a post-surrender fiduciary duty, and that this duty was based upon the *specific* nature of the Crown-Native relationship. As the majority noted in their judgement, the Department of Indian Affairs had "a long-standing policy of reserving mineral rights for the benefit of aboriginal peoples when selling Indian Lands."[66] More importantly, what ultimately decided the issue was the role of section 64 of the

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[64] Ibid. at 8.
[65] Ibid. at 35.
[66] *Blueberry River Indian Band v. Canada* [1995] 4 S.C.R. 344 at 21.

Indian Act.[67] In their reasons both the majority and the minority judged that the Department of Indian Affairs breached its fiduciary duty by failing to regain the potentially valuable mineral rights through section 64 of the *Indian Act* and therefore failing to act in the best interests of the band and avoid an exploitative bargain.[68] The majority's judgement is best summed up by J. Gonthier's statement:

> In my view, a reasonable person in the DIA's position would have realized by August 9, 1949 that an error had occurred and would have exercised the s. 64 power to correct the error, reacquire the mineral rights, and affect a leasing arrangement for the benefit of the Band. That this was not done was a clear breach of the DIA's fiduciary duty to deal with I.R. 172 (surrendered land) according to the best interests of the Band.[69]

The analysis of the enforcement of the post-surrender duty is very straightforward in that section 64 of the *Indian Act* gives the Crown the ability to withdraw from transactions that do not serve the best interests of the band in question. This allows the Crown to enforce its duty of acting in the best interests of the band post-surrender. Furthermore, the nature of this decision was chiefly concerned with defining an aspect of the fiduciary duty's associated with land surrenders and the *Guerin* decision.[70]

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[67] Section 64 of the 1927 *Indian Act* allows the Crown to revoke any sale or lease issued in error or mistake. It states: If the Superintendent General is satisfied that any purchaser or lessee of any Indian lands, or any person claiming under or through him, has been guilty of any fraud or imposition, or has violated any of the conditions of the sale or lease, or if any such sale or lease has been made or issued in error or mistake, he may cancel such sale or lease and resume the land therein mentioned, or dispose of it as if no sale or lease thereof had ever been made. See: *Blueberry River Indian Band v. Canada* [1995] 4 S.C.R. 344 at 112.

[68] Ibid. at 24.

[69] Ibid. at 22.

[70] *R. v. Guerin.*, [1985] 1 C.N.L.R. 120.

When examining the details of the *Blueberry River Indian Band* case, it is clear that the court's application and enforcement of fiduciary principles are consistent with the general application of fiduciary doctrine as it relates to land surrenders. While the *Blueberry River Indian Band* case did create new precedent in regards to post-surrender duties, the case it itself did turn largely on it is own facts. What ultimately decided the outcome of the case was section 64 of the *Indian Act*. This fact is consistent with the *Guerin* decision, which was the other major land surrender case at that time. In *Guerin*, Dickson held that the *Indian Act* was the chief agent in ensuring and enforcing the Crown's fiduciary principles in regards to land surrenders. This reasoning is consistent with fiduciary analysis because the *Indian Act* mandates or enforces the traditional relationship between the Crown and First Nations peoples in regards to land surrenders.[71] That like the Royal Proclamation of 1763, the *Indian Act* is simply the continuation of the long-standing practice of interposing the Crown between the First Nations and prospective purchasers or leasers of their land, in order to prevent First Nations from being exploited.

Like the *Guerin* case, the *Blueberry River* case demonstrates an example where both the actual judicial and fiduciary analysis are consistent on the application of fiduciary principles to the case. The primary reason for this agreement is the use of the *Indian Act* as an application of the Crown's fiduciary obligations. In both cases, through the evidence of the *Indian Act* it is clear that the role of the Crown in land surrenders is to interpose itself between Indians and

[71] Rotman, Parallel Paths, 106-107.

third parties. The Crown's role of accepting responsibility of Indian land interests clearly falls within the definition of fiduciary obligations. Moreover, from the application of these fiduciary principles, it is clear that the objective of the court's interpretation was the protection of Indian land interests. The court interpreted the Crown's fiduciary obligations in a manner that clearly defined the objective of the Crown's obligations as the protection on Indian land interests via the *Indian Act.*

4.3 Section C: ***Semiahmoo Indian Band v. Canada***

In *Semiahmoo Indian Band v. Canada,*[72] the Federal Court of Appeal held that under the precedent set out by the *Blueberry River Indian Band* case, the Crown owed the band a judicially enforceable fiduciary duty to avoid exploitative bargains in surrender transactions. Furthermore, this pre-surrender duty was also found to exist as a post-surrender duty. This finding forced the Crown to restore the surrendered land to the band. In 1951 the Crown sought and obtained small land surrender in order to allow the Department of Public Works to expand its custom facilities. However, no expansion of the custom facilities was ever carried out. Meanwhile, over the years, the band requested the return of the land but government officials refused their requests. As a result, the band sought judicial redress. The band argued that the 1951 surrender was exploitative because the band would not have surrendered the land in the normal course of events and felt powerless before the Crown in this transaction. The court found that the Crown had a clear duty to protect the band by refusing to consent to an absolute

[72] *Semiahmoo Indian Band v. Canada* [1998] C.N.L.R. 250.

surrender of reserve land, land for which there was no clear or current public need.

The Federal Court of Appeal in the 1998 *Semiahmoo Indian Band v. Canada* case examined the legal relationship between the Crown and First Nations in a manner that would be considered consistent with general fiduciary law. The court made it clear that it would measure the application of the Crown's fiduciary duties by assessing the specific relationship between the two parties. An example of the court's determination to assess the specifics of this particular Crown-Native relationship, are demonstrated in the quote: "the Court must examine the specific relationship between the Crown and the Indian Band in question in order to define the nature and scope of that obligation."[73]

The Court of Appeal ruled that the Crown had breached it is fiduciary duties on two counts. The first breach occurred as a pre-surrender fiduciary duty, when the Crown failed to withhold it is own consent to the 1951 land surrender. The court noted that as was stated in the *Apsassin* case, the Crown has a fiduciary obligation to prevent exploitative bargains.[74] The 1951 surrender was found to be exploitative for two reasons. The first reason was that the band would not have surrendered the land in the normal course of events and felt powerless before the Crown in this transaction.[75] The band felt powerless because it knew that the Crown had the ability to expropriate the land for public purposes even if

[73] Ibid. at 37.
[74] Ibid. at 34.
[75] Ibid. at 46.

the band refused to surrender.[76] The second reason the surrender was deemed exploitative was that the Court ruled that the Crown had a clear duty to protect the band by refusing to consent to an absolute surrender of reserve land for which there was no foreseeable public need.[77] In it is judgment the Court ruled that:

> The specter of expropriation clearly had a negative impact on the ability of ...Band to protect their own interests in the "negotiations" which ultimately led to the surrender...the Crown must ensure that it impairs the rights of the affected Indian band as little as possible, which includes ensuring that the surrender is for a timely public purpose. In these circumstances, the Crown had a clear duty to protect the Band from an exploitative bargain by refusing to consent to an absolute surrender which involved the taking of reserve land for which there lacked a foreseeable public need.[78]

The second breach of the Crown's fiduciary duties occurred post-surrender. The second breach occurred in 1969 when the Crown refused to return the surrendered land to the Band, despite a formal Band council resolution that such action be taken. By 1969, it was clear that the Band wanted the land back for economic development, and that the Public Works department did not have any definite plans for development of the land in the foreseeable future.[79] As a result, the land was being unused and it indicated that the Public Works department was retaining the land merely for the sake of convenience.[80] The Court ruled that by 1969 a reasonable person in the DIAND would have realized these facts, and therefore: "The respondent's failure to reconvey any portion of

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[76] Ibid. at 46.
[77] Ibid. at 46.
[78] Ibid. at 48.
[79] Ibid. at 66.
[80] Ibid. at 66.

the surrendered land to the Band despite its knowledge, by 1969, of these material facts constituted a breach of it is post-surrender duty."[81]

In regards to the enforcement of this duty, like the *Blueberry River Indian Band* case, the *Semiahmoo* case focused largely on defining the nature of the duties that were identified in the *Guerin* decision.[82] While the *Blueberry River* case focused largely on defining the post-surrender duty, the *Semiahmoo* case focused on examining both the pre and post surrender aspects of the fiduciary relationship. In this regard the *Semiahmoo* case is important because it clarifies the Crown's fiduciary obligation of ensuring the avoidance of exploitative bargains. This includes the pre-surrender obligation of the Crown withholding it is own consent when after *it is own* careful scrutiny it deems a potential transaction to be exploitative. Furthermore the Court made it clear that the breach of the fiduciary duty to avoid exploitative bargains "must be on the extent to which the respondent (the Crown) protected the best interests of the Band while also acknowledging the Crown's obligation to advance a legitimate public purpose."[83] This leads into the Crown's second breach of it is fiduciary duty, in that the evidence of the Court showed that by 1969 it was clear to both the Semiahmoo Indian Band and the Crown that the Public Works department had no clear plan for the land, and that this surrender was not advancing a legitimate public

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[81] Ibid. at 68.

[82] It should be noted that while not directly related to the focus of this paper the Court ruling in the *Semiahmoo* case, also touched on constructive trusts and equitable damages. The Court ordered the return of the surrendered lands through a constructive trust to the benefit of the band. The Court also decided that the band could be provided with equitable damages for lost opportunities and injurious affection to the remainder of it is reserve lands consequential to the deprivation of the surrendered lands for such a long period of time.

[83] *Semiahmoo Indian Band v. Canada* [1998] C.N.L.R. 250 at 46.

purpose.[84] In regards to the actual enforcement, like the *Blueberry River Indian Band* case, the *Indian Act* surrender provisions make it clear that the purpose of interposing the Crown between the band and a third party is to prevent the band from being exploited.[85]

The judgment in the *Semiahmoo* case was consistent with both previous cases concerning land surrenders, and general fiduciary principles. It was consistent with previous land surrender cases in that it elaborates upon the Crown's fiduciary obligation to prevent exploitative bargains. This obligation was first identified in *Guerin*, and examined in the *Blueberry River Indian Band* case.[86] Furthermore the case also builds upon the *Blueberry River* precedent of defining and examining the Crown's post-surrender fiduciary duties. With reference to fiduciary doctrine, the *Semiahmoo* case is consistent with fiduciary principles in that the Court's decision in the case was based upon the specific circumstances of the Crown-Semiahmoo relationship. That the ultimate enforcement of the Crown's fiduciary duties in this case was the *Indian Act*, an act which both the *Guerin* case and the fiduciary literature argues, mandates the historic Crown-Native relationship. Moreover it is clear from the evidence that the Crown breached its fiduciary duty to avoid exploitative transactions. It is clear that the Band felt it had no choice but to surrender the land, that the Public Works department had no real legitimate public purpose for the land. Moreover the Crown (in the form of the DIAND) was aware by 1969 that Band wanted the land

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[84] Ibid. at 68.
[85] Ibid. at 35.
[86] Ibid. at 35.

back and that the Public Works department had no foreseeable plans for the surrendered land. Like the *Guerin* and *Blueberry River* cases, the *Semiahmoo* decision was consistent with the principles derived from fiduciary law. Like the other two cases, the *Indian Act* played an important role in influencing the Court to rule that the Crown had breached it is fiduciary obligations. In addition, like the cases before it, it is clear from the application of fiduciary principles that the ultimate objective of the judicial interpretation was the protection of Indian land interests.

4.4 Section D: ***Wewaykum Indian Band v. Canada***

At issue in the *Wewaykum Indian Band v. Canada*[87] case, was the content of the Crown's fiduciary duty before and after a reserve is created. The details of the case were focused upon two B.C. Indian bands claiming each others reserve land. Both the Campbell River Indian Band, and the Cape Mudge Indian Band claimed that the Crown owed them varying amounts of monetary compensation as a result of the Crown having breached it is fiduciary duty to both bands. Both bands also sought a formal declaration of trespass, possession and injunctive relief from the opposing band. Neither band claimed title based on existing aboriginal or treaty rights, instead, both bands rested their claims on the documentation of the Department of Indian Affairs. It is apparent that in the late nineteenth and early twentieth century, in separate instances the Department of Indian Affairs possessed documents that acknowledged that either the Cape Mudge band or Campbell River band owned *both* reserves. In 1912, McKenna

[87] *Wewaykum Indian Band v. Canada,* [2002] 4 S.C.R. 245 at 79.

McBride Commission acknowledged the error, but also stated that the current allocation of reserves was correct. Furthermore neither band challenged the government on this issue, and they accepted the current boundaries. In 1936 and 1937 each band issued a declaration listing its reserves. Neither band claimed the other's reserve. The dispute resurfaced in the late eighties when both bands initiated legal action against each other and the Crown. However, the Supreme Court dismissed the appeal having found that the Crown had not breached it is fiduciary duties, and that the B.C *Statute of Limitations* had extinguished any claim that the bands might have.

The 2002 *Wewaykum* decision was based on three aspects of the Crown's fiduciary duty: The first was the scope of the Crown's fiduciary duty in the process of the creation of Indian reserve lands; the second was whether the acts of government officials breached any fiduciary duty, and the third was whether equitable remedies were available to remedy such breaches.[88] In examining the scope of the Crown's fiduciary duty with reference to reserve creation, the Court made it clear that not all aspects of the Crown-Native relationship were fiduciary in nature. This is exemplified by Binnie's statement that:

> 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...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.[89]

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[88] Ibid. at 5.
[89] Ibid. at 83.

This reasoning is important and foreshadowed the Court's decision that the Crown did not breech any fiduciary duties. The Court's decision was based on two issues. The first was that in this particular case, unlike the *Guerin* case, the Crown was not interposing it itself between an Indian band and non-Indians with respect to an existing Indian interest in lands. Furthermore the two band's claims were not based upon any treaty or aboriginal right and therefore not protected by the *Constitution Act, 1982.* As a result, the two bands' claims of a fiduciary duty were outside the boundaries of the two types of fiduciary duties recognized by the courts.[90] The Court ruled that while the Crown's fiduciary duty towards aboriginal peoples varies in nature, it does not provide aboriginal peoples with a general indemnity.[91] The Court held that in this particular case, the Crown's 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."[92] The Court ruled that before the reserve is created, the Crown exercises a public law function under the *Indian Act* and that at this stage it is fiduciary duty is limited to the basic obligations of loyalty, good faith in the discharge of it is mandate, providing full disclosure appropriate to the subject matter, and acting with a view to the best interest of the beneficiaries[93]. It is only after reserve creation that the band acquires a "legal interest" in it is reserve and consequently the Crown's fiduciary duty expands to include the

[90] Ibid. at 91.
[91] Ibid. at 87.
[92] Ibid. at 91.
[93] Ibid. at 86.

protection and preservation of the band's interest from exploitation.[94] Furthermore, the Court stated that under the *Indian Act* "the Band had the right to decide whether to surrender the reserve, and it is decision was to be respected...if the Band's decision was foolish or improvident—a decision that constituted exploitation - - the Crown could refuse to consent."[95]

The *Wewaykum* case further clarified the scope of the Crown's fiduciary duties in relation to land surrenders. In keeping with fiduciary law's "functional theory" when one examines the specific circumstances of the two band's relationship with the Crown it is clear that the Crown did not breech it is fiduciary obligation to prevent exploitative bargains. Furthermore it is clear that this case was consistent with other cases involving fiduciary obligations that arise from land surrenders. As the Court stated in *Guerin*, it is not until after the reserve is created, that the band acquires a legal interest in the reserve, giving rise to a distinct fiduciary obligation on the part of the Crown. It is important to again note the role that the *Indian Act* plays in enforcing the Crowns fiduciary obligations regarding land surrenders. Furthermore it is important to note that the objective of the interpretation was the issue of Indian land interests. While the decision was not in favor of the plaintiffs, the decision was not influenced by objectives other then the application of fiduciary principles.

In the *Wewaykum* decision this importance came to light in that it is only after the creation of the reserve that the band acquires a legal interest, and it is only after the surrender of this reserve land (through the *Indian Act*) that specific

[94] Ibid. at 98.
[95] Ibid. at 99.

fiduciary obligations arise. Based on this legal process and the actual circumstances of the case, it is clear the Court's determination of the actual specifics of the case and the relationship. However, contrary to the general literature's argument that the Crown has a general fiduciary duty to Aboriginal peoples, this decision took an opposing position that the Crown only has *specific* fiduciary obligations related to various aspects of the Crown-Native relationship.

4.5 Chapter Summary

This chapter demonstrated how fiduciary analysis has been consistently applied to decisions involving land surrenders. It also demonstrated the role the *Indian Act* plays in mandating fiduciary obligations that are consistent with a private law fiduciary approach to the Crown-Native fiduciary relationship. Similar to a private law fiduciary, the *Indian Act* allows the Crown to interpose itself between an Indian Band and a third party during land surrender. These circumstances present a situation very similar to trusts, which are a function of private law. Furthermore as noted in this chapter, trust law had a large influence on *Guerin* and subsequent decisions associated with land surrenders. Also in regards to land surrenders, it is clear from the application of fiduciary analysis that the objective of the courts decision is the determination of the nature of the Indian interest in the land. Like fiduciary relationships in private law, the objective of the interpretation was based upon whether the beneficiary's (specific Indian land interest) interest was in some way infringed upon or exploited by the fiduciary (the Crown in this case). In short the interpretation focuses exclusively upon the Indian land interest.

CHAPTER 5 ACCOMMODATION VERSUS FIDUCIARY OBLIGATIONS

It is apparent that while the judiciary is willing to use fiduciary rhetoric, it is unwilling to apply actual situation-specific fiduciary principles to the rights protected under section 35 of the Constitution. Unlike the Crown's fiduciary obligations regarding land surrenders, the judicial interpretation of the recognition of aboriginal and treaty rights takes into account another interest other then that of the beneficiary. This interest is that of the public good. As a result of this consideration, the judicial interpretation has balanced its decisions between the protection of the beneficiary and the Crown's obligations to the public good. The result of this balanced interpretation is that the judiciary has not applied actual fiduciary principles to the interpretations. The reason for this is that fiduciary principles are based upon their being two actors; the fiduciary and the beneficiary. Because the judicial interpretation of aboriginal rights balances the interests of the beneficiary with that of the public good, the objectives of the interpretation is one of accommodation. In other words the legal interpretation's objective is not to address fully the interests of the beneficiary (as in other fiduciary relationships) but rather to accommodate the beneficiary's interests while taking into account the interests of the public good. While the judiciary has been willing to accommodate rights protected under section 35 of the Constitution Canadian courts at various levels have been unwilling to interpret

the Canadian-Native relationship in a manner that is characteristic of a true fiduciary relationship.

5.1 Section A: *R. v. Sparrow*

The first major decision involving section 35 was *R. v. Sparrow* in which the Supreme Court held that the Canadian government had a responsibility to act in a fiduciary capacity in respect to aboriginal peoples. The source of this fiduciary obligation was the *suis generis* nature of Indian title and the historic powers and responsibility assumed by the Crown. The court ruled, "contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[96] This court decision made it clear that the Crown's fiduciary duty to aboriginal peoples applies to Crown-Native relations generally; that it exists as a guiding principle in the consideration of Aboriginal and treaty rights in section 35 (1) of the *Constitution Act 1982*, and that the duty itself is an entrenched element of section 35 (1) of the constitution.[97] Furthermore the court stated that Section 35 (1) rights are to be construed in a purposive way, and that "a generous liberal interpretation is demanded given that the provision is to affirm aboriginal rights."[98] Based on this statement, the court asserted that Aboriginal rights are not to be depicted as frozen in forms that existed at the time of contact but instead they should be interpreted flexibly in order to permit their evolution

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

[97] The Crown's fiduciary duty concerning the protection of the rights recognized in section 35 (1) of the Constitution. This section states: "The existing aboriginal aboriginal and treaty rights of the aboriginal peoples are hereby recognized and affirmed." See *Constitution Act, 1982*, Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11

[98] *R. v. Sparrow.*, [1990] 1. S.C.R. 1075 at 1077.

over time.[99] The court also ruled that government actions and legislation can infringe on the exercise of an aboriginal or treaty right once the obligations of the *Sparrow* justificatory test have been met. In other words aboriginal rights can be infringed upon if there is a valid legislative objective. For the most part, legal jurisprudence generally considers the *Sparrow* decision to be the most prominent in Canadian aboriginal rights jurisprudence.[100] This decision is highly regarded because it determined that Section 35 (1) included the existence of a Crown responsibility to act in a fiduciary capacity with respect to Aboriginal people. Furthermore the decision recognized that the Crown owed Aboriginal people a general fiduciary duty; a duty which should be interpreted in a purposive way. This recognition of general duty is consistent with the "functional theory's" application of fiduciary principles as well as *Sparrow's* interpretation of the fiduciary relationship. However as the general literature on the relationship makes clear it is the post-Sparrow decisions that do not take into account the existence of the Crown's fiduciary obligations as outlined in the *Sparrow* decision.[101]

As previously noted, the *Sparrow* decision is arguably the most liberal court interpretation of the Crown's fiduciary obligations. Furthermore as previously noted, the *Sparrow* decision held that fiduciary duties are triggered on the showing of a violation of subsection 35 (1). However, the decision also stated

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[99] Ibid. at 1093.

[100] Rotman, Parallel Paths, 122. See also Mainville, An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach, 54; and Macklem, Indigenous Difference and the Constitution of Canada, 162.

[101] Leonard Rotman, "Hunting For Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in Badger and Van Der Peet" Constitutional Forum, 08 (1997): 1.

that "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."[102] Clearly this statement indicates that while the *Sparrow* decision acknowledges that the Crown has fiduciary obligations to Aboriginal peoples, it also wants to reconcile these obligations with the federal governments obligations to the public good. By acknowledging that it has fiduciary obligations and that these obligations must be reconciled with federal power the decision balances the interests of aboriginal peoples with that of the public good. That the rights protected by the fiduciary relationship are not absolute and can be infringed upon by government legislation. While it appears that the Crown was attempting to fulfil its a fiduciary obligation, upon closer examination it appears that *Sparrow* and the following decisions were merely accommodating aboriginal rights rather then acknowledging their full fiduciary duties. This subordination was continued in 1996 when a series of cases narrowed Aboriginal and treaty rights to activities that could be shown to be integral to the distinctive culture of an Aboriginal people at the time of first contact with Europeans.

5.2 Section B: ***R. v. Badge*** and ***R. v. Van Der Peet***

In 1996 several major decisions including *R. v. Badger*, and *R. v. Van Der Peet*[103] elaborated further upon the precise scope and nature of aboriginal and treaty rights. The *Badger* decision extended the *Sparrow* justification test to

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[102] *R v. Sparrow* [1990] 1 S.C.R. 1075 at 1109.

[103] *R v. Badger*, [1996] 1 S.C.R. 771. and *R v. Van der Peet*, [1996] 2 S.C.R. 507.

claims arising from treaties as well as claims based on ancestral practices, customs and traditions.[104] In *Badger*, the Supreme Court held that through unilateral enactments[105] the federal government possessed the ability to override or alter treaty rights guaranteed to Aboriginal peoples.[106] It was this last aspect of the *Badger* ruling which enabled the federal government to enact legislation that infringes upon treaty rights, an infringement which in turn violates the Crown's pre-existing fiduciary obligations to Aboriginal peoples.[107] These obligations include the specifics of treaties, as well as the fiduciary obligation to act in the best interests of Aboriginal peoples. Furthermore *R v. Badger* seemed to water down and weaken the Crown's fiduciary obligation by not questioning the federal government's unilateral power to extinguish treaty rights.[108] The decision in this case indicates that while the Supreme Court is willing to acknowledge it is fiduciary obligations conceming aboriginal and treaty rights, the rights protected by the relationship are not absolute and that the Court is willing to only accommodate these interests rather then recognizing the rights in a manner that is stays constant to fiduciary principles and objectives.

In *R. v. Van der Peet*, the Supreme Court held that when assessing an Aboriginal rights claim, a court must outline the nature of the right at issue in order to determine whether the rights claim meets the test of being integral to the

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[104] *R v. Badger*, [1996] 1 S.C.R. 771 at 14.

[105] In this specific case it was the *Natural Resource Transfer Agreement, 1930*, that overruled Treaty No. 8 hunting rights.

[106] *R v. Badger*, [1996] 1 S.C.R. 771 at 9.

[107] Rotman, Constitutional Forum, 3.

[108] Peter H. Russell "High Courts and the Rights of Aboriginal Peoples: The Limits Of Judicial Independence," Saskatchewan Law Review, Vol. 61 (1998): 271.

distinctive culture of the Aboriginal group claiming the right. Furthermore in order for a right to be integral, a practice, custom, or tradition must be of central significance to the Aboriginal group concerned and must have existed prior to contact with non-Aboriginal society.[109] As in *Badger,* the court's interpretation of the *Van der Peet* decision is inconsistent with the Crown's fiduciary duty as alluded to in *Sparrow.* This case is inconsistent in that the relationship between the Crown and First Nations peoples is a continuous relationship and therefore given the situation specific analysis of fiduciary doctrine and the length of time of the relationship, aboriginal rights that are significant to their society are continuously evolving. The *Van der Peet* decision does not allow aboriginal rights to evolve with time because it rules that for an aboriginal right to be integral it must have existed prior to contact with a non-aboriginal society.[110] This interpretation severely limits aboriginal rights as not only must the right be integral to the Aboriginal culture in question, it must also have existed since before the time of contact. Furthermore, the specific right in question must be relevant enough in today's society for an aboriginal group to desire to claim the right. The *Van der Peet* interpretation severely limits the variety of rights that can be claimed. These limitations again demonstrate the court's intentions to acknowledge its fiduciary obligations but at the same balance this acknowledgement with rights that flexible in interpretation rather than absolute.

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[109] *R v. Van der Peet*, [1996] 2 S.C.R. 507 at 44.

[110] Ibid. at 60.

5.3 Section C: ***R. v. Gladstone***

In *R. v. Gladstone* as in *Van der Peet*, the court examined the issue of justifying infringements on Aboriginal rights and the justification test as set out in *Sparrow*. The right in question[111] was never extinguished by the Canadian government, because it failed to demonstrate a clear and plain intention to do so. As well, the court held that Aboriginal rights are not absolute but instead may be limited based on the doctrine of priority, which (after conservation concerns have been met) places Aboriginal rights over the rights of other users. The court stated that priority is to be decided on a case by case basis. *Gladstone* also expanded the list of possible valid legislative objectives that justify infringements of section 35. These objectives 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."[112]

Both the *Van der Peet* and *Gladstone* decisions demonstrate the Supreme Courts acknowledgement of it is obligation to protect aboriginal rights. However both decisions also demonstrate the Supreme Court limiting these rights in a manner that is not constant with fiduciary doctrine. While the *Van der Peet* decision examines the nature of aboriginal rights, it is done in a manner that does not take into account the specifics of the historical Crown-Native relationship since the time of contact. The *Gladstone* decision examined justifications for infringing upon aboriginal rights and the widened the number of valid objectives that can justify the infringement upon aboriginal rights. The fact that the Crown

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[111] The Heiltsuk Band's right to exchange and trade commercially in herring spawn on kelp.
[112] *R. v. Gladstone.*, [1996] 2 S.C.R. at 75.

has the legislative ability to infringe upon it is beneficiary's rights conflicts with general fiduciary principles. Furthermore the series of legislative objectives that the Court deemed were valid infringements are clearly objectives that directed towards general public interests.[113] The *Gladstone* decision indicates that in particular circumstances the judiciary will overlook the Crown-Native fiduciary relationship in order to address general public good. Both these decisions demonstrate the Supreme Court interpreting the Crown's fiduciary duties in a manner inconsistent with the general canons of fiduciary law.

5.4 Section D: ***Delgamuukw v. British Columbia***

Like *Sparrow*, the 1997 *Delgamuukw* decision is considered to be one of the more liberal interpretations of aboriginal rights and the fiduciary duties that arise from them. As previously mentioned the *Delgamuukw* decision recognized aboriginal title as a "right to the land it itself" and unlike other aboriginal rights, aboriginal title holders can carry out activities that are free from the historical and cultural limit is that were set out in the *Van der Peet* trilogy.[114] Furthermore the Court held that "Aboriginal title encompasses the right to use the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, cultures, and traditions which are integral to distinctive aboriginal cultures."[115] Aboriginal title arises from the prior occupation of Canada by Aboriginal peoples and the pre-contact existing systems of aboriginal law.

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[113] Ibid. at 54.
[114] Russell, loc.cit., 271.
[115] *Delgamuukw v. British Columbia.*, [1997] 3 S.C.R. 1010 at 117.

Based on these facts it appeared that the Supreme Court had interpreted aboriginal title to have a very broad focus, a focus which would seem to be on a nation to nation basis rather then a "paradigm of accommodation".

However despite recognizing the legality of aboriginal title, the decision clearly focused more on accommodating the right of aboriginal title rather than recognizing the Crown's full fiduciary duties related to the protection of this right. The Court's desire to "accommodate" rather then to fulfill it is fiduciary obligations is demonstrated in several ways. The Court widened the legislative objectives that can justify the infringement of aboriginal title by including: "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."[116] By allowing these objectives to be legitimate justifications for Crown infringement, the decision indicates that the government can infringe upon this right for a wide variety of reasons that cover almost any kind of activity that takes place upon land. As well, in relation to justifying an infringement of Aboriginal title, the Court heavily emphasized the role of consultation.[117] Consultation is one of the processes necessary for the Crown to justify infringement of aboriginal rights and title. In Delagamuukw the court ruled that:

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[116] Ibid. at 165.

[117] Consultation is part of the Crown's justification analysis when justifying an infringement of an existing aboriginal or treaty right. Furthermore if their rights are infringed, aboriginal peoples are to have their rights accommodated this can include: mitigation of harmful impacts on aboriginal rights, minimal impairment of aboriginal rights, providing compensation or attempting negotiated solutions. See: Thomas Isaac, Aboriginal Law: Cases, Materials and Commentary (3rd ed.; Saskatoon, Purich Publishing, 2004), 215 and 218.

> There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title was justified. The nature and scope of the duty of consultation will vary with the circumstances. ... 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.[118]

After the *Delgamuukw* decision cases, concerning aboriginal title were focused largely on the issue of consultation. In regards to the issue of consultation, the issue of "accommodating" aboriginal title is paramount. By widening the legislative objectives which can infringe upon aboriginal title,[119] and then emphasizing the importance of consultation, it is evident the Court was not interested in fully recognizing the Crown's fiduciary obligations, but instead, desired a moderate approach which both acknowledged aboriginal title and acknowledged the Crown's obligations to the public good .

5.5 Section E: ***Halfway River First Nation v. B.C.***

Perhaps the best examples of the court's emphasis on accommodating aboriginal rights, is found in the series of lower court cases that occurred after *Delgamuukw*. The *Halfway River First Nation v. B.C.*[120] was an important decision because it widened the scope of the Crown's fiduciary duties and demonstrated the subordinate role that the Crown's fiduciary obligations are placed in when compared with the Crown's desire to balance these obligations

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[118] *Delgamuukw v. British Columbia.*, [1997] 3 S.C.R. 1010, at 168.

[119] As happened in *Delgamuukw*

[120] *Halfway River First Nation v. B.C.* [1999] 4 C.N.L.R. 1.

with the Crown's obligations to the public good . The BC Court of Appeal ruled that there had been inadequate consultation in the issuance of a timber cutting permit and therefore an unjustified infringement by the Province of the Halfway River First Nation's treaty right to hunt. The scope was widened in that the Court found that it was the *Provincial* government, which was guilty of inadequate consultation; this finding was important because before this decision only the Federal government had ever been found guilty of unjustified infringement of Aboriginal and treaty rights. The second aspect of the scope of the fiduciary obligations which were widened was in regards to consultation. This decision held that consultation was a substantive requirement under the test for justification. Furthermore, it ruled that in regards to land use decisions that may affect Aboriginal or treaty rights that the Crown's duty to consult imposes a positive obligation to ensure that aboriginal peoples have the ability to ensure "that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action."[121]

With reference to *Sparrow,* the *Halfway* decision reaffirmed the Crown's fiduciary duties and obligations particularly in regards to the justification test when either aboriginal or treaty rights are infringed upon.[122] Furthermore, the court noted, that overriding all of the issues of justification was "whether the honor and integrity of the Crown had been upheld in it is treatment of the petitioner's rights."[123]

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[121] Ibid. at 160.
[122] Ibid. at 144-145.
[123] Ibid. 146.

In regards to the actualities of the case, the majority held that the province (In this particular case the Ministry of Forests) owed a duty to justify it is infringement of Halfway's treaty rights. Part of this duty included the Ministry's duty to consult with the Band prior to making decisions which would affect the Band's treaty rights. The Court ruled that the Ministry didn't make all the reasonable efforts to consult with Halfway and in particular it failed to inform itself respecting aboriginal and treaty rights that were associated with Halfway River First Nation.[124]

While the *Halfway* decision widened the Crown's fiduciary duties in regards to aboriginal and treaty rights, it is important to examine the context of these fiduciary duties. The *Delgamuukw* decision widened the reasons for justified infringement of aboriginal title and placed a heavy emphasis on consultation. The *Halfway* decision widened the Crown's fiduciary obligations, in a manner that acknowledged the importance of the public good. While fiduciary principles support the expansion of the Crown's fiduciary duties, it would object to the notion that the main protection aboriginal people have in regards to Aboriginal title is to be consulted upon, particularly when the reasons for justified infringement have been widened. Furthermore the widened reasons for justified infringement and heavy emphasis on consultation particularly in land use decisions all speak to the Court's focus on accommodating aboriginal rights rather then recognizing their full fiduciary obligations.

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[124] Ibid. at 159.

5.6 Chapter Summary

Beginning with *Sparrow* and ending with the *Halfway* decision it is clear that while courts at various levels were willing to recognize aboriginal rights, the manner in which these existing rights were interpreted, were not consistent with situation specific analysis. While these individual cases recognized and articulated what constituted an aboriginal right, the cases also increasingly widened the justifications for infringing upon these rights. Arguably in a true fiduciary relationship, there should be no justification for the fiduciary to infringe upon the beneficiary's interests. In the case of the Crown-Native relationship there are a wide variety of justifications for infringing upon the court interpreted version of aboriginal rights. The interpretation of and justifications for infringing upon aboriginal rights has been affected by other interests in Canadian society; chiefly the governments obligations to the public good. Because both the Crown and the court's interpretation of Crown fiduciary obligations recognize this fact, the judiciary cannot interpret aboriginal rights in a manner consistent with the functional application of fiduciary principles. Instead the courts have attempted to accommodate aboriginal rights rather than recognize them in a manner consistent with fiduciary analysis.

CHAPTER 6 THE EMPHASIS ON CONSULTATION

While the *Halfway* decision did expand fiduciary obligations associated with consultation, it was the next three decisions that greatly expanded the notion of the duty to consult. The *Mikisew, Taku* and *Haida* decisions all greatly expanded the parameters of the duty to consult.[125] This in turn indicated how the judicial interpretation is attempting to accommodate rather than fufill the Crown's fiduciary obligations. This is indicated largely because the emphasis on consultation speaks to the actions of land use and land sharing. As Devlin and Murphy conclude the purpose of the duty to consult "forces conversations that may lead to settlement and thus avoid litigation."[126] In short, through consultation and compensation for the infringement of aboriginal title, the courts hope to accommodate in a non-adversarial way aboriginal title without fully recognizing the Crown's potential fiduciary obligations. Furthermore this consultation and discussion that is focused largely on the issue of natural resources allows for a certain amount of resource based industry certainty as consultation often facilitates resource sharing or negotiated settlements related to various natural resources. As well consultation is largely inexpensive for all parties (including the business community) involved particularly when compared to the costs of long

[125] It should be noted that both the *Taku* and *Haida* decisions are now before the Supreme Court of Canada.

[126] Richard F. Devlin, and Ronalda Murphy. "Contextualizing the Duty to Consult: Clarification or Transformation?" Unpublished Paper, Dalhousie Law School, September 2002, 56.

term litigation. It is clear that through consultation the courts are attempting to address the Crown's fiduciary obligations in a manner that acknowledges interests other then the beneficiary (aboriginal peoples).

6.1 Section A: ***Mikisew Cree First Nation v. Canada***

The *Mikisew Cree First Nation v. Canada* is significant because it examines the extent of the obligations on the Crown engendered by the duty to consult.[127] The Federal Court ruled that the onus of proof is on the Crown to prove that it did provide for meaningful consultation with First Nations, and that the Crown cannot delegate it is duties to interested third parties.[128] The Court also held that despite the primary obligation on the Crown to consult, there is a reciprocal obligation held by Aboriginal people to participate fully and in good faith in the consultation process.[129] Finally the Court also reemphasized the importance of consultation in the justification of infringement of aboriginal and treaty rights:

> "The question of whether the Crown's actions were consistent with it is fiduciary duty in this case hinges on consultation. In fact it is premature to consider the issues of priority, minimal infringement and compensation given that the consultation that would enable the Crown to satisfy those branches of the test was not undertaken."[130]

The *Mikisew* decision placed a direct emphasis on consultation and clarified the process through which it should take place. It is evident from the

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[127] *Mikisew Cree First Nation v. Canada (Minister of Canada Heritage)* [2002] 1 C.N.L.R. 169.

[128] Ibid. at 156.
[129] Ibid. at 54.
[130] Ibid. at 181.

Mikisew decision that the judiciary is attempting to foster negotiations rather then litigation related to Aboriginal rights in general through the process of consultation. This is particularly true when one considers that there is reciprocal obligation on aboriginal peoples to participate fully and in good faith in the consultation process.

6.2 Section B: ***Taku River Tlingit First Nation v. Ringstad et al***

The Crown's fiduciary obligations were further expanded in *Taku River Tlingit First Nation v. Ringstad et al.*[131] The Court held that the Crown (in this case the province) has a fiduciary duty to consult with an affected First Nation in respect of unproven, asserted claims of aboriginal rights or title.[132] It held that:

> To say as the Crown does here that establishment of the Aboriginal rights or title in court proceedings is required before consultation is required would effectively end any prospect of meaningful negotiation or settlement of Aboriginal land claims.[133]

Furthermore the *Taku* decision was precedent setting in that it was the first time the courts explicitly recognized that the province had fiduciary obligations in respect of First Nations peoples, and that the Crown owed fiduciary duties to First Nations peoples even before aboriginal rights or title had been proven. This decision is another example of the courts attempting to accommodate aboriginal rights through the process of consultation. Furthermore, it makes direct reference to the concern of the court regarding the fostering of land negotiations and

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[131] *Taku River Tlingit First Nation v. Ringstad et al*, [2002] B.C.C.A. 59

[132] Ibid. at 204.

[133] Ibid. at 93.

settlement. From this evidence it is clear that the courts recognize the need to address the issue of aboriginal title, but at the same time they are reluctant to address the issue in a manner consistent with fiduciary principles.

While both the *Mikisew* and *Taku* decisions expanded the Crown's fiduciary obligations regarding consultation the decision known as *Haida Nation v. British Columbia #1, #2*, expanded the obligations even further.

6.3 Section C: ***Haida Nation v. British Columbia #1, and #2***

In *Haida Nation v. British Columbia #1,* and *#2* both the Crown and the Haida advanced the same arguments as the Crown and the Taku Tlingit had argued for in the *Taku* decision. As a result the Court's judgment was the same as the *Taku River* decision.[134] Moreover, it should be noted that there were two major differences in that both *Haida* decisions also determined that in certain circumstances third parties owed First Nations a legally enforceable duty to consult with them in good faith and seek workable accommodations.[135] Furthermore the *Haida 1#* ruled that in relation to fiduciary duties:

> the obligation to consult is a free standing enforceable legal and equitable duty...[that] must take place before the infringement. The duty to consult and seek an accommodation does not simply arise from a *Sparrow* analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under it is protection.[136]

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[134] *Haida Nation v. B.C. and Weyerhaeuser(1)* [2002] 2 C.N.L.R. (B.C.C.A.) 121and *Haida Nation v. B.C. and Weyerhaeuser(2)* [2002] 2 C.N.L.R. (B.C.C.A.) 462.

[135] Ibid. at 92 and 93.

[136] Ibid. at 55.

Finally the importance of reconciliation is again demonstrated in a quotation cited in *Haida #2* from the *Delgamuukw* decision:

> 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...Indeed compensation for breaches of fiduciary duty is a well-established part of the landscape of aboriginal rights: Guerin. In keeping with the duty of honor 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.[137]

6.4 Chapter Summary

Clearly from these three cases it is quite evident that a large part of the court's interpretation of the Crown's fiduciary obligations emphasizes the accommodation of aboriginal title and rather then the Crown's actual fiduciary obligations. While one could argue that this emphasis has widened the Crown's fiduciary obligations, one should consider that by examining the actual principles of fiduciary law (nation to nation) the justification for infringing upon aboriginal title was set very low. Therefore the subsequent importance placed upon consultation creates a very different interpretation of the Crown's fiduciary obligations then would be interpreted using actual fiduciary analysis. The result of the Court's interpretation is a very conservative view of fiduciary doctrine, one which does not live up to the standards of true fiduciary principles. The interpretations focus on consultation demonstrate that instead of recognizing and protecting aboriginal

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[137] *Haida Nation v. B.C. and Weyerhaeuser(2)* [2002] 2 C.N.L.R. (B.C.C.A.) 462 at 39.

rights in a manner consistent with situation specific analysis, the judicial interpretation while recognizing aboriginal rights, is more concerned with accommodating this interest in a manner that balances it with the interest of the public good.

CHAPTER 7 CONCLUSION

When one compares the application of fiduciary analysis to the Crown's obligations to Aboriginal peoples it is evident that this interpretation is applied in an inconsistent manner. In regards to the Crown's fiduciary obligations associated with land surrenders, it is clear that the courts are willing to correctly apply fiduciary doctrine to their decisions. This is in marked contrast with the Crown's fiduciary obligations associated with the recognition and protection of aboriginal and treaty rights.

The reason for this marked contrast in approaches is that fiduciary law is traditionally part of the private law spectrum whereas the legal relationship between aboriginal peoples and the Crown in Canada is a matter of public law. In regards to the Crown's obligations related to land surrenders it can arguably still be considered a private law issue. As noted previously, the *Guerin* decision was heavily influenced by common law trust and trust-like principles. Furthermore, the Crown's role of protecting Indian interests in transactions with third parties is very similar to other fiduciary relationships that are found in the realm of private law. Because of these similarities it is very easy for the courts to apply and enforce fiduciary principles to the Crown's obligations in regards to land surrenders. This is because the Crown only owes a duty to the beneficiary and not other interests.

This is contrasted greatly with the legal interpretation of the Crown's constitutional law fiduciary obligations. When one examines this particular aspect of the Crown-Native legal relationship it appears that the court decisions are primarily concerned with accommodating aboriginal rights rather then recognizing the rights through the application of situation specific fiduciary principles. In regards to the constitutional law fiduciary it is clear that the courts are trying to balance the Crown's fiduciary obligations with the Crown's obligations to the public good. That while it is willing to recognize aboriginal and treaty rights, the Canadian legal system is unwilling to recognize these rights in a manner that is consistent with fiduciary principles. In short, while the courts are willing to use fiduciary rhetoric to recognize both aboriginal and treaty rights, they are unwilling to recognize these rights in a manner which is consistent with the fiduciary analysis of a nation to nation relationship. From this standpoint it is clear that the concept of accommodation is incompatible with that of a fiduciary relationship. Clearly as this paper has shown the public good and aboriginal interests can have competing perspectives and therefore because the Crown has obligations to both parties, its difficult to view the Crown as a fiduciary solely representing and advocating for the fiduciary obligations it owes to aboriginal peoples.

The best examples of this issue are the *Delgamuukw* and post-*Delgamuukw* decisions in that while *Delgamuukw* recognizes the right of aboriginal title (which would be consistent with the legal concept of a fiduciary relationship) it also weakened this right by allowing for a large number of justifications for the Crown's ability to infringe upon this right (this would not be

consistent with the legal concept of a fiduciary analysis). Subsequent decisions while using fiduciary rhetoric have focused upon accommodating (through consultation and in some cases compensation) aboriginal title. Given the wide number of justifications for infringement and the emphasis on consultation it is evident that despite using fiduciary rhetoric the judiciary is subordinating the concept of a fiduciary analysis based upon a nation to nation relationship, for the concept of accommodating aboriginal rights. This subordination is not consistent with the general legal literature's theoretical argument for a general fiduciary duty toward aboriginal peoples.

As this paper indicates the main reason for the court's failure to interpret the Crown-Native fiduciary relationship in a manner consistent with fiduciary principles is the issue of public versus private law. Given the Crown's obligations to other interests, it is unlikely to expect the courts to interpret the relationship in a manner consistent with fiduciary principles. The consequence is the judiciary's attempts to accommodate aboriginal rights while recognizing the importance of other interests. Given the *suis generis* nature of aboriginal law, the judiciary's interpretation of the fiduciary relationship in turn legitimizes the relationship as being fiduciary despite the interpreted relationships failure to live up to true fiduciary principles. Given the "paradigm of accommodation", the *suis genersis* nature of aboriginal law, and the lack of adhering to fiduciary principles, the various levels of Canadian courts have the independent ability to decide the nature of the Crown-Native relationship as they see fit. The result of these circumstances demonstrates the failings of fiduciary principles in a public law

setting. That when interpreting the Crown's fiduciary obligations to Aboriginal peoples, the courts use their own discretion and attempt to balance its obligations to native peoples with that of its obligations to other interests; namely the public good. This "paradigm of accommodation" demonstrates the judiciary's desire to include the issue of aboriginal rights (particularly aboriginal title) in Crown policy making decisions in a manner which is not consistent with true fiduciary principles. This "paradigm of accommodation" is contrasted with the judiciary's interpretation of the Crown's obligations regarding land surrenders. In these decisions the interpretation of the Crown's obligation was consistent with fiduciary principles as well as very similar to various as aspects of private law such as trust law. These two interpretations of the Crown's fiduciary duties demonstrate an inconsistency in the way the courts at various levels interpret the Crown's fiduciary obligations. This inconsistency has already impacted the judicial interpretation of the fiduciary relationship in two different ways. The first potential impact has been the citation of land surrender decisions being used in aboriginal rights cases. In cases such as *Sparrow*, *Delgamuukw*, and *Taku* the interpretations have cited various land surrender cases to reach their conclusions about the nature of the Crown-Native relationship. While it is debatable whether the actual citation of these cases has led to misapplied judicial interpretations, the citation of land surrender cases in aboriginal rights cases depending upon the context is questionable. The citation of these cases may be problematic in that Canadian courts at all levels have clearly used fiduciary analysis in two very

different manners when it comes to land surrenders and the constitutional law fiduciary.

The second problem regarding the inconsistent application of fiduciary principles is the interpretation of the fiduciary relationship in general. The best example of this is the *Taku* and *Wewaykum* decisions. The *Taku* decision argued that the duty to consult does not arise simply from the *Sparrow* analysis but rather it is based upon the broader fiduciary relationship between the Crown and Indian peoples. It is evident from this decision and several other aboriginal rights cases (including *Sparrow*) that the interpretation of the Crown's duties regarding aboriginal rights is based upon the concept of a general fiduciary obligation. This is in contrast with the *Wewaykum* land surrender decision. In regards to land surrenders, while the judiciary is willing to apply fiduciary principles on a case by case basis it is unwilling as in *Wewaykum*, to acknowledge a theoretical general fiduciary duty to aboriginal peoples. As in the *Wewaykum* decision interpretation of fiduciary principles stated that not all aspects of the Crown-Native relationship are fiduciary and that the examples of land surrenders and aboriginal and treaty rights may be the only aspects of the relationship that are fiduciary in nature. At present these are the only aspects of the Crown-Native relationship that are recognized by the courts as being fiduciary in nature. Furthermore contrary to the argument for a general duty, there is a small amount of literature that argues that the fiduciary obligations related to land surrenders is derived solely from the *Indian Act,* and the government's acceptance of interposing itself between First

Nations and third parties.[138] Similarly this decision argued that the fiduciary obligations related to aboriginal and treaty rights stem from the Canadian government's recognition of these rights in the *Constitution Act 1982*. The *Taku* and *Wewaykum* examples demonstrate not only an inconsistent application of fiduciary principles but also an inconsistent interpretation of *how* and *where* these principles come from. The inconsistent interpretation of where the fiduciary principles are derived from as well as the inconsistent application of fiduciary principles have created the dangerous potential for ill-informed or misapplied interpretations of the legal relationship between the Crown and Native peoples.

138 *See:* David W. Elliot, "Aboriginal Peoples in Canada and the United States and the Scope of the Special Fiduciary Relationship" Manitoba Law Journal, 24 (1996) 137-186.

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