



**THE CROWN'S FIDUCIARY RELATIONSHIP  
WITH ABORIGINAL PEOPLES**

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## THE CROWN'S FIDUCIARY RELATIONSHIP WITH ABORIGINAL PEOPLES

These notes are intended to provide a brief introduction to the complex and evolving “fiduciary” relationship between the Crown and Canada’s Aboriginal peoples.

### BACKGROUND

Canada’s Aboriginal peoples have always held a unique legal and constitutional position. In the *Royal Proclamation of 1763*, often referred to as the “Magna Carta of Indian Rights,” the colonial British Crown found it

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

Emphasizing the Crown’s concern with the “great Frauds and Abuses” committed by purchasers of Aboriginal lands, the *Royal Proclamation* reserved to the Crown the exclusive right to negotiate cessions (giving up) of Aboriginal title. A century later, subsection 91(24) of the *Constitution Act, 1867* granted the federal Parliament legislative authority over “Indians, and Lands Reserved for the Indians.” Surrenders and designations of reserve land under the *Indian Act*, the principal vehicle for the exercise of federal jurisdiction over “status Indians” since 1876, reflect the “protective” provisions of the *Royal Proclamation*. In practice, pre- and post-Confederation federal governments negotiated surrenders of vast Aboriginal territories in major treaties concluded throughout the 19<sup>th</sup> and early 20<sup>th</sup> centuries, largely in Ontario and the western provinces excluding British Columbia. Finally, section 35 of the *Constitution Act, 1982* recognizes and affirms “existing aboriginal and treaty rights” of Canada’s Aboriginal peoples,

defined as including the “Indian, Inuit and Métis peoples.” In *R. v. Van der Peet* (1996),<sup>(1)</sup> the Supreme Court of Canada commented that

the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact ... above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status. (emphasis in original)

## JUDICIAL INTERPRETATION

In broad legal terms, a “fiduciary” is “one who holds anything in trust,” or “who holds a position of trust or confidence with respect to someone else.” Hence, a “fiduciary relationship” is one in which someone in a position of trust has “rights and powers which he is bound to exercise for the benefit” of another. Such relationships include those between trustees and their beneficiaries, solicitors and their clients, and so forth.<sup>(2)</sup>

The Supreme Court of Canada has adapted these largely private law concepts to the context of Crown-Aboriginal relations. In the 1950s, the Court observed that the *Indian Act* “embodie[d] the accepted view that these aborigines are ... wards of the state, whose care and welfare are a political trust of the highest obligation.”<sup>(3)</sup> The Court’s landmark 1984 decision *Guerin v. R.* (1984)<sup>(4)</sup> portrayed this relationship more fully, and established that it could or did entail legal consequences. *Guerin* found that:

- the fiduciary relationship is rooted in the concept of Aboriginal title,<sup>(5)</sup> coupled with the requirement, outlined above, that the Aboriginal interest in land may be alienated only *via* surrender to the Crown;

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(1) [1996] 2 S.C.R. 507.

(2) See *A Dictionary of Law*, ed. Elizabeth Martin (Oxford University Press, Oxford, 1997); *Jowitt’s Dictionary of English Law*, Second Edition, ed. John Burke (Sweet and Maxwell Ltd., London, 1977).

(3) *St. Ann’s Island Shooting & Fishing Club Ltd. v. R.*, [1950] S.C.R. 211; [1952] 2 D.L.R. 225, at 232.

(4) [1984] 2 S.C.R. 335.

(5) The Court defined the Aboriginal interest in the land as an independent legal right that pre-existed the *Royal Proclamation*.

- this requirement, which places the Crown between the Aboriginal group and third parties to prevent exploitation, gives the Crown discretion to decide the Aboriginal interest, and transforms its obligation into a fiduciary one so as to regulate Crown conduct when dealing with the land for the Aboriginal group;
- in the unique Crown-Aboriginal relationship, the fiduciary obligation owed by the Crown is *sui generis*, or one of a kind.

The scope of the fiduciary concept was extended significantly in *R. v. Sparrow* (1990),<sup>(6)</sup> the Court's first section 35 decision. *Sparrow* determined that:

- the “general guiding principle” for section 35 is that “the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship”;
- “the honour of the Crown is at stake in dealings with aboriginal peoples.<sup>(7)</sup> The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the [infringing] legislation or action in question can be justified”;
- “[t]he justificatory standard to be met may place a heavy burden on the Crown,” while inquiries such as whether the infringement has been minimal, whether fair compensation has been available, and whether the affected Aboriginal group has been consulted may also be included in the justification test.<sup>(8)</sup>

Other section 35 Court rulings containing relevant, generally applicable principles include *R. v. Adams* (1996)<sup>(9)</sup> in which the Court found that, “[i]n light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights ... in

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(6) [1990] 1 S.C.R. 1075. *Sparrow* and subsequent Supreme Court of Canada decisions cited may be accessed *via* the Court's web site at <http://www.lexum.umontreal.ca/csc-scc/en/index.html>.

(7) This broad finding has been reiterated in subsequent decisions, including, for example, *R. v. Marshall*, [1999] 3 S.C.R. 456.

(8) The same analysis has been applied in the Court's section 35 treaty rights cases. See, for example, *R. v. Côté*, [1996] 3 S.C.R. 139.

(9) [1996] 3 S.C.R. 101.

the absence of some explicit guidance.” In *Delgamuukw v. B.C.*,<sup>(10)</sup> the Court ruled that the degree to which the fiduciary duty requires scrutiny of infringing measures varies according to the nature of the Aboriginal right at issue. In the context of Aboriginal title, the Court expanded in particular upon the Crown’s obligation to consult affected Aboriginal group(s), finding that the consultation “must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue.” *Delgamuukw* also stated that under section 35, “the Crown is under a moral, if not a legal, duty to enter into and conduct ... negotiations [with Aboriginal peoples] in good faith.”<sup>(11)</sup>

In *Wewaykum Indian Band v. Canada* (2002),<sup>(12)</sup> a non-section 35 decision, the Court sought to further clarify certain aspects of the Crown-Aboriginal fiduciary relationship and the scope of obligations arising under it, noting the post-*Guerin* “flood of ‘fiduciary duty’ claims ... across a whole spectrum of possible complaints.” The *Wewaykum* ruling confirmed that:

- fiduciary obligations are not restricted to section 35 rights or to existing reserves: they come into play “to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples”;
- the fiduciary duty “does not exist at large.” Because not all obligations between the parties to a fiduciary relationship are necessarily of a fiduciary nature, the focus should be on “the particular obligation or interest [in] dispute and whether or not the Crown had assumed discretionary control ... sufficient to ground a fiduciary obligation”;
- rather than providing a “general indemnity,” the content of the Crown’s fiduciary duty “varies with the nature and importance of the interest sought to be protected”;<sup>(13)</sup>
- the Crown is not an ordinary fiduciary and is obliged, depending on the context, to have regard to the interests of many parties, not just the Aboriginal interest.

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(10) [1997] 3 S.C.R. 1010. The decision contained the Court’s first definitive statement on the meaning and scope of Aboriginal title in Canada.

(11) The scope of the Crown’s fiduciary obligations to consult and to negotiate in good faith features prominently in a number of cases: see, for example, *Makivik Corp. v. Canada (Minister of Canadian Heritage)*, [1999] 1 F.C. 38 (T.D.); *Gitanyow First Nation v. Canada*, [1999] 3 C.N.L.R. 89 (B.C.S.C.), under appeal by Canada and British Columbia; *Halfway River First Nation v. British Columbia (Minister of Forests)* (1999), 64 B.C.L.R. (3d) 206 (B.C.C.A.); *Taku River Tlingit First Nation Ringstad et al.*, 2002 BCCA 59, 31 January 2002 (B.C.C.A.); *Haida Nation v. B.C. and Weyerhaeuser*, 2002 BCCA 147, 27 February 2002 (B.C.C.A.).

(12) 2002 SCC 79, 6 December 2002.

(13) This may involve different stages of the same process. In *Wewaykum*, the Court noted that any fiduciary duty existing prior to the establishment of a reserve expands following its creation to reflect the affected First Nation community’s acquisition of a legal, quasi-proprietary, interest in the land.

As *Wewaykum* suggests, general principles set out in these and other decisions do not finally determine the precise scope of fiduciary obligations that may be owed by the Crown to a given Aboriginal group in a given set of circumstances. Cases in which these matters are pivotal to Aboriginal claims will continue to come before Canadian courts with regularity, where they are to be decided on a case-specific basis within the general guidelines articulated by the Court.

## EXTRA-JUDICIAL CONSIDERATIONS

The 1996 *Report of the Royal Commission on Aboriginal Peoples* (RCAP)<sup>(14)</sup> saw the fiduciary relationship as originating in treaties and other historical links, describing it in conceptual terms that differ from those expressed by the courts:

Because of this relationship, the Crown acts as the protector of the sovereignty of Aboriginal peoples within Canada and as guarantor of their Aboriginal and treaty rights. This fiduciary relationship is a fundamental feature of the constitution of Canada.<sup>(15)</sup>

The Report emphasized that, although the provinces and territories are also bound by fiduciary obligation(s), a position that appears consistent with the emerging jurisprudence in the area,<sup>(16)</sup> Parliament has primary jurisdiction in relation to Aboriginal peoples under subsection 91(24) of the *Constitution Act, 1867*:

The federal government cannot, consistent with its fiduciary obligation, sit on its hands in its own jurisdiction while treaties are broken, Aboriginal autonomy is undermined, and Aboriginal lands are destroyed.<sup>(17)</sup>

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(14) Minister of Supply and Services, Ottawa, 1996.

(15) *Report of the Royal Commission on Aboriginal Peoples*, note 14, vol. 2, *Restructuring the Relationship*, Part One, p. 244.

(16) See, for example, Supreme Court of Canada section 35 treaty rights cases involving provincial statutory instruments: *R. v. Badger*, [1996] 1 S.C.R. 771, *R. v. Côté*, note 8. In addition, it is implicit, in the *Delgamuukw* decision, note 10, that measures infringing Aboriginal title might be effected by the Province of B.C. for valid legislative objectives. See also *Gitanyow First Nation v. Canada*, note 11, in which the B.C. Supreme Court characterized the federal and provincial Crown as indivisible.

(17) *Report of the Royal Commission on Aboriginal Peoples*, note 14, vol. 5, *Renewal: A Twenty-Year Commitment*, p. 7.

The RCAP was critical of past and current governments' performance of their fiduciary role; many recommendations reflect its view that government needs to fulfil this role more positively through a variety of measures, including broader recognition of the Aboriginal peoples to whom the duty is owed.

The federal government has not issued a comprehensive official policy in this area. Its approach<sup>(18)</sup> identifies two principal categories of fiduciary obligations for government managers to take into account, based on the *Guerin* and *Sparrow* decisions. Guerin-type obligations arise in situations where the Crown has a duty to act in the interests of an Aboriginal group and has discretionary power in the matter (for example, in connection with the surrender of reserve land). Sparrow-type obligations arise when the Crown must respect constitutionally protected Aboriginal or treaty rights and justify interferences with those rights. Federal guidelines also underscore the honour of the Crown as an additional key element to be maintained in relations with Aboriginal peoples. The government document differentiates between the fiduciary relationship and fiduciary obligations, such that some Crown activities affecting Aboriginal peoples that fall within the fiduciary relationship would not necessarily give rise to legally enforceable fiduciary obligations. The *Wewaykum* decision appears to endorse a similar position.

Explicit or implicit governmental acknowledgement of the Crown-Aboriginal fiduciary relationship may be found in, for example:

- *Gathering Strength: Canada's Aboriginal Action Plan*,<sup>(19)</sup> the federal government's January 1998 response to the RCAP Report. While not appearing to state the fiduciary relationship directly, the document emphasizes objectives relating to renewed relationships, partnerships, and shared responsibilities;
- section 5.8 of the 1994 Manitoba Framework Agreement Initiative,<sup>(20)</sup> under which "[t]he Crown's fiduciary relationship will continue in accordance with judicial decisions, aboriginal rights, constitutional provisions including Section 35 of the Constitution Act, 1982, the Treaties and other laws and sources of law, or any of them";

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(18) As set out in an Interdepartmental Working Group Report dated October 1995 and entitled "Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues, A Guide for Managers."

(19) Minister of Indian Affairs and Northern Development, Ottawa, 1997.

(20) This Agreement between the Assembly of Manitoba Chiefs and Canada sets out a process to dismantle DIAND operations in Manitoba, develop Manitoba First Nations government institutions, and restore to Manitoba First Nations governments the jurisdictions currently held by federal government departments. Material on the FAI may be accessed *via* the web site of the Assembly of Manitoba Chiefs, at <http://www.manitobachiefs.com/history/history.html>.

- the federal government's 1995 policy guide on Aboriginal Self-Government,<sup>(21)</sup> which states that self-government may “change the nature” of the Crown's “unique, historic, fiduciary relationship” with Canada's Aboriginal peoples, in that, as Aboriginal institutions assume greater governance responsibilities, Crown responsibilities will lessen accordingly;
- the statement of the Minister of Indian Affairs in the context of 2001 discussions on First Nations Governance, asserting that the initiative would not “eliminate the fiduciary relationship that exists between the Crown and First Nations”;<sup>(22)</sup>
- the 2002 *Provincial Policy for Consultation with First Nations* issued by the Government of British Columbia in light of Supreme Court of Canada decisions which recognize the relevance of the fiduciary relationship in the context of potential infringement of Aboriginal rights or title.<sup>(23)</sup>

## COMMENTARY

The foregoing overview suggests that the Crown's fiduciary relationship with and ensuing obligations toward Aboriginal peoples have implications for the development and conduct of government policy in matters that engage Aboriginal interests. It further indicates that the scope of the obligations, and thus the nature of associated policy implications, will vary with the individual circumstances at issue.

Important questions related to implementation of the Crown-Aboriginal fiduciary relationship remain. The application of Supreme Court of Canada decisions confirming the fiduciary relationship has yet to be fully defined in a number of contexts, for example, land claim and self-government negotiations. Similarly, the standard(s) for government conduct that will uphold “the honour of the Crown” in various situations require clarification.

Aboriginal groups and government are frequently at odds in litigation, negotiation, and policy fora, as to the scope of governmental responsibility that flows from the fiduciary relationship. Aboriginal parties generally support a broader view of Crown obligations

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(21) *Aboriginal Self-Government: The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Indian Affairs and Northern Development, Ottawa, 1995). The policy may be accessed via the Department's web site, at [http://www.inac.gc.ca/pr/pub/sg/plcy\\_e.html](http://www.inac.gc.ca/pr/pub/sg/plcy_e.html).

(22) Bill C-7, the First Nations Governance Act, was introduced in the House of Commons on 9 October 2002 and referred to the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources following first reading.

(23) The document may be accessed via the web site of the B.C. Ministry of Aboriginal Affairs, at <http://www.gov.bc.ca/tno/consult/>.

than the government appears prepared to endorse. Assembly of First Nations' resolutions attest to unresolved issues regarding many aspects of the current relationship. In April 2000, then National Chief of the Assembly of First Nations Phil Fontaine observed that "DIAND, like the Government of Canada itself, suffers from a schizophrenic personality. It holds and administers fiduciary obligations to our peoples at the same time as it must observe its political obligations to the rest of Canada. ... It advocates one moment on our behalf and in the next moment, through the Justice Department, against us." As the Supreme Court of Canada's *Wewaykum* ruling commented, the Crown is not an ordinary fiduciary and may be required to consider multiple interests in some contexts.

Supreme Court of Canada decisions confirm that the fiduciary relationship does have legal and constitutional scope. The concept itself and obligations arising from it are still being developed.