THE CROWN'S FIDUCIARY OBLIGATION TOWARD

ABORIGINAL PEOPLES

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I. INTRODUCTION

In light of the evolving jurisprudence surrounding the Crown's fiduciary obligation towards aboriginal peoples, one would be hard pressed to identify an area of Crown decision making which is not potentially impacted in some measure by this obligation. This circumstance arises from pronouncements by the Supreme Court of Canada in recent cases which affirm that the Crown's fiduciary obligation is not only limited to Crown management of reserve lands and resources but also extends to the Crown's decision making and legislative authority over lands and resources subject to aboriginal rights. Accordingly, this paper will trace the genesis and development of the Crown's responsibility and accountability as legally enforceable obligations towards First Nations, with particular emphasis on Supreme Court of Canada decisions which have directly addressed the nature and scope of the Crown's fiduciary duties[1].

II. THE GENESIS AND DEVELOPMENT OF THE CROWN'S LEGALLY ENFORCEABLE RESPONSIBILITIES TOWARD ABORIGINAL PEOPLE IN CANADIAN LAW

The Supreme Court of Canada first affirmed the existence of the Crown's legally enforceable fiduciary duty toward aboriginal peoples in the landmark *Guerin* decision.[2] In *Guerin*, the Musqueam Band surrendered reserve lands to the Crown for lease purposes to a golf club. The lease terms obtained by the Crown were different from, and much less favourable than, those approved by the Band at the surrender meeting. The Supreme Court of Canada found that the Crown owed a fiduciary obligation to the Musqueam people with respect to the leased lands and reasoned that the *sui generis* nature of aboriginal title, coupled with the historic powers and responsibilities assumed by the Crown toward aboriginal peoples, constituted the source of such a fiduciary obligation.[3]

In keeping with the common law jurisprudence relating to fiduciary obligations applicable within the commercial mainstream, the Supreme Court of Canada in *Guerin* confirmed that the fiduciary obligation related to the exercise of Crown authority and discretion in a manner consistent with those equitable principles which require a fiduciary to act with "the utmost of loyalty to its principal" and in the "best interest" of the principal or beneficiary. Dickson J. (as he then was) described the Crown's fiduciary duty as follows (in the context of the Crown's post-surrender scenario):

> Through the confirmation of the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests and transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interest really lie.[4]
>
> (emphasis added)

Further, in discussing the source of the Crown's fiduciary duty, Dickson J. underscores the discretionary nature of the Crown's authority:

> . . . where by statute, agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary strict standard of conduct.[5]
>
> (emphasis added)

In spite of the "strict standard of conduct," imposed upon the Crown, Dickson J. held that the Crown could not ignore the terms which Musqueam directed and understood would be embodied in the lease on their behalf. He reasoned that Musqueam's representations or instructions to the Crown concerning their preferred terms of lease "inform and confine the field of discretion within which the Crown was free to act," such that it was unconscionable to permit the Crown

simply to ignore those instructions.[6] He concluded that such unconscionability was the key to a finding that the Crown breached its fiduciary obligation because:

> Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.[7]

It is clear that the Court's analysis in *Guerin* holds the Crown no less accountable to the strict ethic of utmost good faith, loyalty and diligence which is imposed on fiduciaries exercising discretion within the commercial mainstream. Indeed, the obligation of the Crown is more onerous than that owed to other beneficiaries. Because the fiduciary duty of the Crown is now entrenched in section 35 of the *Constitution Act, 1982,* that duty embraces a constitutional dimension; one which specifically limits and directs the Crown's legislative capacity, placing upon the Crown the burden of justifying any infringement of an aboriginal right. In *Sparrow,* the Supreme Court of Canada reasoned as follows:

> . . . we find that the words "recognition and affirmation" [in section 35] incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.[8]

Accordingly, the Crown's fiduciary obligation towards aboriginal peoples is not simply a common law duty which applies to government officials administering aboriginal lands, chattels and resources; it is also *sui generis* duty embodied within our constitution which holds the Crown to a high standard of honourable dealing where, as the Court points out, "the honour of the Crown is at stake."[9] The Crown's fiduciary obligation relates directly to the question of what comprises legitimate regulation or legislative curtailment of a right, and any definition of the Crown's obligation in this regard must be informed by this constitutional imperative and

constraint. This distinguishes the Crown's fiduciary obligation towards aboriginal peoples from any other fiduciary obligation imposed at law or in any other contexts.

The Supreme Court of Canada in *Sparrow, supra*, not only affirmed that the fiduciary obligations of the Crown were elevated to constitutional status by virtue of their embodiment in section 35, it also provided further insight into the scope and depth of the obligation itself. The Court begins its analysis by underlining the accountability of the Crown to aboriginal peoples and concludes with a legal test that requires the Crown to justify any infringement of an aboriginal right. The Court reasons:

> The constitutional recognition afforded by the provision [section 35], therefore, gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century is increasingly more complex, interdependent and sophisticated and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying an legislation which has some negative effect on any aboriginal right protected under section 35(1).[10]
>
> (emphasis added)

The "justification" of Crown actions requires that the Crown establish a valid legislative objective and that the legislative scheme or government action in question is consistent with the Crown's fiduciary relationship toward aboriginal peoples. In *Sparrow*, the Court reasoned that the Crown's fiduciary obligation required that the food fishing right of the Musqueam be given priority in the allocation of the resource, such that there was "a link between the question of justification and the allocation of priorities in the fishery."[11]

While *Sparrow* dealt with aboriginal food fishing fights, the doctrine of priority extends to other aboriginal rights.[12] The doctrine was applied by the Supreme Court of Canada in *Van Der Peet* and *Gladstone* in the context of commercial fishing rights, and in *Delgamuukw* within the context of an aboriginal title claim, albeit in a modified form. It appears that the Crown, if challenged, must demonstrate that priority (as distinct from exclusive aboriginal use) has been given to the First Nation in question whose aboriginal rights were affected; that is, the First Nation's rights must be accommodated and an opportunity created by the Crown to facilitate the participation of that First Nation in utilizing the resource. The objective underlying this requirement was expressed by the Supreme Court of Canada in *Sparrow* as follows:

> The constitutional entitlement embodied in section 35(l) requires the Crown to ensure that its regulations are in keeping with the allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is, rather, to guarantee that those plans treat aboriginal peoples <u>in a way ensuring that their fights are taken seriously</u>.[13]
>
> (emphasis added)

It would seem, therefore, that if a legislative scheme is to "take seriously" the rights of aboriginal peoples, as expressly directed by the Supreme Court of Canada in *Sparrow,*[14] such a scheme must do more than simply establish a licensing or other resource management system that was devised without consideration for those aboriginal rights. There must be evidence, in the author's view, of an attempt by the Crown to accommodate and give expression to the rights in question. In the absence of such accommodation, the Crown risks a finding that an infringement cannot be justified.

The Court in *Sparrow* also reasoned that there were further questions to be addressed in the justification analysis, including:

(a) questions of whether there has been as little infringement as possible in order to effect the desired results;

(b) whether in a situation of expropriation, fair compensation was available;

(c) whether the aboriginal group in question had been consulted with respect to the conservation measures implemented.[15]

To the extent that government action causes an infringement of an aboriginal right which is unnecessary and beyond that required to achieve a valid legislative objective, and to the extent that such an aboriginal right is infringed without fair compensation or meaningful consultation, the Crown is clearly subject to court challenge rendering government action and legislation void and compensable.

A characteristic which distinguishes fiduciary law from tort law is that fiduciaries may be held accountable for failing to act; that is, from failing to take specific actions in the best interests of the beneficiary for whom they are responsible.[16] This distinction was not lost on the Supreme Court of Canada in the next precedent setting case after *Guerin* which addressed the Crown's fiduciary obligation when managing the use of reserve lands: *Blueberry River Indian Band v. Canada, [1995]* 4 S.C.R. 344; 130 D.L.R. (4th) 193 ("the *Blueberry River* case"). In that case, the Band transferred, in 1940, its mineral rights in its reserve to the Crown in trust, requiring the Crown to lease those rights for the benefit of the Band. In 1945, the Band agreed to surrender the whole reserve to the Crown "to sell or lease the same to such person or persons and upon

such terms as the government of the Dominion of Canada may deem most conducive to our welfare and that of our people."[17] The lands were sold through the Department of Veterans' Affairs to returning veterans as agricultural lands. The Crown failed, through inadvertence, to hold back mineral rights in the reserve lands as was its usual practice; oil was later found on the reserve. Speaking for the majority, Gonthier J. described the fiduciary obligation in a manner consistent with that articulated in *Guerin:*

> ... DIA [Department of Indian Affairs] was required to act in the best interest of the Band in dealing with the mineral rights. In fact, the DIA was under a fiduciary obligation to put the Band's interest first ...
>
> (emphasis added)

Again, the Court focussed on the discretionary nature of the Crown's authority to sell or lease the lands in question. Government officials were found to be under a fiduciary duty to continue the leasing arrangement which had been established in the prior 1940 Surrender. Further, the Court reasoned that the fiduciary duty to act in the best interests of the Band was also breached when DIA failed to retract the transfer of mineral rights from the sale of the land, once it realized these rights were mistakenly passed to the Department of Veterans' Affairs:

> As a fiduciary, the DIA was required to act with reasonable diligence. In my view a reasonable person in the DIA's position would have realized by August 9, 1989 that an error had occurred, and would have exercised the section 64 power to correct the error, reacquire the mineral rights and effect a leasing arrangement for the benefit of the Band. That this was not done was a clear breach of the DIA's fiduciary duty with IR172 according to the best interests of the Band.[18]
>
> (emphasis added)

This is the first case, within the aboriginal law context, in which the Supreme Court of Canada has held the Crown accountable by what "it failed to do," namely, to take specific steps to correct a previous error. The Supreme Court of Canada effectively found that the Crown had a positive obligation to transfer the legal interests in the Band's mineral rights back to the Band after they had been inadvertently sold.

Further, McLachlin J. confirmed that, indeed, the duty on the Crown as a fiduciary was that "of a man of ordinary prudence in managing his own affairs,"[19] citing the Supreme Court of Canada decision in *Fales v. Canada Permanent Trust Company*, [1977] 2 S.C.R. 302 at p. 315, in support. McLachlin J. reasoned:

> The duty of the Crown as fiduciary was that of a man of ordinary prudence in managing this own affairs [cite omitted]. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.[20]

Accordingly, it is clear that the Crown's fiduciary obligations not only comprise duties of good faith and loyalty, but also include duties of skill and competence in managing the affairs of aboriginal peoples. This conclusion is consistent with the Court's reasoning in *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 at 173, where La Forest J. reasons as follows.

> ... the fiduciary duty is different in important respects from the ordinary duty of care. In *Canson Enterprises v. Boughton* [cite omitted], I traced the history of the common law claim of negligent representation from its origin in the equitable doctrine of fiduciary responsibility [cite omitted]. However, while both negligent representation and breach of fiduciary duty arise in reliance-based

> relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.[21]
>
> (emphasis added)

Both the *Guerin* and *Blueberry River* cases are of assistance not only in elucidating the substance of the Crown's fiduciary obligation towards aboriginal peoples, but also in providing guidance with regard to the type of damages that would flow from such breaches. It is beyond the scope of this paper to address this subject matter in any depth; however, in light of the recent pronunciation of the Supreme Court of Canada in *Delgamuukw* that compensation will be available where aboriginal title has been infringed, this topic merits some consideration in this paper.

Dickson J. in *Guerin* affirmed that "the quantum of damages is to be determined by analogy with the principles of trust law."[22] Wilson J. agreed, reasoning that the beneficiary in breach of fiduciary duty cases is "entitled to be placed in the same position so far as possible as if there had been no breach of trust."[23] Simply put, the remedy is restitutionary in nature. It is noteworthy in this light that the Supreme Court of Canada decision in *McNeil v. Fultz* (1906), 38 S.C.R. 198 established the governing principle for damages for breach of trust. In that case, where the trustee wrongfully withheld securities he was bound to deliver, liability was held to be assessed upon the assumption that the beneficiary would have disposed of the trust property at the best price obtainable. In *Guerin,* Wilson J. applied *McNeil v. Fultz* in determining the appropriate measures of damages to which the Musqueam Band was entitled. In upholding the trial judge's

decision, Wilson J. found the proper measure of damages comprised a monetary assessment of the Band's lost opportunity to develop the reserve land such that damages would be based on the difference between that monetary assessment and the value of the golf club lease obtained by the Crown. Specifically Wilson J. reasoned:

> Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period now they were wrongfully withheld from him by the trustee (see *McNeil v. Fultz* ...), so also it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of contract. In contract, it would have been necessary for the Band to prove that it would have developed the land, in equity a presumption is made to this effect: See *Waters Law of Trusts in Canada,* p. 845.[24]
>
> (emphasis added)

According to *Guerin,* therefore, the beneficiary's objectives in relation to the trust property are not the basis for assessing damages. It is not relevant to an assessment of damages in these cases to ask the beneficiary what it would have done with the trust property, or what it did do with its own property, that was not subject to a trust. The courts simply do not have recourse to the beneficiary's knowledge or intention.

It is also noteworthy that Wilson J. underscored that the position at common law concerning damages for breach of trust are to be distinguished from those principles which are applicable in tort and contract law. She relied on previous authorities which affirm that the obligation of a defaulting trustee is not to be limited by common law principles governing remoteness of damage. Wilson J. endorsed an analysis which does not involve any inquiry as to whether the

loss was caused by, or flowed from, the breach itself. Rather, the inquiry in each instance is whether the loss would have happened if there had been no breach at all. As such, the obligation to make restitution in cases of breach of fiduciary or trust obligations are of a more absolute nature than the common law obligation to pay damages for tort of breach of contract.[25]

McLachlin J.'s analysis in *Blueberry River* is consistent with that of Wilson J. in *Guerin*. In *Blueberry River*, McLachlin reasoned that a beneficiary of fiduciary duty is entitled to have his or her property restored or value in its place, even if the value of the property turns out to be much greater than that which could have been foreseen at the time of the breach, citing the Court's decision *Hodgkinson v. Simms, supra,* in support:

> The trial judge's emphasis on the apparent low value of the mineral rights [at the time of surrender] suggests an underlying concern with the injustice of conferring an unexpected windfall on the Indians at the Crown's expense. This concern is misplaced. It amounts to bringing foreseeability into the fiduciary analysis through the back door. This constitutes and error of law. The beneficiary of fiduciary duty is entitled to have his or her property restored or value in its place even if the value of the property turns out to be much greater than could have been foreseen at the time of the breach …[26]
>
> (emphasis added)

In light of the reasons of the Supreme Court of Canada in *Blueberry River* and *Guerin*, it appears that damages for breach of fiduciary duty should be assessed with the goal of placing the beneficiary in the position he or she would have been in had there been no breach, applying the presumption that the beneficiary would have put the trust property to its most advantageous use. This is consistent with those principles of law that place the fiduciary in the position of determining and acting in accordance with what is in the best interest of the beneficiary.

The Supreme Court of Canada's analysis in *Blueberry River* is also of assistance in clarifying questions arising from *Guerin* concerning whether any pre-surrender fiduciary duty exists on the part of the Crown in respect of reserve lands. MacLachlin J. concluded the Crown's obligation in pre-surrender situations is limited to one of preventing exploitative bargains:

> It follows that under the *Indian Act*, the Band had the right to decided whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident - a decision that constituted exploitation - the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.[27]

In this context, MacLachlin J. synthesized the Court's decisions in cases unrelated to the Crown's fiduciary duty towards aboriginal peoples, such as *Frame and Smith,*[28] *Norberg and Wynrib,*[29] and *Hodgkinson v. Simms, supra,* reasoning as follows:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person (cites omitted). . . . The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in a situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. <u>This is the notion at the heart of the fiduciary obligation</u>.[30]
>
> (emphasis added)

It would appear, therefore, in circumstances where a surrender has taken place or where the Crown, pursuant to the *Indian Act* or any other enactment or regulation, is exercising discretionary powers which impact the management or administration of aboriginal lands or resources, a fiduciary obligation will arise.

The decision of the Federal Court of Appeal in *Semiahmoo Indian Band v. Canada* (1997), 148 D.L.R. (4th) 523 applied both *Guerin* and *Blueberry River* in concluding that, indeed, a pre-surrender fiduciary obligation existed. In 1951, the Semiahmoo Band agreed to an absolute surrender of approximately 22 acres of its reserve for $550 per acre. No appraisal of the value of the land was done before setting the final price. The purpose of the surrender was to improve customs facilities adjacent to the reserve. The Federal Crown retained title to the surrendered lands, but most of it remained unused for customs facilities or any other purpose. In 1969, the Department of Indian Affairs learned that the surrendered lands would not be used to build an expanded customs facility in the foreseeable future. A determinative factor in finding liability was that the Band's knowledge that, regardless of its decision on the issue of surrender, there was a risk that it would lose its land through expropriation in any event. Indeed, the Band was particularly vulnerable as land had been previously taken from the Band through expropriation. This fact, coupled with the Department of Indian Affairs' knowledge that the surrendered lands would not be used to build an expanded customs facility in the foreseeable future, led to a finding of liability and, in particular, the Court's conclusion that the surrender of 1951 amounted to an exploitative bargain:

> When land is taken in this way and it is not known what, if any, use will be made of it, or whether the land is going to be used for government purposes, I think there is an obligation on the fiduciary to condition the taking by reversionary provision, or ensure by some other mechanism that the least possible impairment of the plaintiffs rights occur."[31]
>
> In my view the 1951 surrender agreement, assessed in the context of this specific relationship between the parties, was an exploitative bargain. There was no attempt made in drafting its

> terms to minimize the impairment of the Band's rights and, therefore, the respondent should have exercised its discretion to withhold its consent to the surrender or to ensure that the surrender was qualified or conditional.[32]
>
> . . .
>
> I should emphasize that the Crown's fiduciary obligation is to withhold its own consent to surrender where the transaction is exploitative. In order to fulfill this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploited bargain. As a fiduciary, the Crown must be held to a strict standard of conduct. Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility scrutinize the transaction.[33]
>
> (emphasis added)

The Court in *Semiahmoo* clearly directed that the Crown should minimize the impairment of bands' reserve rights in light of any public purpose to which reserve lands are to be put; moreover, the Court indicated that the use, expropriation or surrender of reserve lands for a public purpose should be timely such that if the public purpose does not materialize, the reversionary interest should return to the Band.

As in *Blueberry River,* the Court in *Semiahmoo* found that the Crown had an obligation to restore the lands to the Semiahmoo Band. While s. 64 of the 1927 *Indian Act* was helpful in the *Blueberry River* case, there was not an equivalent provision in successor statutes; yet, this was not a barrier to relief in *Semiahmoo* because the Court essentially found that in the absence of such a provision, the Crown still had a fiduciary obligation to act in the best interests of the Band, particularly when the Crown continued to own and control the land. As such, while it was Public Works, not the Department of Indian Affairs, that was in possession of the surrendered

lands, the Crown still had an obligation to restore the lands to the Band.[34] Therefore, while the Court found that the Crown's original breach of fiduciary duty in consenting to the 1951 Surrender Agreement was statute barred by operation of the thirty year ultimate limitation period, it concluded that the Crown was liable for a second breach of fiduciary duty in 1969 when it failed to correct its original breach by restoring the lands to the Band after the Band had requested it do so.

Semiahmoo is also instructive as it deals with the issue of remedies. The Federal Court of Appeal affirmed that in cases of breach of fiduciary obligation "there is no inquiry as to whether the loss suffered by the plaintiff flowed from the breach. The issues of causation, foreseeability and remoteness are not considered. Rather, the inquiry is whether the loss would have happened had there been no breach."[35] Further, the Federal Court of Appeal applied Wilson J.'s approach in *Guerin* and directed that equitable damages should be calculated based on the presumption that the Band would have used the reserve land in the most advantageous way during the period that it was improperly held by the Crown.[36]

In *Semiahmoo*, the Court imposed a constructive trust in favour of the Semiahmoo Band with respect to the surrendered reserve lands. While the Court was not clear, on the basis of existing authority, whether in a case of breach of fiduciary duty it was necessary to show unjust enrichment in order to justify a restitutionary remedy (such as a constructive trust) or whether it was sufficient to show that ordinary damages (calculated on common law principles), would not provide adequate compensation to the beneficiary for the impugned breach, the Court cautiously applied the elements of unjust enrichment and found that they had been satisfied on the facts of the case before it.[37] It is also noteworthy that in concluding that a restitutionary remedy such as

a constructive trust was appropriate in the circumstances of that case, the Court also considered the element of deterrence:

> Further, it is well-settled law that fiduciary law contains within it an element of deterrence (citation omitted). A restitutionary remedy in this case will signal to the Respondent that it must act with due regard to the best interests of affected Indian bands when dealing with land retained by the Respondent post-surrender. In other words, when the Respondent retains land obtained by way of a surrender, its fiduciary obligations do not end when the band 'signs on the dotted line.'[38]

Having found that the Crown was unjustly enriched and that the restitutionary remedy should act as a deterrent to the Crown in the future, the Court concluded that a constructive trust remedy was most appropriate, particularly in light of the unique value placed upon land by First Nations in general:

> By virtue of the Respondent's breaches of its fiduciary duty, the Band lost, and was not able to regain, its interest in the Surrendered Land. Given the unique value placed upon land by the First Nations in general, and upon the surrendered land by the Band in particular, a monetary award *simpliciter* would be an inadequate remedy for the Respondent's actual breach of the fiduciary duty *(Lac Minerals, supra* at 676-679). In my view, it is appropriate in these circumstances for the Court to *create* a beneficial interest in the Surrendered Land for the Band by imposing a constructive trust.[39]

In *Semiahmoo,* the Court not only imposed a constructive trust (returning to the Band a beneficial interest in the lost reserve lands) but also gave the Band an opportunity to obtain equitable damages to compensate it for losses sustained by the Band's inability to develop and use the land while in the possession of the Crown. However, the question of the quantum of

equitable damages was referred back to the trial judge and a settlement was eventually reached prior to trial.

A. Aboriginal Rights Cases Affecting the Crown's fiduciary Duty

Precedent setting cases other than *Guerin, Blueberry River* and *Semiahmoo* which have addressed the nature and scope of the Crown's fiduciary obligation towards aboriginal peoples have, in more recent years, mostly focused on the Crown's fiduciary obligations in the context of the assertion of a s. 35 aboriginal rights. These cases are *R. v. Gladstone, R. v. Van Der Peet, R. v. Adams, Delgamuukw v. Her Majesty the Queen, Hay River First Nation v. The Ministry of Forests and Canadian Forest Products*,[40] and most recently the Supreme Court's decision in *Marshall v. Her Majesty the Queen.*[41] Each of these cases will be briefly addressed below.

1. *R. v. Gladstone*

As indicated above, in *R. v. Gladstone,* the Supreme Court of Canada considered the *Sparrow* justification analysis in light of the assertion of a commercial fishing right. In doing so, the Court modified and adapted its justification analysis in *Sparrow*. The Court found that the Gladstone brothers, as members of the Heiltsuk First Nation, had a commercial right to harvest and sell herring spawn-on-kelp, The Court also found that the fishery regulations infringed that right but reflected a valid legislative objective. On the question of whether the infringement was justified, however, the Court sent the matter back to trial. Nonetheless, in doing so, the Court set out an analytical framework which addressed the issue of the Crown's fiduciary obligation and, in particular, its duty to accommodate the existence of the commercial right. Specifically, the Court reasoned:

> ... the government must demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples. This means . . . that the government must demonstrate that it has given the aboriginal fishery priority in a manner consistent with this Court's decision in *Jack v. The Queen*, [1980] 1 S.C.R. 294 at p. 313 where Dickson J. (as he then was) held that the correct order of priority in the fisheries is '(i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing'[42]
>
> (emphasis added)

The Court was, nonetheless, clearly concerned with the notion that giving priority to a First Nation to exercise a commercial fishing right would, in the circumstances of a right with no inherent limit (such as a commercial right to fish), may lead to a right to the exclusive use of the fishery. Such a result was not, according to the Court, the intention of the Sparrow decision:

> The basic insight of *Sparrow* -- that aboriginal rights holders have priority in the fishery -- is a valid and important one; however, the articulation in that case of what priority means, and its suggestion that it can mean exclusivity under certain limited circumstances, must be refined to take into account the varying circumstances which arise when the aboriginal right in question has no internal limitations.[43]

Accordingly, the doctrine of priority enunciated in Sparrow was modified to ensure that no aboriginal right holder would have the right to the exclusive use of a given resource where no internal limitation to the right exists:

> Where the aboriginal right is one that has no internal limitations then the doctrine of priority does not require that, after conservation has been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resources in a manner respectful of the fact that those rights have priority over the

> exploitation of the fishery by other users. This right is at once both procedural and substantive; at this stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal right holders in the fishery.[44]
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> (emphasis added)

Therefore, it is patent that the Crown is obliged to set up a process of consultation with First Nations, before allocating a given resource among various users, and further the actual allocation determined by the Crown must reflect the prior interest of the aboriginal right holder. As the Court later reasoned in *Gladstone*, the content of the doctrine of priority is "something less than exclusivity but which nonetheless gives priority to the aboriginal right."[45] Further, the Court did provide some guidance on how the question of whether the Crown granted priority to a First Nation could be assessed. The Court referred to its reasons in *Sparrow* relating to consultation and compensation and then set out the following factors:

1. whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example);

2. whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal right holders;

3. the extent of the participation in the fishery of aboriginal right holders relative to their percentage of the population;

4. how the government has accommodated different aboriginal rights in a particular fishery (food vs. commercial rights, for example),

5. how important the fishery is to economic and material well-being of the Band in question;

6. what criteria have been taken into account by the government in, for example, allocating commercial licences amongst different users.

The above questions are not exhaustive, but are indicative of the type of inquiry the Court expects the Crown to engage in, prior to making an allocation decision. In setting out these guiding questions, the Court underscores that "certainly the holders of such aboriginal rights must be given priority, along with other holding aboriginal rights to the use of a particular resource" and then acknowledges that the existence of other potential aboriginal rights holders with an equal claim, suggests that there must be some external limitation on the exercise of those aboriginal rights.[46]

2. *R. v. Van Der Peet*

Chief Justice Lamer's analysis in *R. v. Van Der Peet* did not address the justification analysis; it confirmed, however, that the Crown's fiduciary obligations to aboriginal peoples shapes and informs legislative and treaty interpretations. Essentially, the Court reasoned that the historical relationship between the Crown and aboriginal peoples and the fact that the "honour of the Crown is at stake" in the Crown's dealings with aboriginal peoples requires that statutory and constitutional provisions protecting the interests of aboriginal peoples must be given a generous and liberal interpretation.[47] Further, the Court reasoned that the fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regard to what falls within the scope of s. 35, such doubt or ambiguity must be resolved in favour of aboriginal peoples:

> Because of this fiduciary relationship, and its implications of (sic) the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal

> peoples, must be given a general and liberal interpretation [cite omitted]. This general principle must inform the Court's analysis of the purposes underlying s. 35(l), and of that provision's definition and scope.
>
> The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(l), such doubt or ambiguity must be resolved in the favour of aboriginal peoples.[48]

These interpretive principles, grounded in the Crown's fiduciary obligation, will not only influence the Court's delineation of the nature and scope of aboriginal rights and its construction of statutes but, further, in light of the *Delgamuukw* decision and its emphasis on the importance of oral history, will affect treaty interpretation as well, Consider that in *Delgamuukw*, the Court, in part, allowed the appeal on the basis that the trial judge had not given the requisite weight to oral history which related to proof of aboriginal title. Specifically, the Court in *Delgamuukw* reasoned as follows:

> Notwithstanding the challenges created by the use of oral history as proof of historical facts, <u>the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that the courts are familiar with</u>, which largely consist of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples [cite omitted]. To quote Dickson CJ, given that most aboriginal societies 'do not keep written records,' the failure to do so would 'impose an impossible burden of proof on aboriginal peoples and, 'render negatory' any rights that they have [cite omitted]. This process must be undertaken on a case-by-case basis. . .[49]
>
> (emphasis added)

The Court's receptiveness to oral history, coupled with its inclination to interpret ambiguous treaty language in a manner favouring First Nations, suggest that treaties could very well be reconstructed on this basis.

3. *Marshall v. Her Majesty the Queen*

The very recent case of the Supreme Court in *Marshall v. Her Majesty the Queen, supra,* further illustrates how the Crown's fiduciary obligation in the treaty interpretation process can significantly modify a treaty's written test. In that case, the accused, a M1'kmaq Indian, was charged with three offences set out in the Federal Fisheries Regulations: selling eels without a licence, fishing without a licence and fishing during a closed time with an illegal net. He admitted that he had caught and sold 463 pounds of eel without a licence (worth less than $800). The only issue at trial was whether he possessed a treaty right to catch and sell fish under the treaties of 1760-61, that exempted him from compliance with the Regulations. During the negotiations leading to the treaties of 1760-61, the aboriginal leaders asked for truckhouses "for furnishing them with necessaries in exchange for their peltry" in response to the Governor's inquiry "whether they were directed by their Tribes to propose any other particulars to be treated upon at this time." The written treaty document, however, contained only the promise by the Mi'kmaq not to "traffic, barter or exchange any commodities in any manner but with such persons or the managers of such truckhouses as shall be appointed or established by His Majesty's Governor." While this trade clause is framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals, the trial judge found that it reflected a grant to them of the positive right to bring the products of their hunting, fishing and gathering to a truckhouse to trade. He also found that when the exclusive trade obligation and

the system of truckhouses and licensed traders fell into disuse, the "right to bring" such products to the truckhouses disappeared. The accused was convicted on all three counts. The Court of Appeal upheld the convictions and concluded that the trade clause does not grant the Mi'kmaq any rights, but simply represented a mechanism imposed upon them to help ensure that the peace between the Mi'kmaq and the British was a lasting one by obviating the need of the Mi'kmaq to trade with the enemies of the British or unscrupulous traders. The Supreme Court of Canada allowed the appeal. More specifically, the Court found that the treaty did protect an aboriginal right to hunt, fish and trade for purposes of securing the "necessaries" of life, which the Court interpreted to be the equivalent of earning a moderate livelihood.

It is of significance that in *Marshall,* the Court considered extrinsic evidence, and in particular historical documentation, evidencing the substance of treaty negotiations, in order to ensure that the integrity and honour of the Crown would not be compromised by failing to fulfill promises which caused the Mi'kmaq to sign treaty. In so doing, the Supreme Court of Canada found that the courts below erred in concluding that the only enforceable treaty obligations were those set out in the written treaty document itself.[50] Specifically, the Court reasoned:

> If the law is prepared to supply the deficiencies of written context prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.[51]

On this basis then, the Court justified giving effect to the treaty by considering facts not evidenced in the written text of the treaty itself:

> The trial judge's view that the <u>treaty obligations are all found within the four corners</u> of the March 10, 1760 document [the

> treaty], albeit generously interpreted, erred in law by failing to give adequate weight to the concerns and perspectives of the Mi'kmaq people, despite the recorded history of the negotiations, and by giving excessive weight to the concerns and perspectives of the British who held the pen [cite omitted]. The need to give balanced weight to the aboriginal perspective is equally applied in aboriginal rights cases [cite omitted].
>
> While the trial judge drew positive implications from the negative trade clause (reversed on this point by the Court of Appeal), such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiation sessions and more favourable terms are evident from the other documents in evidence the trial judge regarded as reliable. Such an overly deferential attitude to the March 10, 1760 document [the written treaty document] was inconsistent with the proper recognition of the difficulties of proof confronted by aboriginal people, a principle emphasized in the treaty context by *Simon* at p. 408 and *Badger*, at para. 4 and in the aboriginal rights context in *Van Der Peet* at para. 68 and *Delgamuukw* at paras. 80-82. The trial judge interrogated himself on the scope of the March 10, 1760 text. He thus asked himself the wrong question. His narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s. Had the trial judge not given undue weight to the March 10, 1760 document, his conclusions might have been very different.[52]
>
> (emphasis added)

It is evident from the above quote that the Supreme Court of Canada will no longer find the express words of a given treaty document determinative. The honour and integrity of the Crown in fulfilling treaty promises requires the Court to look at extrinsic evidence in reconstructing the true terms of the treaty. *Marshall* makes it clear that the Court will look at extrinsic evidence such as historical documents. Further, *Delgamuukw* also makes it clear that the Court will consider oral history as well as historical documentation in such a treaty reconstruction process.

In the final analysis, the treaty document itself becomes simply one piece of evidence to weigh in determining the rights embedded in the treaty in question.

4. *R. v. Adams*

In R. v. Adams, the Supreme Court of Canada found that the appellant, a Mohawk, had an aboriginal right to fish for food. In doing so, and in addressing the justification analysis, the Court shed further light on how the existence of a fiduciary duty must shape the content and language of a legislative and regulatory regime which infringes an aboriginal right. The regulations in question did not allow for the issuance of licences for aboriginal food fishing but rather simply permitted the Minister, at his discretion, to issue a special permit to an Indian or Inuk, authorizing them to fish for their own subsistence. The regulatory scheme did not, however, set out the criteria through which Minister's discretion was to be exercised. Accordingly, the Court found that the regulatory scheme imposed undue hardship on the appellant and interfered with this preferred means of exercising the right.[53] In this context, the Court reasoned specifically as follows:

> In light of the Crown's unique fiduciary obligation towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confirms administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegated regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of the aboriginal rights under the *Sparrow* test.
>
> (emphasis added)

The requirement for setting out specific criteria in the legislative or regulatory regime will presumably require greater specificity in enactments and regulations involving forestry, mining, fishing and any other resource. Further, in light of *Sparrow* and *Gladstone,* such specificity will likely require provisions which accommodate the existence of aboriginal rights.

5. *Delgamuukw v. Her Majesty the Queen*

In *Delgamuukw*, the Supreme Court of Canada addressed its justification analysis as it relates to the special fiduciary relationship between the Crown and aboriginal peoples, further elucidating its reasons in *Sparrow, Gladstone and Adams*. The Court emphasized that the requirements of the fiduciary duty are a function of the "legal and factual context" of each appeal.[54] The Court suggests that the Crown's fiduciary duty can be satisfied in a number of ways, depending, in large measure, on the aboriginal right at issue. With respect to aboriginal title itself, the Court reasons as follows:

> The manner in which the fiduciary duty operates with respect to the second stage of the justification test - both with respect to the standard of scrutiny and the particular form the fiduciary duty will take - will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of the lands; second, aboriginal title encompasses the right to choose to what use land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, the lands held pursuant to aboriginal title have an inescapable economic component.
>
> The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply. What is required is that the government demonstrate (at para. 62) both 'the process by which it allocated the resource and the actual allocation of the resource

> which results from that process reflect the prior interest' of the holders of aboriginal title in the land. By analogy with *Gladstone*, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, and that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of the aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licencing fees) be somewhat reduced. This list is illustrative and not exhaustive. This is an issue that may involve an assessment of the various interests at stake and the resources in question. No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the lands and any grant, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here.[55]
>
> (emphasis added)

It would appear, therefore, that in addition to requiring the prioritization of aboriginal sustenance and commercial rights, the doctrine of priority as articulated in *Sparrow* and modified in *Gladstone,* could also require governments to accommodate aboriginal title rights by, for example, facilitating the participation of aboriginal peoples in the development of the resource in question. The Court also reasoned, however, that the fiduciary duty of the Crown may be satisfied in alternative ways:

> Moreover, the other aspects of aboriginal title suggests that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the

> Crown's failure to consult an aboriginal group in respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin.* The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions and will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these cases when the minimum acceptable standard is consultation, this consultation must be in good faith and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal land.[56]
>
> (emphasis added)

Thus, while the exclusive nature of aboriginal title may require the Crown to accommodate the participation of aboriginal peoples in the development of the resources of British Columbia,[57] the principle that aboriginal title encompasses the right to choose how land can be used, may give rise to fiduciary duty on the part of the Crown to involve aboriginal peoples in its decision-making with respect to traditional aboriginal lands. Hence, the duty of consultation. The difficulty arises, of course, as to what is meant by consultation. The Court suggests a continuum where one end would comprise "mere consultation" (presumably, the Crown would be required to notify First Nations of intended activity on traditional lands) and the other end of the continuum would require the full consent of a First Nation prior to government action. Unfortunately, the law has not yet developed in a way to provide any greater clarity on this particular issue at this time.

The Court in *Delgamuukw* also dealt with the question of compensation arising from a breach of fiduciary duty. Specifically, the Court reasoned that aboriginal title, unlike the aboriginal right

to fish for food, has a "inescapably economic aspect" particularly in light of the modem uses to which lands held pursuant to aboriginal title can be put.[58] The Court reasons as follows:

> The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well. A possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith of the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of infringement payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. Since the issue of damages were severed from the principle action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringement of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.[59]

It would appear, therefore, that the Court in *Delgamuukw* expanded the Crown's fiduciary obligation as potentially encompassing the following aspects in relation to aboriginal title.

1. According to the *Gladstone* decision, the Court reaffirmed that the process by which the Crown allocates a resource and the actual allocation of the resource should reflect the prior interest of the holders of aboriginal title in the land;

2. The right to choose how aboriginal title land can be used, suggests that the Crown has an obligation to include aboriginal peoples in decisions taken with respect to their lands. The duty of consultation arises within this context and may range from the duty on the part of the Crown to "merely consult" with a First Nation to the onerous duty not to act without the full consent of a First Nation;

3. Following its decision in *Guerin,* the Court reasoned that in keeping with the duty of honour and good faith from the Crown, fair compensation would ordinarily be required when aboriginal title is infringed, however, the court did little to provide guidance on how compensation would be quantified other than noting that the quantum of equitable damages in such circumstances would vary with:

(a) the nature of the particular title affected;

(b) the nature and severity of the infringement; and

(c) the extent to which aboriginal interests were accommodated by the Crown.

6. *Halfway River*

The recent decision of the British Columbia Court of Appeal in *Halfway River First Nation v. B.C., supra,* provides further guidance on the Crown's fiduciary obligation as it relates to the question of consultation, within an administrative law context, where a district forest manager's decision to permit logging on the traditional lands of the petitioners was challenged. The trial judge quashed the decision of the District Manager granting the forest company's application for a cutting permit on Crown land, adjacent to a reserve which had been granted to the Halfway River First Nation pursuant to Treaty.

In upholding the decision of the trial judge to quash the decision of the District Manager to grant the cutting permit in question, Finch J.A. found that the Crown, and in particular the provincial government through the District Manager, had failed to justify the infringement of the petitioners' aboriginal rights because it did not conduct adequate and meaningful consultation

with them before making the decision. Specifically, he found that the Crown had failed to provide "in a timely way, information that the aboriginal group would need in order to inform itself on the effects of the proposed action and to ensure that the aboriginal group had an opportunity to express their interests and concerns."[60] In particular, Finch J.A. found a positive duty on the part of the Crown to inform the petitioners of its intended action on their traditional territory reasoning as follows:

> I respectfully agree with the Learned Chambers Judge that given the positive duty to inform resting on the Crown, it is no answer for it to say that the Petitioners did not take affirmative steps in their own interest to be informed, conduct that the Learned Chambers Judge described as possibly 'not . . . entirely reasonable.[61]
>
> (emphasis added)

Indeed, Finch J.A. suggested that even though there was a sufficiently important legislative objective, even if the Petitioners' rights were infringed as little as possible, and even if the effects of the infringement outweighed the benefits to be derived from the government's conduct, the justification of the infringement could not be established because the Crown failed in its duty to consult.[62]

Madam Justice Huddart expanded upon Mr. Justice Finch's view that the District Manager had a positive obligation to recognize and affirm the petitioner's treaty right to hunt and further stated:

> Moreover, the District Manager was also required to determine the nature and extent of the treaty right to hunt so as to honour the Crown's fiduciary obligation to the First Nation.[63]
>
> (emphasis added)

Indeed, Madam Justice Huddart concluded the District Manager's failure to consult constituted a "deficiency in the decision making process" which was a "breach of the Crown's fiduciary responsibilities."[64]

B. Implications of Developing Jurisprudence on the Crown's Fiduciary Obligation

This brief survey of the case law illustrates that, generally speaking, the courts have held the Crown responsible and accountable to aboriginal peoples in circumstances where the Crown has exercised discretionary power in the management and administration of aboriginal land and resources and where legislative enactments have infringed aboriginal or treaty rights. That accountability requires, in very pragmatic terms, that the Crown is able to justify its actions when challenged. In such circumstances, the Supreme Court of Canada has repeatedly stated that "the honour of the Crown is at stake" in dealing with aboriginal people and that the Crown will be held "to a strict standard of conduct."[65]

In the context of the Crown's administration and management of reserve lands, it is clear that the Crown will be required to act with good faith, loyalty and diligence as expressed in *Guerin* and that the Court will impose upon the Crown a standard of care equivalent to that of a prudent person acting reasonably in the management of its affairs.[66] In this regard, the Crown will be held to no less a standard of care than that imposed on a competent fiduciary acting within the commercial mainstream.

With regard to aboriginal rights and title, the *Delgamuukw* and *Sparrow* cases provide constitutional protection such that the Crown must justify an infringement of an aboriginal right in a manner consistent with the Crown's fiduciary obligation towards aboriginal peoples. In the

context of subsistence rights such as fishing for food or hunting for food, Sparrow establishes the Crown must give aboriginal peoples first priority in the allocation of the resource. Application of the justification analysis to commercial rights such as the right to harvest and sell herring spawn-on-kelp or eel, requires a modification of the doctrine of priority, so that the accommodation of the aboriginal right does not necessarily lead to use of the resource by aboriginal people only.[67] Simply put, the Crown must assist First Nations in ensuring the expression of their rights both for sustenance purposes and in the commercial marketplace. While priority may be given to an aboriginal right, the allocation of the resource is based on the principle of reconciliation of aboriginal rights with the broader political community.[68]

With respect to the Crown's responsibility in relation to aboriginal title, the Court has suggested that its fiduciary duties may be satisfied in a number of ways. First, given that aboriginal title encompasses the right to exclusively use and occupy traditional lands, the duty might require that the Crown accommodate the participation of aboriginal peoples in the development of resources within their traditional territories; for example, by granting various licences and permits. Second, given that aboriginal title encompasses the right to choose to what use land can be put, this aspect of title suggests that the fiduciary obligations of the Crown and aboriginal people may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their land. Third, given that aboriginal title has an inescapable economic component, the fiduciary relationship between the Crown and aboriginal peoples may require that compensation be paid before an infringement of aboriginal title can be justified.

The fiduciary obligation of the Crown towards aboriginal people also informs the manner in which the courts will assess and interpret legislation and treaties. The *Adams* case directs that

enactments or regulations which confer a discretionary power on Crown officials should specifically set out the criteria through which such discretionary powers are to be exercised. In *Van Der Peet*, the court not only reaffirmed that statutory and constitutional provisions protecting the interests of aboriginal people must be given a general and liberal interpretation but also stated that any doubts or ambiguities with respect to the scope of those rights must be resolved in favour of aboriginal peoples. These principles are especially instructive in the context of treaty interpretation, particularly in light of the Supreme Court of Canada decisions in *Marshall* and *Badger*,[69] where the Supreme Court has underscored that: (a) treaties represent an exchange of solemn promises between the Crown and various Indian Nations such that the Crown is held to a high standard of honourable dealing, (b) it is always assumed that the Crown intends to fulfill its promises,- (c) the Court will not sanction any sharp dealings; and (d) the Court will not consider itself bound by the written text of the treaty but will consider extrinsic evidence in determining the true terms of the treaty agreement.[70]

Moreover, the principle that the Crown's fiduciary obligation requires that it must fulfill its promises becomes particularly engaging in treaty cases where oral history suggests that promises were made by the Crown at the time of the making of treaty which are not found in the treaty's written text. We now know, since the Supreme Court's decision in *Delgamuukw* that the Crown will given considerable weight to oral history. As discussed above, the Court specifically stated that oral history must be placed on an equal footing with historical documents.[71] Placing oral history on an equal footing with written historical documents coupled with the principle that the fiduciary obligation of the Crown requires that its promises be kept, suggests that First Nations

may very well be in a position to argue that the substance and scope of treaty rights are broader than those articulated in the written text of the treaty itself.

* * *

III. CONCLUSION

Jurisprudence relating to the Crown's responsibility to aboriginal people has categorically affirmed that the Crown will be held to a high standard of honourable dealing when it exercises legislative or discretionary powers in a manner which affects aboriginal lands and resources. The tenor of the most recent cases suggests that aboriginal rights be accommodated by the Crown, and that such accommodation in turn requires that the Crown identify what treaty or aboriginal rights may be affected by their actions so that aboriginal peoples can be consulted in a manner which takes their right seriously. Furthermore, we know that such consultation will in certain circumstances require that First Nations be involved in the Crown's decision-making processes relating to land and resource use and that such consultation may require that the Crown not proceed with a decision or action without the consent of the First Nation affected. Significant difficulties admittedly arise, given that the evolution of the law in this area remains in its formative stages, in predicting precisely when consent will be required and when it will not. Nonetheless, in the final analysis, the Crown will be held to a strict standard of conduct in dealing with aboriginal lands and resources and, further, the Crown must in some manner facilitate and accommodate the expression of these rights in the commercial marketplace. This was made clear by the Court in its decisions in *Gladstone* and *Marshall* where commercial rights to fish were affirmed and in *Delgamuukw* where the Court recognized that aboriginal title had an inescapable economic component. Aboriginal entitlement to the expression of these rights are at

the heart of the Crown's fiduciary obligation and, where these obligations are not met, the infringement of an aboriginal right could lead not only to a reinstatement of lost title lands and a re-allocation of resources, but also to the legal obligation to compensate First Nations for lost opportunities associated with the inability to exercise aboriginal rights.

IV. ENDNOTES

1 There is a significant nexus between the Crown's fiduciary duty and issues relating to self-government, the role of administrative tribunals and the legal duty to negotiate in good faith; these are beyond the scope of this paper but should be acknowledged as important issues requiring attention.

2 *Guerin et al v. The Queen* (1984), 2 S.C.R. 338; 13 D.L.R. (4th) 321 (hereinafter *Guerin* cited to D.L.R.)

3 *Guerin, supra,* at 341, See also *R. v. Sparrow*, [1990] 70 D.L.R. (4th) 385 at 408

4 *Guerin, supra,* at 340

5 *Guerin, supra,* at 341

6 *Guerin, supra,* at 344

7 *Guerin, supra,* at 344

9 *Sparrow, supra,* at 409

9 *Sparrow, supra,* at 413

10 *Sparrow, supra,* at 410

11 *Sparrow, supra,* at 413

12 The Supreme Court of Canada refers interchangeably to "the doctrine of priority" and the "idea" of priority in various cases such as *R. v. Van Der Peet,* [1996] 2 S.C.R. 507; 137 D.L.R. (4th) 289; *R. v. Gladstone,* [1997] 2 S.C.R. 723; 137 D.L.R. (4th) 648; *R. v. Delgamuukw,* [1997] 3 S.C.R. 1010; 153 D.L.R. (4th) 193

13 *Sparrow, supra,* at 416

14 *Sparrow, supra,* at 417

15 *Sparrow, supra,* at 416-417

16 See, for example, *B.(K.L.) v. British Columbia*, 51 B.C.L.R. (3rd) 1; *Fine's Flowers Ltd. v. General Accident* (1977), 81 D.L.R. (3rd) 139

17 *Blueberry River, supra,* at 197-204

18 *Blueberry River, supra,* at 205

19 *Blueberry River*, *supra,* at 230

20 *Blueberry River*, *supra,* at 230

21 *Hodgkinson, supra,* at 173

22 *Guerin, supra,* at 345

23 *Guerin, supra,* at 362

24 *Guerin, supra,* at 366

25 *Guerin, supra,* at 365

26 *Blueberry River*, *supra,* at para. 103, p. 229-30

27 *Blueberry River*, *supra,* at 208-209

28 *Frame and Smith,* [1987] 2 S.C.R. 99; 42 D.L.R. (4th) 81

29 *Norberg and Wynrib,* [1992] 2 S.C.R. 226; 92 D.L.R. (4th) 449

30 *Blueberry River*, *supra* at 209

31 *Semiahmoo, supra,* at 537

32 *Semiahmoo, supra,* at 538

33 *Semiahmoo, supra,* at 539

34 *Semiahmoo, supra,* at 545

35 *Semiahmoo, supra,* at 563

36 *Semiahmoo, supra,* at 563

37 *Semiahmoo, supra,* at 556. Specifically, the Court found that the Crown had been unjustly enriched, that there had been a corresponding deprivation suffered by the Plaintiff Band and that there was an absence of a juristic reason for the enrichment.

38 *Semiahmoo, supra,* at 558

39 *Semiahmoo, supra,* at 560

40 *Halfway River First Nation v. The Ministry of Forests and Canadian Forest Products,* unreported, Registry No. CA023526, No. CA023539, British Columbia Court of Appeal, August 12, 1999

64 *Halfway River, supra*, at para. 179

65 See *Guerin, supra,* at 341 and *Sparrow, supra,* at 413

66 *Blueberry River, supra,* at 230

67 Proper accommodation of an aboriginal right may, in extreme cases involving serious conservation concerns, lead to exclusive use; yet, clearly, the court did not envision this to be the norm.

68 *Delgamuukw, supra,* at 161

69 *Badger v. The Queen* (1996), 133 D.L.R. (4th) 324 at 341

70 *Badger, supra,* at para. 41; *Marshall, supra,* at paras. 4, 9, 19-20, 40, 49-52

71 *Delgamuukw, supra,* at para. 87