CROWN-NATIVE RELATIONS AS FIDUCIARY: REFLECTIONS ALMOST TWENTY YEARS AFTER *GUERIN*

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The judicial recognition of the fiduciary relationship between the Crown and Aboriginal peoples in Canada is approaching its twentieth anniversary. Since its initial articulation in the 1984 Supreme Court of Canada decision in Guerin v. The Queen, the understanding of Crown-Native relations as fiduciary has become well-entrenched, even axiomatic, notwithstanding the sparse judicial commentary and elaboration on that relationship and its implications. This paper reflects upon the almost twenty year understanding of Crown-Native relations as fiduciary, including the implications of the Supreme Court's most recent pronouncements on Crown-Native fiduciary relations in Osoyoos Indian Band v. Oliver (Town of) and Wewaykum Indian Band v. Canada, and examines some of the unanswered questions revolving around the judicial understanding of those relations as fiduciary that remain to the present day.

La reconnaissance juridique du rapport fiduciaire entre la Couronne et les peuples autochtones au Canada marquera bientôt son vingtième anniversaire. Depuis son premier énoncé dans le jugement de la Cour Suprême du Canada dans la cause Guerin c. R. en 1984, la conception des rapports Couronne-autochtones comme étant fiduciaires est devenue bien enracinée, même axiomatique, malgré la rareté de commentaire et d'élaboration juridiques au sujet de ces rapports et de leurs conséquences. Dans cet article, l'auteur réfléchit sur les quelque vingt années de conception des rapports Couronne-autochtones comme étant fiduciaires, y compris les conséquences possibles des plus récentes déclarations de la Cour Suprême au sujet des rapports fiduciaires Couronne-autochtones dans Osoyoos Indian Band c. Oliver (Town of) et Wewaykum Indian Band c. Canada et il examine quelques-unes des questions relatives à la conception juridique de ces rapports comme étant fiduciaires qui demeurent sans réponse encore aujourd'hui.

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I. INTRODUCTION

As recently as the Supreme Court of Canada's judgment in *Wewaykum Indian Band v. Canada*,[1] the proposition in Canadian law that fiduciary obligations are owed by "the Crown"[2] to Aboriginal peoples was unquestioned.[3] The initial assertion that the relationship between the Crown and Aboriginal peoples is fiduciary in nature came from the judgments of Dickson and Wilson JJ. in the Supreme Court of Canada's 1984 decision in *Guerin v. The Queen*[4] and has been affirmed in a number of that Court's subsequent judgments.[5] Although *Wewaykum* questions whether Crown-Native relations ought to be generally presumed as fiduciary in nature,[6] it does not entail a fundamental change in the understanding of Crown-Native fiduciary relations that has existed since *Guerin*.[7]

Since the initial sanctioning of Crown-Native fiduciary relations as fiduciary in *Guerin*, the Crown's duty was found to be an integral element of section 35(1) of the *Constitution Act, 1982*[8] in the Supreme Court's unanimous judgment in *R. v. Sparrow*.[9] In its attempt to indicate the importance of those relations and how they affected Crown-Native interaction generally, the Court in *Sparrow* said:

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1 [2003] 1 C.N.L.R. 341 (S.C.C.) [*Wewaykum*].

2 In an English common law context, the phrase "the Crown" has a variety of meanings and may refer to various personifications of that entity. It could refer to the historical notion of a single and indivisible Crown, to the Imperial Crown, the Crown in right of Britain or, domestically, to the Crown in right of Canada or the various provincial Crowns. Moreover, there are further divisions within these classifications that relate to the executive and legislative branches of the Crown. For more detailed discussion of these distinctions, see J.T. Juricek Jr., *English Territorial Claims in North America to 1660* (Ph. D. dissertation, University of Chicago, 1970) [unpublished] and the commentary upon it in G.S. Lester, *The Territorial Rights of the Inuit of the Northwest Territories* (D. Jur. dissertation, Osgoode Hall Law School, 1981) [unpublished].

3 The general phrase "the Crown" has been purposefully used to reflect the fact that the emanations of the Crown in Canada that owe fiduciary duties to Aboriginal peoples have not yet been determined. While it is clear from the jurisprudence that the federal Crown owes these duties to Aboriginal peoples, whether provincial Crowns also owe these duties to Aboriginal peoples has yet to be authoritatively determined by Canadian courts.

For further discussion of this issue, see L.I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility" (1994) 32 Osgoode Hall L.J. 735 ["Provincial Fiduciary Obligations"]. For a contrary viewpoint, see R. Boivin, "À qui appartient l'obligation de fiduciare à l'égard des autochtones?" (1994) 35 C. de D. 3.

4 (1984), 13 D.L.R. (4th) 321 (S.C.C.) [*Guerin*].

5 For *e.g. Sparrow, infra* note 9; *Blueberry River Indian Band v. Canada* (1995), 130 D.L.R. (4th) 193 (S.C.C.) [*Blueberry River*]; *Osoyoos Indian Band v. Oliver (Town of)*, [2001] 3 S.C.R. 746 [*Osoyoos*].

6 Note Binnie J.'s statement in *Wewaykum, supra* note 1 at para. 81: "The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."

7 The *Wewaykum* judgment does not question whether Crown-Native relations should be understood as fiduciary, only whether it is to be automatically presumed that Crown-Native relations are fiduciary in the absence of demonstrating the fiduciary nature of a particular interaction, or element of it, according to the facts in issue: see *ibid.* For further discussion of the *Wewaykum* judgment, see L.I. Rotman, "Developments in Aboriginal Law: the 2002–3 Term," (2003) 21 S.C.L.R. (2d) (forthcoming).

8 Enacted as Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11.

9 (1990), 70 D.L.R. (4th) 385 (S.C.C.) [*Sparrow*].

> ... [T]he 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.[10]

With the sanctioning of the Crown's fiduciary duty in *Guerin* and its expansion in *Sparrow*, Crown-Native fiduciary relations were firmly entrenched as an integral basis of Crown-Native interaction. Meanwhile, the presence of the Crown's fiduciary duty in section 35(1) equally underscores and influences the Aboriginal and treaty rights that are contained within that constitutional guarantee.

The Royal Commission on Aboriginal Peoples ("RCAP") reaffirmed the role of Crown fiduciary obligations that had been intimated in *Guerin* and reaffirmed *Sparrow* when it said that "the government cannot treat Aboriginal people as if they were adversaries. On the contrary, it must be mindful of the trust-like relationship with them and recognize and protect their Aboriginal rights as a trustee would protect them."[11] In stating this, the RCAP recaptured the flavour and intensity of the Supreme Court's vision in *Sparrow* and demonstrated its continuing vitality.

Since *Sparrow* indicated the lofty place of Crown-Native fiduciary relations more than a decade ago, little has been made of the implications of what the Court established in that case, notwithstanding the fact that what the Court articulated in that judgment was as monumental as the initial sanctioning of Crown-Native relations as fiduciary in *Guerin*. Given the implications of the Supreme Court's findings in *Guerin* and *Sparrow* – which, together, established the fiduciary nature of Crown-Native relations as the pivotal element of modern Canadian Aboriginal and treaty rights jurisprudence with implications for potentially all elements of Crown-Native interaction[12] – one would have expected that the issue would, like a fine wine, have become more full-bodied and complex with age. This has not, in fact, been the case. Although the issue of Crown-Native fiduciary relations remains as vibrant as it did shortly after *Guerin* was released, in many ways it exists in an essentially similar, embryonic state today as it did at that time. As stated in *Parallel Paths*:

> In the 1984 landmark case of *Guerin v. R.*, the Supreme Court of Canada unanimously declared that the Crown is bound by fiduciary obligations to the aboriginal peoples of Canada. By determining that the nature of the Crown's obligation to aboriginal peoples is fiduciary, hence, legal rather than merely political or moral, the Supreme Court of Canada blazed a new path in Canadian aboriginal rights jurisprudence. Yet, more than ten years later, the Cana-

10 *Ibid.* at 408.

11 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Vol. II, Part I, Restructuring the Relationship*, (Ottawa: Minister of Supply & Services Canada, 1996) at 24–5 ["*RCAP*"].

12 See *Parallel Paths*, *infra* note 32 at 4; compare *Wewaykum*, *supra* note 1.

> dian judiciary remains poised at the perimeters of the Crown's duty, refusing to venture into its core.[13]

Although this commentary was made some time ago, it remains equally relevant to the present-day understanding of the status of Crown-Native fiduciary relations.

The difficulty with *Guerin* stems not from what it says, but as a result of the way it has been used. The *Guerin* judgment did not delve into any substantial discussion of Crown-Native fiduciary relations in general, but it has been cited as if it had. Indeed, subsequent case law has simply referred to *Guerin* to substantiate the existence of Crown-Native fiduciary relations without explaining why the particular relationship under scrutiny in each case was fiduciary or the implications of such a finding. Thus, the fiduciary concept's application to Crown-Native relations, at least prior to *Wewaykum*, had become axiomatic. This created a problematic situation, in that the status of Crown-Native fiduciary relations in Canada was both axiomatic and embryonic, which is not a healthy combination. The problem was not that the recognition of the fiduciary nature of those relations had become axiomatic, but that in becoming axiomatic, it further obviated juridical perception of the need to flesh out the embryonic status of the meaning and implications of describing Crown-Native relations as fiduciary:

> The continued application of fiduciary principles to the Crown-Native relationship based on the *Guerin* precedent may be seen to be inversely related to the perceived need to explain its application to that relationship. The more often *Guerin* is cited, without elaboration, for its proposition that the Crown owes fiduciary obligations to aboriginal peoples, the perceived need to explain the basis of the Crown's duty is reduced. Indeed, since *Guerin* has been used as the springboard for the imposition of fiduciary duties upon the Crown towards aboriginal peoples, judicial and academic analysis of the basis of the Crown's duty and its effects has decreased. However, it is of little benefit to state that a fiduciary relationship exists or that it has been breached without illustrating what the relationship encompasses or the ramifications of such a breach. Indeed, the portrayal of a relationship as fiduciary is only an initial step; the explanation of the resultant obligations arising by virtue of the relationship's existence is much more onerous.[14]

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13 *Parallel Paths*, *infra* note 32 at 3 (references omitted). This reference recognizes the fact that only Dickson J.'s majority judgment founded the Crown's duty in *Guerin* on fiduciary grounds, whereas Wilson J. deemed a trust to exist between the parties and Estey J. rooted the Crown's duty on the basis of an agency relationship, all of these are forms of fiduciary relationships.

14 *Parallel Paths*, *infra* note 32 at 12. See also L.I. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism, and Fiduciary Rhetoric in *Badger* and *Van der Peet*," (1997) 8 *Constit. Forum* 40 at 44–5:

> ... simple judicial recognition of or professed adherence to the Crown's fiduciary obligations to Aboriginal peoples is not identical to the courts' enforce-

In becoming a catch-phrase to describe Crown-Native interaction, the axiomatic quality and embryonic state of the fiduciary concept's application to Crown-Native relations was further entrenched.

Why have Canadian courts been willing participants in the use of "fiduciary" as a catch-phrase to describe Crown-Native interaction? An overly cautious approach to the fiduciary concept, generally, and in its application to Crown-Native relations specifically may be discerned as the basis for this judicial practice. Such caution suggests either a lack of judicial comfort with the concept or a wariness about it, both of which generate cause for concern.[15] One possible reason for the apparent judicial unease in applying fiduciary principles to Crown-Native relations is that the fiduciary concept requires adopting a different mind set than do many other legal concepts. Indeed, in applying this unique fiduciary construct to Crown-Native interaction in *Guerin* and later affirming its application in *Sparrow*, the Supreme Court of Canada "initiated a new way of thinking about Aboriginal peoples' rights and their relationship with Canadian legal, political, and social realms."[16] As suggested by Judge David Arnot, the Treaty Commissioner for Saskatchewan:

> The Supreme Court of Canada's unanimous rebuke of government privilege in *R. v. Guerin* is the milestone in restoring a system of law based on principles of fundamental justice over the exercise of individual discretion. In defining the "fiduciary duty" of the Crown, the Supreme Court restored the concept of holding ministers to a standard of fairness that demands forethought as to what conduct lends credibility and honour to the Crown, instead of what conduct can be technically justified under the current law.[17]

The conceptually difficulty associated with the fiduciary concept could certainly create judicial unease – one need only look to the confusion in non-Aboriginal fiduciary jurisprudence and commentary to observe this.[18] Alternatively, the difficulty associated with the fiduciary concept's application to

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> ment of those obligations. Effecting the latter necessitates scrutinising the Crown's actions in light of its fiduciary responsibilities. The use of fiduciary rhetoric by the judiciary is rendered meaningless without a commitment to enforce its application in practice. ...
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> The existence of the Crown's fiduciary duty in section 35(1) of the *Constitution Act, 1982* is a constitutional imperative to ensure that the Crown lives up to the historical obligations it owes to the Aboriginal peoples. ... This constitutional imperative requires more of the courts ... than the proliferation of empty rhetoric ...

15 Although *Wewaykum*, *supra* note 1, does not follow the unquestioned use of fiduciary rhetoric to describe Crown-Native relations, it does not delve much deeper into the issues raised here than the case law this paper criticizes.

16 L.I. Rotman, "Conceptualizing Crown-Aboriginal Fiduciary Relations" in Law Commission of Canada, *In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin, 2002) at 26.

17 Judge D. Arnot, "Treaties as a Bridge to the Future" (2001) 50 U.N.B.L.J. 57 at 66–7.

18 See generally L.I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34 Alta. L. Rev. 821.

Crown-Native relations may not even be recognized by some judges, which brings about its own set of problems. The most obvious of these problems is the erroneous perception that *Guerin* articulated everything that needed to be said about Crown-Native fiduciary relations, leaving nothing to be done other than to apply *Guerin* to the facts in issue. Clearly, though, describing Crown-Native relations as fiduciary is only the beginning of a process, not the final determination. As the prominent American jurist Felix Frankfurter indicated in *Securities & Exchange Commission* v. *Chenery Corp.*:

> ... [T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligation does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?[19]

Thus, it may not unfairly be said that *Guerin* and the bulk of Crown-Native fiduciary case law have pointed us down the fiduciary path as a way of conceptualizing Crown-Native relations, but they have not provided significant answers to the types of questions posed by Justice Frankfurter in *Chenery Corp.*

To this point, most considerations of Crown fiduciary duties to Aboriginal peoples have focussed on duties owed by facets of the federal Crown. Thus, fiduciary duties have been judicially attached to the executive[20] and legislative[21] branches of the federal Crown, although they have not been found to exist on the part of quasi-judicial boards of the federal government.[22] Meanwhile, the Supreme Court of Canada has yet to comment expressly on whether provincial Crowns owe fiduciary duties to Aboriginal peoples[23] in spite of recent articula-

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19 318 U.S. 80 (1943) at 85–6 [*Chenery Corp.*].

20 *Guerin*, *supra* note 4.

21 *Sparrow*, *supra* note 9. The *Sparrow* judgment also indicated, *ibid.* at 406, that section 35(1) of the *Constitution Act, 1982* "affords aboriginal peoples constitutional protection against provincial legislative power," thereby insinuating that provincial legislative powers – and, hence, the legislative branch of provincial Crowns – are also bound by fiduciary duties to Aboriginal peoples. See also *Parallel Paths*, *infra* note 32 at 251–3; Rotman, "Provincial Fiduciary Obligations" *supra* note 3; B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 755; Slattery, "First Nations and the Constitution: A Question of Trust," (1992) 71 Can. Bar Rev. 261 at 274.

22 *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159.

23 With the notable exception of its comments in its brief judgment in Ontario *(Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 ["*Bear Island, SCC*"], where the Court held that "the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians. These matters currently form the subject of negotiations between the parties": *ibid.* at 575. The inference of provincial duty in this pronouncement came from the fact that the only governmental party engaged in negotiation with the Aboriginal litigants was the Ontario government: see *Bear Island Foundation v. Ontario*, [2000] 2 C.N.L.R. 13 at para. 24 (Ont. C.A.). However, as indicated, *ibid.* at para. 34, Laskin J.A., for the court, initially stated that no such provincial fiduciary duty exists: "I am doubtful whether the provincial Crown owes fiduciary duties to Aboriginal people that, on breach, would allow for the transfer of land. The fiduciary duty of the Crown to Aboriginal people is fundamentally a duty of the federal Crown." Alternatively, he held that the matter was *res judicata*: see *ibid.* at paras. 35–45.

tions of the existence of such duties by lower courts.[24] Furthermore, the Supreme Court has not yet defined the scope of the potential beneficiaries of Crown fiduciary duties. For instance, are the duties owed simply to recognized bands under the federal *Indian Act*[25] or are they owed to non-status Indian, Inuit, and Métis groups as well?[26]

From the above discussion, the description of Crown-Native fiduciary relations in Canada as both axiomatic and embryonic appears particularly apt. This suggests a rather urgent need to reconsider how Canadian courts have dealt with the issue of Crown-Native fiduciary relations. When the implications of *Wewaykum* are added to the mix, there is an even greater need to rethink the treatment of Crown-Native fiduciary relations in judicial and academic commentary. That does not mean that existing jurisprudence must be discarded simply because *Wewaykum* questions whether Crown-Native relations ought to be generally understood to be fiduciary. On the contrary, *Wewaykum* reaffirms the important place of the fiduciary concept in Crown-Native interaction because of the tremendous emphasis it places on attempting to limit the general understanding of Crown-Native relations as fiduciary. Apart from this issue – and from the questions it does raise – the *Wewaykum* judgment simply adds to the confused status of Crown-Native fiduciary relations and provides a further impetus for reflection upon the bases for characterizing Crown-Native relations as fiduciary.

This paper is not designed to canvass the various roots of contemporary Crown-Native fiduciary relations or speculate as to the multitudinous implica-

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24 See *e.g. Cree School Board v. Canada (Attorney General)*, [1998] 3 C.N.L.R. 24 at paras. 116–17 (Que. Sup. Ct.); *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.); *Gitanyow First Nation v. Canada*, [1999] 3 C.N.L.R. 89 at para. 47 (B.C.S.C.):

> In 1867, the powers, duties and responsibilities of the Crown pre-Confederation were enumerated and assigned to either the Crown in Right of Canada and or the Crown in Right of the Provinces. But, as can be seen above, the fiduciary obligation of the Crown, which characterized its relationship with aboriginal peoples, continued after 1867 as before. As a result, in its dealings with native peoples within its jurisdictional powers, the Crown in Right of British Columbia must act in light of that duty even as its predecessor, the Crown of colonial times, should have done.

See also *ibid.* at para. 53: "I conclude that the duty to negotiate in good faith, founded upon the fiduciary relationship between aboriginal people and the Crown, applies equally to the Crown in Right of Canada and the Crown in Right of British Columbia"; *Haida Nation v. British Columbia (Minister of Forests)*, [2001] 2 C.N.L.R. 83 at para. 23 (B.C.S.C.): "the authorities do establish, as a matter of law, that the federal Crown stands in a fiduciary relationship with all Aboriginal peoples of Canada, and the provincial Crown stands in a similar relationship to the Aboriginal peoples of British Columbia"; see also *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 4 C.N.L.R. 117 at para. 61 (B.C.C.A.): "In *Halfway River*... this Court confirmed that the fiduciary duty is owed to the Indian people equally by the provincial Crown as by the federal Crown"; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2002] 2 C.N.L.R. 312 at paras. 161–2, 173, 194 (B.C.C.A.).

25 R.S.C. 1985, c. I-5.

26 This issue is considered, below, as well as in L.I. Rotman, "The Application of Crown Fiduciary Duties to Off-Reserve, Non-status, and Métis Peoples" in J. Magnet and D. Dorey, eds., *The Aboriginal Peoples Movement Off-Reserve* (Toronto: Butterworths, forthcoming).

tions that arise from the existence of such relations. That route has already been travelled.[27] Rather, the paper will look to recent Supreme Court of Canada jurisprudence as a basis for discussing, in a general and speculative way, the extent to which the understanding of the Crown's fiduciary obligations to Aboriginal peoples has played itself out since the initial descriptions of Crown-Native relations as fiduciary in *Guerin* and *Sparrow*. This discussion is intended to provide a barometer for determining whether the Crown's fiduciary obligations to Aboriginal peoples are, in fact, being fulfilled.[28] Two important issues that have generally been overlooked will be considered: who the beneficiaries of Crown fiduciary duties are and how those duties are seen to coincide with judicial articulations of the "honour of the Crown."

II. THE FIDUCIARY IMPLICATIONS OF *GUERIN* AND *SPARROW*

The Supreme Court of Canada's determination in the *Guerin* case that the federal Crown owed fiduciary duties to Aboriginal peoples was a momentous event in Canadian Aboriginal and treaty rights jurisprudence. Much like the recognition of Aboriginal title in *Calder v. Attorney General of British Columbia*[29] some dozen years earlier had forever altered Canadian common law's understanding of Aboriginal peoples' legal relationship with land, the *Guerin* judgment had an equally profound effect upon the understanding of Crown-Native relations.

While there had been no express legal recognition of Crown fiduciary duties to Aboriginal peoples prior to *Guerin*,[30] the historic interactions between the parties, as well as the various agreements and alliances forged between them, provided the basis for the contemporary understanding of Crown-Native relations as fiduciary. Indeed, the initial finding of Crown-Native fiduciary relations in *Guerin* was premised upon the historical relationship between the parties that was said by Dickson J., as he then was, to date back to the *Royal Proclamation of 1763*.[31] However, that duty may be seen within Dickson's own judgment to predate this.[32]

This historical relationship between the Crown and Aboriginal peoples – which was based initially upon mutual trust and obligation – created what may be described as an inchoate fiduciary bond between the parties. That bond was

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27 See *Parallel Paths, infra* note 32.

28 The manner in which this paper addresses the broad question "Are the Crown's Fiduciary Obligations Being Met?" is not in the context of specific duties, but more globally and thematically.

29 (1973), 34 D.L.R. (3d) 145 (S.C.C.).

30 For some of the more noteworthy pre-*Guerin* cases alleging the existence of a fiduciary or trust relationship between the Crown and Aboriginal bands, see *Henry v. The King* (1905), 9 Ex. C.R. 417; Dreaver *v. The King* (1935), 5 C.N.L.C. 92 (Exch.); *Chisholm v. The King*, [1948] 3 D.L.R. 797 (Exch.); *Miller v. The King*, [1948] Ex. C.R. 372, rev'd (1950), [1950] 1 D.L.R. 513 (S.C.C.); *St. Ann's Island Shooting and Fishing Club v. The King*, [1949] 2 D.L.R. 17 (Exch.), aff'd (1950), [1950] 2 D.L.R. 225 (S.C.C.). These are discussed in greater detail in *Parallel Paths, infra* note 32 at 73–87.

31 *Guerin, supra* note 4 at 334, 340, referring to R.S.C. 1985, App. II, No. 1 ["*Royal Proclamation of 1763*"].

32 See L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, (Toronto: University of Toronto Press, 1996) at 108–9 ["*Parallel Paths*"].

ultimately solidified through more formal and intense means, such as treaties. While history forms the backdrop of Crown-Native fiduciary interaction, the contemporary understanding of Crown-Native fiduciary relations is not wedded entirely to historical events, but has evolved just as the relationship between the Crown and Aboriginal peoples in Canada has evolved. In *Sparrow*, in which the Supreme Court held, building upon the precedent in *Simon v. The Queen*,[33] that Aboriginal and treaty rights are not to be read statically, but must be allowed to evolve over time.[34]

With its articulation of the fiduciary standard as the basis for understanding Crown-Native relations, *Guerin* sanctioned principles of Crown-Native interaction that had been enunciated in *obiter* comments in various judgments in Canadian Aboriginal and treaty rights jurisprudence for more than a century. Indeed, early Aboriginal and treaty rights jurisprudence in Canada had acknowledged the Crown's position of trust with respect to Aboriginal peoples and their lands, albeit not consistently and not in the manner the subject was dealt with in *Guerin*. This was the case notwithstanding the fact that until the passage of section 35(1) of the *Constitution Act, 1982*, Aboriginal rights, if they were recognized at all, were deemed to exist at the pleasure of the Crown and could be unilaterally extinguished. Meanwhile, treaty promises were regarded by the courts as moral obligations that were not legally enforceable[35] until the entrenchment of treaty rights in section 35(1).[36]

One of the earliest judicial statements concerning the Crown's responsibility to protect the interests of the Aboriginal peoples came in 1846 in the case of *Bown v. West*, where Chief Justice John Beverly Robinson said, "The government, we know, always made it their care to protect the Indians, so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants."[37] Shortly thereafter, he affirmed this duty in *Totten v. Watson*: "From the earliest period the Government has always endeavoured, by proclamation and otherwise, to deter the white inhabitants from settling upon Indian lands, or from pretending to acquire them

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33 [1985] 2 S.C.R. 387.

34 *Sparrow*, *supra* note 9 at 397. It should be noted, however, that the Supreme Court's adherence to the rejection of frozen rights theory in *Sparrow* has neither been consistent nor absolute since the *Sparrow* judgment. Most prominently, in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, the Supreme Court's majority judgment restricted the scope of constitutionally protected Aboriginal rights to those which were traceable prior to contact and were elements of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right: *ibid.* at paras. 46, 60–1.

35 Note, for example, the infamous remark of Lord Watson in *Attorney General of Ontario v. Attorney General of Canada: Re Indian Claims*, [1897] A.C. 199 at 213 (P.C.), where he stated that "Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities ... beyond a promise and agreement, which was nothing more than a personal obligation by its governor." This statement was adopted in both *R. v. Wesley*, [1932] 4 D.L.R. 774 at 788 (Alta. C.A.) and in *R. v. Sikyea* (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.) at 154.

36 After section 35(1) came into effect on April 17, 1982, Aboriginal and treaty rights existing on that date could no longer be extinguished absent the consent of the Aboriginal peoples in question or via constitutional amendment.

37 (1846), 1 E. & A. 117 at 118 (U.C. Exec. Council).

by purchase or lease."[38] What was, however, evident in some of these early recognitions was that the duty or responsibility owed by the Crown was not necessarily regarded as enforceable in the courts. The statement made by Taschereau J. in *St. Catherine's Milling and Lumber Co. v. The Queen* is indicative:

> The Indians must in the future ... be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.[39]

Without the ability to apply judicial pressure or supervision, this "sacred political obligation" remained largely unfulfilled. This state of affairs existed until the passage of section 35(1) of the *Constitution Act, 1982* and the Supreme Court's sanction of a legally-binding Crown fiduciary duty in *Guerin*. Eventually, the significance of these two occurrences came together in the Supreme Court's judgment in *Sparrow*.

In the *Sparrow* case, the Supreme Court was faced with the need to "explore for the first time the scope of s. 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada."[40] In the context of examining the scope of section 35(1) generally and Musqueam Aboriginal fishing rights specifically, the Court held that section 35(1) incorporates the Crown's fiduciary obligations to Aboriginal peoples.[41]

The Court determined that section 35(1) operated as a restraint on the exercise of Crown legislative power, thereby entailing, as the Court had earlier suggested in *Guerin*, that the Crown, as fiduciary, did not possess an unfettered discretion to act as it pleased on behalf of Aboriginal peoples. Instead, the Crown, in promulgating legislation that adversely affected Aboriginal interests, had to justify the imposition of such initiatives by subjecting them to scrutiny according to specified criteria.[42] This marked a drastic change from pre-1982

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38 (1858), 15 U.C.Q.B. 392 at 396.

39 (1887), 13 S.C.R. 577 at 649.

40 *Sparrow, supra* note 9 at 389.

41 *Ibid.* at 408–9.

42 Briefly, the test developed in *Sparrow* requires that Crown legislative objectives be reasonable, not impose undue hardship on the Aboriginal peoples to be affected, and not deny Aboriginals their preferred means of exercising their section 35(1) rights. Other requirements are that the legislative goal must be consistent with the Crown's fiduciary obligations, that it minimally infringe the rights in question in order to effect the desired result, and that the Crown must engage in consultation with Aboriginal peoples regarding the legislative initiative and, where appropriate, offer fair compensation for its legislative infringement of section 35(1) rights.

While *Sparrow* created a justificatory framework for the regulation of Aboriginal rights, a framework which was adopted vis-á-vis treaty rights in *R. v. Badger* (1996), 133 D.L.R. (4th) 324 (S.C.C.) and confirmed in *R. v. Marshall* (1999), 177 D.L.R. (4th) 513 (S.C.C.) [*Marshall No. 1*] and *R. v. Marshall* (1999), 179 D.L.R. (4th) 193 (S.C.C.) [*Marshall No. 2*], this author has suggested that the application of the *Sparrow* test to treaty rights is inappropriate because of the important distinctions between those forms of rights: see L.I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights and the *Sparrow* Justificatory Test," (1997), 36 *Alta. L. Rev.* 149; *Parallel Paths, supra* note 32 at 125–6.

jurisprudence. In support of this change, the Court quoted, with approval, Professor Lyon's characterization of the purpose and function of section 35(1):

> ... [T]he context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[43]

With the entrenchment of section 35(1) and the judicial explanation of its effect in *Sparrow*, Crown legislative power over Aboriginal peoples was now subjected to limits. As the Court explained in *Sparrow*:

> Federal legislative powers continue, including, of course, the right to legislate with respect ro Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with section 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any governmental regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principles enunciated in *Nowegijick* ... and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin* ...[44]

This reconciliation was not restricted to federal legislative power, though. A similar effect was imposed upon provincial legislative competence in respect of Aboriginal peoples, as indicated in the Court's finding that section 35(1) "affords Aboriginal peoples constitutional protections against provincial legislative power."[45]

The Supreme Court indicated in *Sparrow* that section 35(1) was to be regarded as a far more significant point in Crown-Native relations than may previously have been envisaged. As the Court stated, the enactment of section 35(1) "at the least, provides a solid constitutional base upon which subsequent negotiations can take place."[46] Thus, it concluded that section 35(1), put into its proper historical, political, and legal contexts, provided the missing element of coercion to force the Crown to fulfill its obligations to the Aboriginal peoples through incorporation of the Crown-Native fiduciary relationship and its impact upon federal legislative powers under section 91(24) of the *Constitution Act, 1867*.

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43 N. Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100, cited with approval in *Sparrow, supra* note 9 at 406.

44 *Sparrow, supra* note 9 at 409.

45 *Ibid.* at 406.

46 *Ibid.*

While the *Guerin* judgment initiated the process of providing shape and content to the Crown's historical duties to Aboriginal peoples, *Sparrow* augmented the scope of these duties by placing them squarely within section 35(1). This progression in the articulation of the Crown's fiduciary obligations and the progressive understanding of the Crown's duty-as existing in both historical commitments and the Canadian constitution-gave a firm grounding for the enforcement of those rights by Aboriginal peoples that was notably absent from early judicial recognitions of Crown obligations.

III. POST-*SPARROW* FIDUCIARY JURISPRUDENCE AT THE SUPREME COURT OF CANADA

In spite of the number of cases which discuss, to varying extents, the Crown's fiduciary obligations to Aboriginal peoples, the Supreme Court of Canada had, until quite recently, decided only one post-*Sparrow* case involving Crown-Native relations on the basis of fiduciary duty. That case, *Blueberry River Indian Band v. Canada*,[47] did little to amplify the implications of Crown-Native fiduciary relations suggested in *Guerin* and *Sparrow*. Matters have changed somewhat with the recent decisions in *Osoyoos Indian Band v. Oliver (Town of)*,[48] *Ross River Dena Council Band v. Canada*,[49] and *Wewaykum*.[50]

The *Osoyoos* judgment, while not strictly a fiduciary case, concerns the ability of an Indian Band to tax lands that had been expropriated from its reserve and upon which an irrigation canal was built. In the process of determining whether the band could assess the canal lands for taxation purposes, the Supreme Court's majority judgment held that the Crown's fiduciary duty to Aboriginal peoples was not restricted to acts of surrender, but applied equally to expropriations. Iacobucci J., for the majority,[51] outlined a two-step process that characterized the Crown's duty. The first step was for the Crown to determine whether an expropriation involving Indian lands was required to fulfill a public purpose. Once the decision to expropriate was made, the Crown was then found to have a duty to preserve the Indian interest in the land to the greatest extent practicable.[52]

Justice Iacobucci found that there was a strong need for the Crown to justify the removal of lands from a reserve because of the difficulties associated with a band's ability to replace expropriated lands with acceptable substitutes, Aboriginal cultural attachments to land, and the Crown's fiduciary duty, which required that a clear and plain intent was necessary in order to remove land from a reserve.[53] Also, Iacobucci J. determined that preserving the Band's interest in the land to the greatest extent practicable was best accomplished in the circumstances by preserving the band's taxation jurisdiction over the land, thereby

47 *Blueberry River, supra* note 5.
48 *Osoyoos, supra* note 5.
49 [2002] SCC 54 [*Ross River*].
50 *Wewaykum, supra* note 1.
51 McLachlin C.J.C., Binnie, Arbour, and LeBel JJ. concurring.
52 *Osoyoos, supra* note 5 at para. 53.
53 *Ibid.* at paras. 45–7.

ensuring its ability to earn income from it.[54] The fact that the Band's taxation jurisdiction arose subsequent to the Order in Council authorizing the expropriation was held to be immaterial. Since there was insufficient evidence before the Court to provide a clear answer as to the type of interest reasonably required for the canal and the canal had already been built when the transfer was made, Iacobucci J. said that this interest was limited to that reasonably required to operate and maintain the canal.[55] As a result, he found that the expropriation ought to be understood to grant a statutory easement only, which entailed that the canal lands remained "in the reserve" for Band taxation purposes.

Gonthier J.'s dissenting judgment,[56] disagreed with the majority's finding that the Crown's fiduciary duty in the context of the Order in Council required it to protect the Band's ability to tax the canal lands. He premised his conclusion on the fact that the Band had no such taxation powers when the Order in Council was adopted.[57] Based on his findings, which included, *inter alia*, that there was no demonstrated breach of the Crown's fiduciary duty, Justice Gonthier found that the Order in Council, read in a plain and ordinary fashion, removed the land from the reserve, thus terminating the Band's ability to impose tax upon it.[58]

The consideration of the Crown's fiduciary duty in *Osoyoos* affirms a point that should have been understood for quite some time previously. The majority's finding that the Crown's duty applied equally to expropriations as to surrenders should have been clear following the *Sparrow* decision's discussion of the nature and extent of the Crown's duty more than a decade previously. However, an important element of the majority's discussion of the Crown's duty in *Osoyoos* was its rejection of the Crown's contention that no fiduciary duty is owed where such a duty would conflict with the Crown's public law duties.[59] In concluding this, the Court opposed the previous benchmark commentary on this point in the Federal Court of Appeal's majority judgment in *Kruger v. The Queen*.[60] Iacobucci J. held that there was a need to reconcile these often competing interests – a proposition that is consistent with a fiduciary's obligation to treat all beneficiaries fairly, even when they have disparate or competing interests – rather than having the public interest trump that of Indians.[61] For this reason, the expropriation of land in order to build the canal – which was designed to aid the agricultural development of the South Okanagan region of British Columbia – was allowed, but the interest in land taken was limited to the extent necessary to allow its operation while minimally impairing the rights and interests of the Band.

The minority's finding that the Crown had no duty to protect the Band's ability to tax the canal lands because it enjoyed no such taxation powers when the Order in Council was made ignores important considerations emanating

54 *Ibid.* at para. 53.
55 *Ibid.* at para. 65.
56 L'Heureux-Dubé, Major, and Bastarache JJ. concurring.
57 *Ibid.* at para. 135.
58 *Ibid.* at para. 188.
59 Note the corroboration of this point in *Wewaykum*, *supra* note 1 at para. 104.
60 (1985), 17 D.L.R. (4th) 591 (F.C.A.).
61 *Osoyoos*, *supra* note 5 at para. 52.

from the *Blueberry River* case.[62] In that case, the Court found that the Crown breached its fiduciary duty when it included mineral rights in its transfer of reserve lands when it did not need to do so, notwithstanding the fact that the value of those rights at the time of the transfer was indeterminate.[63] As McLachlin J., as she then was, indicated in *Blueberry River*, "A reasonable person does not inadvertently give away a potentially valuable asset ... 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."[64] Thus, in *Osoyoos*, since there was no need to extinguish the Band's interest in the canal lands in order to build and operate the canal *and* there was no additional cost to maintaining the Band's continuing interest in the lands, the Crown ought to have had a duty to preserve as full and ample an interest for the Band as allowable under the circumstances. Following this reasoning would have led to the same result as that arrived at by the majority, but based on fiduciary principles that are somewhat different, although not antagonistic, to what was articulated by the majority in *Osoyoos*.

In *Ross River*,[65] the Supreme Court had to determine whether lands set aside for the use of an Indian Band, but not designated as a reserve under the *Indian Act*, constituted a reserve under the definition of that term in the *Act*.[66] In this case, the issue of the Crown's fiduciary duty was not pleaded; nonetheless, LeBel J. (Gonthier, Iacobucci, Major, Binnie, and Arbour JJ. concurring, Bastarache J., McLachlin C.J.C., and L'Heureux-Dubé J. concurring in the result) said that, whether in the context of a treaty or the act of reserve creation, the honour of the Crown rested on the Governor in Council's willingness to live up to the representations it made to a First Nation to entice it to enter into a treaty or accept settlement on specified lands.[67] This statement affirmed his earlier determination that the Governor in Council's exercise of the power to create a reserve "remains subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations, which arise under s. 35 of the *Constitution Act, 1982*."[68]

Justice LeBel emphasized that "the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights."[69] Consequently, he said that the Crown's actions with respect to the lands in question remained impressed with the Crown's fiduciary obligations.[70] Justice LeBel's use of the test in *R. v. Sioui*[71] to determine whether a sufficiently authorized governmental

62 *Blueberry River, supra* note 5.
63 *Ibid.* at paras. 18–19.
64 *Ibid.* at para. 104.
65 *Supra* note 49.
66 *Indian Act, supra* note 25.
67 *Ross River, supra* note 49 at para. 65.
68 *Ibid.* at para. 62.
69 *Ibid.* at para. 68.
70 *Ibid.*
71 (1990), 70 D.L.R. (4th) 427 (S.C.C.) [*Sioui*].

official had indicated that the Crown intended to create a reserve for the Band is also consistent with the Crown's fiduciary duty. In *Sioui*, Lamer J. had stated:

> To arrive at the conclusion that a person had the capacity to enter into a treaty with the Indians, he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty.[72]

The *Sioui* test entails that the Crown's actual intention must be subordinated to a reasonable assessment of its actions in light of the circumstances at the time. This test, and its implications, are consistent with the principles of treaty interpretation and the nature of the Crown's fiduciary responsibilities, pursuant to which courts are to engage in large, liberal, and generous interpretations of vague or ambiguous clauses in documents or agreements affecting First Nations.

The raising of the Crown's fiduciary duty in *Ross River* indicates the Supreme Court's recognition that Crown legislation and procedure that affect the interests of a First Nation must be closely scrutinized in order to uphold the duty and honour of the Crown. Moreover, the fiduciary nature of the parties' interaction creates the need for a court to consider the representations made by the Crown and what a Band would have understood or acknowledged from them. The Crown's fiduciary duty militates against the Court's finding that the Band was not entitled to a reserve in these circumstances because of the failure to satisfy the Crown's internal requirements for reserve creation.

The most recent articulation of the Crown's fiduciary duty by the Supreme Court of Canada came in the *Wewaykum* case,[73] a dispute between two Bands over the possession of their respective reserves located two miles from each other. Each Band claimed that, but for various breaches of fiduciary duty by the federal Crown, it would be in possession of both reserves in question. This would then mean that the successful Band would possess both reserves while the unsuccessful Band would possess neither. In spite of their claims, neither Band sought possession of the other's reserve because of the hardship that such a result would have; instead, both Bands sought equitable compensation from the federal Crown, alleging that it breached its duty to them by denying them rights to the reserves in question. In delivering the judgment of the Supreme Court, Binnie J. considered: (a) the scope of the Crown's fiduciary duty in the creation of reserve lands; (b) whether actions of government officials breached any fiduciary duty found to exist, and; (c) what equitable remedies were available to provide relief for any breaches of fiduciary duty found to have occurred.[74]

When discussing the nature of the Crown-Native fiduciary relationship, Bin-

72 *Ibid.* at 438.

73 *Supra* note 1.

74 *Wewaykum*, *supra* note 1 at para. 5.

nie J. held that the concept of Crown fiduciary duties was premised upon the need to "facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of Aboriginal peoples" rather than in notions of paternalism.[75] The "degree of economic, social and proprietary control and discretion asserted by the Crown" over Aboriginal peoples, said Justice Binnie, "left Aboriginal populations vulnerable to the risks of government misconduct or ineptitude"[76] and gave rise to the existence of Crown fiduciary duties. He also recognized, as the Court had in *Ross River*,[77] that fiduciary relief was not limited to breaches of duty with respect to existing reserves, as in *Guerin*, or regarding section 35(1) rights, as in *Sparrow*.[78] However, he held that there are limits to the scope of the Crown's duty.[79]

In detailing his statement that the Crown's fiduciary duty was not unlimited in scope, Binnie J. stated that such duties do "not exist at large but in relation to specific Indian interests."[80] Correspondingly, he stated that notions that Crown fiduciary responsibility was a source of "plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark."[81] As a point of reference, he listed a variety of cases that alleged unique breaches of fiduciary duty by the Crown,[82] including: the structuring of elections;[83] requiring the provision of social services;[84] rewriting negotiated provisions;[85] covering moving expenses;[86] suppressing public access to information about band affairs;[87] requiring legal aid funding;[88] compelling registration of individuals under the *Indian Act*,[89] and; invalidating a consent signed by an Indian mother to the adoption of her child.[90]

While Justice Binnie expressly declined to comment about the correctness of the dispositions of the judgments relating to the above issues, he reiterated the

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75 *Ibid.* at para. 79, quoting Slattery, "Understanding Aboriginal Rights," *supra* note 21 at 753.

76 *Wewaykum*, *supra* note 1 at para. 80.

77 *Ross River*, *supra* note 49.

78 *Wewaykum*, *supra* note 1 at para. 79

79 *Ibid.* at para. 81.

80 *Ibid.*

81 *Ibid.*

82 *Ibid.* at para. 82.

83 *Batchewana Indian Band (Non-resident members) v. Batchewana Band* (1996), 142 D.L.R. (4th) 122 (F.C.A.), which was dealt with by the Supreme Court on other grounds.

84 *Southeast Child & Family Services v. Canada (Attorney General)* (1997), 120 Man. R. (2d) 114 (Q.B.).

85 *B.C. Native Women's Society v. Canada*, [2000] 1 F.C. 304 (T.D.).

86 *Paul v. Kingsclear Indian Band* (1997), 137 F.T.R. 275; *Mentuck v. Canada*, [1986] 3 F.C. 249 (T.D.); *Deer v. Mohawk Council of Kahnawake*, [1991] 2 F.C. 18 (T.D.).

87 *Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1996), 116 F.T.R. 37, aff'd (1999), 251 N.R. 220 (F.C.A.); *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)* (1988), 51 D.L.R. (4th) 306 (F.C.T.D.); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997), 148 D.L.R. (4th) 356 (F.C.T.D.).

88 *Ominayak v. Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 F.C. 174 (T.D.).

89 Rejected in *Tuplin v. Canada (Indian and Northern Affairs)* [2002] 1 C.N.L.R. 350 (P.E.I.T.D.).

90 *G. (A.P.) v. A. (K.H.)* (1994), 120 D.L.R. (4th) 511 (Alta. Q.B.).

point made by the Supreme Court in *LAC Minerals Ltd. v. International Corona Resources Ltd.* that "not all obligations existing between parties to a fiduciary relationship are themselves fiduciary in nature."[91] Based on this, he held that in order to determine if a fiduciary duty existed on the part of the Crown towards Aboriginal peoples, it was necessary "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."[92] While he held that a public law duty does not necessarily exclude fiduciary relations, such a relationship 'depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty" ...'[93]

Using these considerations, Binnie J. articulated a variety of findings. He held that, prior to reserve creation, the Crown exercises public law functions under the *Indian Act* and any duty it may have at that point is restricted to "basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the Aboriginal beneficiaries."[94] After reserve creation, Justice Binnie stated that the Crown's duty expands to include "the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation."[95] Since each of the appellants was found to lack a beneficial interest in the other's reserve, neither was entitled to dispossess the incumbent band entitled to that interest or to obtain equitable compensation from the Crown for refusing to effect such a dispossession.[96] In any event, he correctly held that the availability of such equitable relief was subject to the equitable defences of laches and acquiescence, among others.[97]

In discussing the Crown's duty prior to reserve creation in *Wewaykum*, Binnie J. found that, owing to the Crown's unique position, it was justifiably concerned with both the interests of the Bands and those of certain non-Indian settlers. Therefore, he held that the Court could not ignore the reality of the conflicting demands confronting the Crown. Vis-à-vis the Bands, the Crown acted in a fiduciary capacity that was premised upon the nature and importance of the former's interests in the lands and the Crown's intervention as "the exclusive intermediary to deal with others (including the province) on their behalf."[98] This duty obliged the Crown to 'act with respect to the interest of the Aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with "ordinary" diligence in what it reasonably regarded as the best interest of the beneficiaries.'[99] The Crown also had a duty to be "even-handed towards

91 *Ibid.* at para. 83, citing [1989] 2 S.C.R. 574 at 597 [*LAC Minerals*].
92 *Wewaykum*, *supra* note 1 at para. 83.
93 *Ibid.* at para. 85.
94 *Ibid.* at para. 86.
95 *Ibid.*
96 *Ibid.*
97 *Ibid.*
98 *Ibid.* at para. 97.
99 *Ibid.*

and among the various beneficiaries" as the initial dispute evolved into conflicting demands between the Bands.[100] The Court agreed with the trial judge's finding that these obligations were properly fulfilled by the Crown.

Following the creation of the reserves and the resultant expansion of the Crown's fiduciary duties, the Crown had a duty to ensure that its Aboriginal beneficiaries were not made subject to exploitative bargains.[101] Binnie J. found that under the fact situation in *Wewaykum* no exploitation had taken place. However, he distinguished the basis of his determination on this point from that upon initial appeal, where the Federal Court of Appeal had stated that the Crown had fulfilled its duties by balancing its competing responsibilities to each of the Bands.[102] As he stated, "the role of honest referee does not exhaust the Crown's fiduciary obligation here. The Crown could not, merely by invoking competing interests, shirk its fiduciary duty."[103]

Regardless of his ruling on the merits of the Bands' claims, Binnie J. concluded that they could not be upheld because of the applicability of the equitable defences of laches and acquiescence, as well as the lapse of the pertinent statutory limitation period. For all of these reasons, the appellants' claims were dismissed.

The significance of *Wewaykum*, for present purposes, lies initially in its articulation of the scope of the Crown's fiduciary duty. The mere fact that this was articulated marks a major advance from post-*Guerin* jurisprudence in this area. However, the tone of Binnie J.'s judgment suggests that he views the scope of the Crown's fiduciary duty in a rather limited way. This is unfortunate, since the broad and flexible nature of the fiduciary concept generally and its application to Crown-Native relations specifically is intended to allow for the demonstration of any and all claims that fit within the requirements of the concept. While it is true that Crown fiduciary duties do not serve to insulate Aboriginal peoples from all executive and legislative actions, which result in detriment or harm to the latter, the limits of the fiduciary concept, whether to categories of relationships or to any form of interaction within a certain type of relationship, remain open.[104] The fact that Binnie J. appeared to suggest in *Wewaykum* that the Crown must *assume* fiduciary obligations – through his statement that "The fiduciary duty ... is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of Aboriginal peoples" – is unfairly limiting of the scope of the Crown's duty. While some strongly advocate the need for undertakings by fiduciaries before fiduciary duties may arise,[105] the Supreme Court has made it clear that the exist-

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100 *Ibid.*

101 *Ibid.* at paras. 99–100.

102 [2000] 3 C.N.L.R. 303 at para. 121 (F.C.A.).

103 *Wewaykum*, *supra* note 1 at para. 104.

104 See *e.g. Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 55, where McLachlin C.J. said, "In recent decades, fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined."

105 See *e.g.* A.W. Scott, "The Fiduciary Principle" (1949) 37 Cal. L. Rev. 539 at 540; J.D. McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 C.B.L.J. 107 at 122; J. Glover, "The Identification of Fiduciaries" in P. Birks, ed., *Privacy and Loyalty* (Oxford: Clarendon, 1997) at 272. See also Glover, "Wittgenstein and the Existence of Fiduciary Relationships: Notes Toward New Methodology" (1995) 18 U.N.S.W.L.J. 443, esp. at 446, 454.

ence of fiduciary obligations are not dependent upon the existence of undertakings by fiduciaries,[106] but may arise equally from parties' conduct.

From these cases, the important role that the fiduciary concept continues to play in Canadian Aboriginal and treaty rights jurisprudence is clear. Even in cases like *Ross River*, in which fiduciary arguments were not raised by counsel, the Court felt it necessary to contemplate the applicability of fiduciary principles to the circumstances in issue. Thus, as reflected equally in more "traditional" fiduciary settings, such as *Osoyoos* and *Wewaykum*, or in circumstances that may not initially appear to raise fiduciary issues, such as *Ross River*, one of the most important implications of characterizing Crown-Native relations as fiduciary is that it sets guidelines for understanding the legal nature of modern Crown-Native interaction. It acts much like an interpretive umbrella that overarches the nature of those relations. Moreover, the non-adversarial character of those relations, as expressed in *Sparrow*,[107] is underscored by the judicial imposition of the fiduciary concept.

In addition to its function as a means of fostering a particular way of looking at Crown-Native relations, the application of the fiduciary concept to Crown-Native relations serves other vital functions, which were ignored in *Wewaykum*:

1. it acts as an important check on governmental legislative power (as seen in *Sparrow*, this applies to both federal and provincial power);
2. it is the primary manifestation of the notion of the "honour of the Crown";
3. it is the primary link between historic and modern Crown-Native relations, and;
4. it animates the rights contained in section 35(1) of the *Constitution Act, 1982*.

This vision is consistent with the Supreme Court's articulation of the purpose of section 35(1) in *Sparrow*, which the Court said was underscored, or influ-

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106 See *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at 63 where La Forest J. expressly stated that "fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary."

107 *Supra* note 9 at 408:

> ... [T]he 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.

Note also the following statement made by the Royal Commission on Aboriginal Peoples:

> ... [T]he government cannot treat Aboriginal people as if they were adversaries. On the contrary, it must be mindful of the trust-like relationship with them and recognize and protect their Aboriginal rights as a trustee would protect them.

RCAP, *Vol. II, Part I, Restructuring the Relationship*, *supra* note 11 at 24–5.

enced, by the existence of Crown fiduciary duties to Aboriginal peoples. The non-adversarial character of Crown-Native relations, as expressed in *Sparrow*, is also clarified through the judicial imposition of the fiduciary concept.

Wewaykum appears to have initiated the process of describing, in more detail, the precise implications of characterizing Crown-Native relations as fiduciary than is evident in previous jurisprudence on this topic. However, it has done so in a rather restrictive manner and it still bypasses a number of the important issues that have plagued Canadian Aboriginal and treaty rights jurisprudence since the initial sanctioning of Crown-Native interaction as fiduciary in *Guerin*. One such question is who the beneficiaries of Crown-Native fiduciary relations are. Another equally important issue which has arisen post-*Guerin* is the link, if any, between the nature of Crown fiduciary duties and the notion of the "honour of the Crown" seen in a variety of non-fiduciary cases, but particularly in the treaty context. These two issues will be canvassed, in turn, as illustrations of the significant issues relating to the understanding of Crown-Native relations as fiduciary that are still awaiting consideration.

IV. WHO ARE THE BENEFICIARIES OF CROWN FIDUCIARY DUTIES?

As indicated earlier, judicial and academic attention to the Crown's fiduciary duty has focussed almost exclusively upon bands recognized under the *Indian Act*, with the obligations found to exist having practical effects either on the bands themselves or the individual members of those bands. All of the Supreme Court of Canada's jurisprudence on the fiduciary obligations of the Crown to Aboriginal peoples has concerned duties owed to a recognized band under the *Indian Act*.

Technically, the Crown's fiduciary duties are not owed to individual Indians, but to bands. While bands are the *de jure* beneficiaries of the Crown's fiduciary obligations, the individual members of the bands are the persons who, collectively, share in the benefits flowing from the Crown's duty. Under section 2(1) of the *Indian Act*, a "band is defined as "a body of Indians":

> (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
> (b) for whose use and benefit in common, moneys are held by Her Majesty, or
> (c) declared by the Governor in Council to be a band for the purposes of this Act.

While the duties owed to bands recognized under the *Indian Act* has been the overwhelming focus of courts, legislators, and commentators to this point, the Crown may well owe fiduciary duties to peoples who exist outside of the *Indian Act* framework as well – such as non-status, Inuit, and Métis peoples.

Under section 91(24) of the *Constitution Act, 1867*, the federal government has legislative responsibility for "Indians, and Lands reserved for the Indians." Historically, the federal government has only regarded "status Indians" as those

persons to whom its primary duties exist.[108] However, in the *Re Indians* reference,[109] the Supreme Court of Canada held that Inuit people are Indians for the purposes of section 91(24) and thereby also fall under federal jurisdiction. While Inuit people are deemed to be "Indians" for section 91(24) jurisdictional purposes, they are not considered "Indians" for *Indian Act* purposes.[110] Thus, it may be seen that the definition of "Indian" in section 91(24) is broader than "Indian" under the *Indian Act*. For purposes of fiduciary identification, internal definitions of "Indian," like that provided by the *Indian Act*, or unilateral assumptions of responsibility by the federal government are not determinative of whether fiduciary duties are owed. There are, as of yet, no definitive judicial pronouncements as to whether Métis peoples may fall under federal jurisdiction. The federal government denies that it possesses responsibility for Métis peoples – which would include any fiduciary obligations – although arguments have been made to suggest that Métis ought to be included.[111]

Since the Crown's fiduciary duty was found in *Sparrow* to be an integral element of the constitutional protection of Aboriginal and treaty rights in section 35(1) – and thereby provides constitutional protection against federal and provincial legislative power – that fiduciary duty ought to be applicable to all of the Aboriginal peoples contemplated by section 35(2), which modifies the phrase "Aboriginal peoples of Canada," referred to in section 35(1). As these subsections read:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

What must be kept in mind, though, is that these two subsections expressly contemplate the protection of Aboriginal and treaty rights belonging to these groups.

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108 A "status Indian" is defined in section 2 of the *Indian Act*, *supra* note 25 as "a person who, pursuant to this Act, is registered as an Indian or is entitled to be registered as an Indian." Consequently, an "Indian" is a person of Aboriginal ancestry who is registered in the Indian Register maintained by the Department of Indian Affairs and Northern Development ("DIAND"). The Indian Register contains the names of persons who are entitled to be registered as "Indians" under the *Indian Act*.

109 *Reference Re Term "Indians,"* [1939] 2 D.L.R. 417 (S.C.C.).

110 Section 4(1) of the *Indian Act*, *supra* note 25, specifically states that "A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit."

111 C. Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the *British North America Act, 1867*" (1978–79) 43 Sask. L. Rev. 37. See also *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, (2002) M.J. No. 57 at para.14 (Q.B.); *R. v. Grumbo*, [1998] 3 C.N.L.R. 172 (Sask. C.A.); *R. v. Fergusion*, [1994] 2 C.N.L.R. 117 (Alta. Q.B.); compare *R. v. Laprise*, [1978] 6 W.W.R. 85 (Sask. C.A.), *R. v. Blais*, [1997] 3 C.N.L.R. 109 (Man. Prov. Ct.), aff'd [1998] 4 C.N.L.R. 103 (Man. Q.B.), aff'd [2001] 3 C.N.L.R. 187 (Man. C.A.). In the Supreme Court of Canada's judgment in *Blais*, 2003 SCC 44, the Supreme Court held that Métis were not "Indians" for the purpose of paragraph 13 of the Manitoba *Natural Resources Transfer Agreement*, 1930, S.C. 1930, c. 29.

While the Crown's fiduciary duty may not be an Aboriginal or treaty right, it certainly informs the understanding and interpretation of those rights, as the Supreme Court of Canada held in *Sparrow*. Consequently, any invocation of section 35(1) rights is, necessarily, accompanied by the Crown's fiduciary duty.

Notwithstanding the *Sparrow*-based application of fiduciary standards to section 35(1), a difficulty is created where there is an attempt to impose fiduciary obligations upon the Crown in certain facets of its interaction with peoples with whom no fiduciary relationship has yet been demonstrated to exist. It is trite to state that fiduciary duties arise only from interactions of some substance or importance. Therefore, it remains necessary to establish some relationship basis for the existence of Crown fiduciary duties to Indian, Inuit, or Métis peoples who are not already beneficiaries of these. Establishing this "relationship basis" will require either the demonstration of associations of a fiduciary nature between the parties, the (actual or figurative) assumption of fiduciary obligations by the Crown, or an adequate rationale for drawing analogies to existing bases of Crown-Native fiduciary relations.

What further complicates matters is that, notwithstanding the definition of "Aboriginal peoples of Canada" in section 35(2) to include the Indian, Inuit, and Métis peoples of Canada, no accepted legal definition of these groups and their membership – as understood in the context of section 35(2) – exists. Thus, as the Ontario Court of Appeal explained in *Perry v. Ontario*, "Legal definitions of aboriginality have yet to crystallize, and the issue of how to identify non-status Indian and Métis persons remains undetermined."[112]

The term "non-status Indian" generally refers to those persons who self-identify as Aboriginal, but who are ineligible for registration under the *Indian Act*. It would also include those persons who are entitled to register under the *Indian Act*, but who have not yet done so. Since the Crown's fiduciary duty, as seen in *Guerin* and *Sparrow*, is rooted in the history of the interaction between the groups that predated the current status/non-status regime, it may be plausibly argued that the issue of Indian "status" is irrelevant to determinations of Crown fiduciary duties. Although non-status Indians exist outside of the federal Crown's 91(24) jurisdiction, that does not mean that the federal Crown cannot possess fiduciary obligations to them (if properly demonstrated, of course). In a manner similar to the operation of the "indoor management rule" in corporate law,[113] divisions of jurisdiction internal to the Crown cannot rightfully have implications upon pre-existing fiduciary obligations owed to beneficiaries who were neither consulted about nor acquiesced to them. Should the federal Crown be found to have associated with non-status groups in a manner that is deemed to give rise to fiduciary obligations, the federal Crown's classification of the

112 [1998] 2 C.N.L.R. 79 at 106 (Ont. C.A.).

113 Simply put, matters that are deemed to be internal to a corporation are not understood to be within the purview of the public, thereby precluding a corporation's reliance upon their technical construction to the disadvantage of a person dealing with the corporation except in circumstances where that person "has or ought to have knowledge of the matters in question by virtue of that person's position with or relationship to the corporation": see *e.g.* s. 19 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16.

group as non-status will be of no practical effect vis-à-vis that determination. Similar forms of jurisdictional considerations are equally relevant to determining the existence of the fiduciary obligations of provincial Crowns. The circumstance of Inuit peoples is different than that of either non-status or Métis peoples. Since Inuit fall under the category of "Indian" for section 91(24) purposes, legislatively, at least, the federal Crown has responsibility for Inuit affairs. That, in and of itself, might suggest that Inuit would fit within existing understandings of Crown fiduciary duties by analogy to the acknowledged fiduciary status of Crown-status Indian relations. The inclusion of Inuit peoples within section 91(24) could be understood as an assumption of federal fiduciary responsibility for the Inuit, much as it is viewed in that way with regard to status Indians. Furthermore, since Inuit peoples fall under the definition of "Aboriginal peoples of Canada" in section 35(2), they would have a further claim based on the argument illustrated earlier in respect of the Supreme Court's judgment in *Sparrow*.

The situation of Métis peoples is unusual, in the sense that Métis may share common issues with status Indians, non-status Indians, or Inuit depending on their circumstances. Métis are individuals who may or may not be recognized as "Indians" under the *Indian Act*, but who identify as Métis culturally and/or who may be identified as Métis for the purposes of constitutional recognition.[114] Métis peoples have distinct practices, customs, language, traditions, and cultural affinities; some of these draw upon Aboriginal and non-Aboriginal practices, while others are entirely unique to Métis cultures. As the RCAP has stated, "What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis."[115]

Métis peoples currently face an identification dilemma, both among themselves and vis-à-vis government. There are a variety of identification criteria that exist among Métis groups. As the Ontario Court of Appeal stated in *R. v. Powley*, "There is no uniformly accepted definition of who is a Métis and certainly no precise test for Métis status for the purposes of s.35."[116] This has contrib-

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114 See *infra* note 116 and its related text.

115 *RCAP, Vol. IV, Perspective and Realities*, *supra* note 11 at 202. This statement was positively referred to by the Supreme Court of Canada in *R. v. Powley*, 2003 SCC 43 at para. 10 ["*Powley, SCC*"].

116 [2001] 2 C.N.L.R. 291 at 335 (Ont. C.A.) ["*Powley, CA*"]. In *Powley, SCC*, *ibid.*, the Supreme Court of Canada stated, at para. 50, that:

> The term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.

Although the Supreme Court held, at para. 12, that it was not necessary for the purposes of the *Powley* appeal to enumerate the various Métis peoples that may exist, it did establish guidelines, at paras. 29–30, for the judicial identification of Métis peoples until such time as Métis communities "standardize" their membership requirements "so that legitimate rights-holders can be identified" (para. 29):

> ... courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. The inquiry must take into account both the value of

uted to the difficulty in establishing and assessing Métis Aboriginal rights.[117] It is only quite recently that appellate courts have affirmed the existence of Métis Aboriginal rights. In the Supreme Court of Canada's disposition of *Powley*, it was unanimously held that Métis peoples possess distinct Métis Aboriginal rights, which are constitutionally protected, by section 35(1) of the *Constitution Act, 1982*.[118] Whether or not the existence of constitutionally-entrenched Métis Aboriginal rights give rise to enforceable Crown fiduciary duties is a separate issue that was not addressed by either the Ontario Court of Appeal or the Supreme Court of Canada in *Powley*.

While *Powley* does not articulate whether Métis peoples are beneficiaries of Crown fiduciary duties, the Ontario Court of Appeal referred to statements made in *Sparrow* that section 35(1), as a solemn commitment made by the Crown, must be given meaningful content.[119] Consequently, it determined that contemporary recognition and affirmation of the Aboriginal rights contained in section 35(1) must be defined in light of the historic fiduciary relationship existing between the Crown and Aboriginal peoples.[120] On the basis of these statements, the Court of Appeal inquired into whether the asserted right in

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> community self-definition, and the need for the process of identification to be objectively verifiable. In addition, the criteria for Métis identity under s. 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors.
> ...
>
> We emphasize that we have not been asked, and we do not purport, to set down a comprehensive definition of who is Métis for the purpose of asserting a claim under s. 35. We therefore limit ourselves to indicating the important components of a future definition, while affirming that the creation of appropriate membership tests before disputes arise is an urgent priority. As a general matter, we would endorse the guidelines proposed by Vaillancourt J. and O'Neill J. in the courts below. In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance.
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> As indicated in note 111, *supra*, Métis are not "Indians" for the purpose of paragraph 13 of the Manitoba *Natural Resources Transfer Agreement, 1930*, S.C. 1930.

For further discussion of the identification of Métis peoples, see. C. Bell, "Who Are the Metis Peoples in Section 35(2)?" (1991) 29 Alta. L. Rev. 351; L. Chartrand, "Are We Métis or Are We Indians? A commentary on *R. v. Grumbo*" (1999–2000) 31 Ott. L. Rev. 267, esp. at 274–5; *RCAP, Vol. IV, Perspective and Realities, supra* note 11 at 200–210.

117 For greater discussion of Métis Aboriginal rights, see C. Bell, "Metis Constitutional Rights in Section 35(1)" (1997) 36 Alta. L. Rev. 180.

118 *Powley, SCC, supra* note 115 at para. 13: "The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive [Métis] communities and that persist in the present day as integral elements of their Métis culture."

119 See also *ibid.* at para. 45, where the Supreme Court said, '[a]lthough s. 35 protects "existing" rights, it is more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities.'

120 *Powley, CA, supra* note 116 at 316.

Powley was limited by legislation in a manner consistent with the Crown's fiduciary duty.[121] What is, perhaps, more telling is that on three separate occasions the Court of Appeal expressly indicated that the Crown had a trust-like, or fiduciary, relationship with Métis people.[122] From these statements, the Ontario Court of Appeal appears to have declared that the definition of Métis Aboriginal rights must be made in light of Crown-Native fiduciary relations generally or Crown-Métis fiduciary relations specifically. Curiously, the Supreme Court of Canada said nothing about Crown fiduciary duties in its judgment in *Powley*.

In spite of its findings, the Ontario Court of Appeal's use of fiduciary rhetoric in *Powley* appears to have been premised more upon its adherence to the dictates of the *Sparrow* judgment than being a statement of the applicability of Crown fiduciary duties to Métis peoples. Nonetheless, based on the manner in which *Sparrow* constitutionalized the Crown's fiduciary duty in section 35(1), it is entirely possible to find that fiduciary obligations are owed to the Métis by the federal and/or provincial Crowns. While this is a logical interpretation of section 35(1) as stated in *Sparrow*, it may be problematic, insofar as the basis of the fiduciary discussion in relation to Métis peoples was not clearly articulated in *Powley*. Once the basis of these duties is established, it will then be possible to determine the scope and content of Crown fiduciary duties to Métis. While questions about fiduciary duties owed to Métis certainly exist, the RCAP has unequivocally stated that:

> The government of Canada owed a fiduciary duty to the members of the Métis Nation, as to all Aboriginal people. The government was legally responsible to act in the best interests of Métis people and not to place its own interests, or those of non-Aboriginal persons, ahead of Métis interests. Its tolerance or reckless ignorance of, and occasional complicity in, the schemes by which many Métis people were effectively stripped of their *Manitoba Act* benefits is difficult to reconcile with that fiduciary responsibility.[123]

V. FIDUCIARY OBLIGATIONS AND THE HONOUR OF THE CROWN

As indicated earlier, the judicial recognition of Crown-Native relations as fiduciary is the pivotal element of modern Canadian Aboriginal and treaty rights jurisprudence. However, this fiduciary relationship, as has already been

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121 *Ibid.* at 338.

122 The first of these statements pointing specifically to Crown fiduciary duties to Métis people arose when the court inquired whether the limitation on the impugned right was "in keeping with the Crown's trust-like relationship with the Métis people": *ibid.* The Court then stated that "the failure to give any priority to Métis hunting is fatal to the assertion that the right has been limited in a manner consistent with the fiduciary duty of the Crown": *ibid.* at 340. Finally, the court held that even if the limitations imposed on the exercise of Métis hunting constituted a valid legislative objective, "the present scheme cannot be justified as being consistent with the Crown's trust-like duty": *ibid.*

123 *RCAP, Vol. IV, Perspective and Realities, supra* note 11 at 224.

discussed, contains a variety of elements. There is the historical basis for the relationship, as outlined initially in *Guerin*, as well as the constitutional basis, as revealed in *Sparrow*. As seen, the obligations found to exist under such relationships implicate the executive and legislative branches of the federal Crown, but, arguably, also implicate provincial Crowns, presumably in both capacities as well.[124] The fiduciary relationship between the Crown and Aboriginal peoples is, however, simply one aspect of a broader conceptualization of Crown-Native relations that also includes treaty relations and other nation-to-nation relations and thus concerns issues surrounding Aboriginal self-government. As Alan Pratt stated in "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?":

> There is no question that the fiduciary duties applicable to the Crown in its dealings with aboriginal peoples arise from a special relationship and that the content of those duties derives from the content and the nature of that relationship. Since that relationship is one between polities or nations, the fiduciary duties must also have relevance to that relationship. At the core of the relationship, as we understand from *Guerin* and *Sparrow*, are the pre-existing rights of aboriginal peoples, the Crown's undertakings to protect aboriginal peoples in the enjoyment of those rights, and the law's concern that the Crown's honour must be upheld in the course of the relationship.[125]

Linking the fiduciary relationship between the Crown and Aboriginal peoples with the honour of the Crown, as Pratt does in the above quote, appears to be an inherently logical step. The fulfilment of fiduciary duties generally requires that fiduciaries act honourably, with honesty, integrity, selflessness, and the utmost good faith (*uberrima fides*) towards the best interests of their beneficiaries. These same traits are applicable to the Crown in discharging its duties owed to the Aboriginal peoples of Canada. Indeed, the honour of the Crown is implicated in a host of actions taken in regard to Aboriginal peoples. That being said, there is a disconnect in Canadian Aboriginal and treaty rights jurisprudence vis-à-vis the linkage between the Crown's fiduciary obligations to the Aboriginal peoples and the notion of the honour of the Crown.

While a number of important statements in recent Supreme Court of Canada decisions refer either to the Crown's fiduciary obligations or to the "honour of the Crown," these ideas are, for the most part, treated independently of one another. Indeed, the latter does not generally appear in cases concerned with the Crown's fiduciary duties. Instead, notions of the "honour of the Crown" are most often seen in treaty cases. While this may appear strange, given that the

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124 While the *Sparrow* judgment clearly implicated the legislative branch of provincial Crowns, as indicated, *supra* note 21, cases such as *Bear Island, SCC*, *supra* note 23, would appear to implicate the executive branch of those Crowns as well as a result of their participation in treaty negotiations and the like: see *Parallel Paths*, *supra* note 32 at 251–3.

125 (1992) 2 N.J.C.L. 163 at 187.

Crown's duty and honour are, most definitely, at stake during its fiduciary dealings in respect of Aboriginal peoples, it is not unusual given the taxonomic tendencies of the Supreme Court evident in its Aboriginal and treaty rights decisions.

These taxonomic tendencies may be traced back almost thirty years in Supreme Court jurisprudence. In *Kruger and Manuel v. The Queen*, the Supreme Court stated, in the context of determining Aboriginal land entitlements, that "If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to the Band and to that land, and not on any global basis."[126] Although the Court's statement in *Kruger and Manuel* was intended as a warning against determining Aboriginal land entitlements outside of the context of a particular claim, it has since been used as a basis to avoid articulating broader principles of Aboriginal and treaty rights that extend beyond individual circumstances. This has created a disjointed jurisprudence because of the absence of connecting principles and broad, conceptual understandings of the nature of the rights under contemplation. The principle in *Kruger and Manuel* was extended in *R. v. Pamajewon*, where the Shawanaga and Eagle Lake First Nations had claimed the right to regulate high-stakes gambling activities on their reserves as an incident of their claimed rights to self-government.[127] The Supreme Court, however, focussed on gambling as a discrete issue rather than viewing it as an element of the Bands' larger rights of self-government. As Lamer C.J.C. stated, to characterize the appellants' activities as falling under a broad right to manage the use of their reserve lands "would be to cast the Court's inquiry at a level of excessive generality."[128] Thus, the Court asked simply whether the appellants possessed Aboriginal rights to high-stakes gambling that were traceable to pre-contact practices according to the test established in *R. v. Van der Peet*.[129] Not surprisingly, the Bands were unable to demonstrate the existence of such a right based on the *Van der Peet* test.

There is a significant distinction between an Aboriginal or treaty right and a practice that is derived from that larger right. This may be observed in *Van der Peet*, where a member of the Sto:lo nation was charged with selling ten salmon for $50 while fishing under the authority of an Indian food fishing licence. Her claim of a broad Aboriginal right to fish was initially recharacterized by the Supreme Court of Canada as the right to sell fish for $50 and, ultimately, as a right to fish only for food. Thus, in a manner akin to what occurred in *Pamajewon*, the issue of whether Mrs. Van der Peet had an Aboriginal right to sell fish became a question of her right to sell fish for $50 or to obtain food from her activities. This form of rights reductionism inappropriately divorces the rights

126 (1977), 75 D.L.R. (3d) 434 at 437 (S.C.C.).

127 [1996] 2 S.C.R. 821.

128 *Ibid.* at 834. This principle was adopted by McLachlin C.J.C. in *Mitchell*, *infra* note 149 at paras. 14–15.

129 *Van der Peet*, *supra* note 34. The *Van der Peet* test requires that an Aboriginal right under s. 35(1) be a practice, custom, or tradition that is traceable to pre-contact practices and that it must not have arisen or been fundamentally altered as a result of contact with Europeans or other post-contact factors.

claimed from the larger context in which they originated and are properly understood.[130] It also supports the inappropriate pigeon-holing of Aboriginal claims into discrete categories.

A prime example of such pigeon-holing may be seen in the Supreme Court's decisions in *Sioui*[131] and *Sparrow*,[132] which were handed down one week apart in the spring of 1990. In *Sioui*, a treaty rights case, the Court made a number of statements that indicated that the relations between the Crown and Aboriginal peoples in the mid-eighteenth century fell "somewhere between the kind of relations conducted between sovereign states and the relations such states had with their own citizens,"[133] were "very close to those maintained between sovereign nations,"[134] and, finally, that "the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations."[135] In contrast, in *Sparrow*, an Aboriginal rights case, the Court indicated the complete subordination of Aboriginal peoples to the "reality" of British sovereignty through its statement that:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown ...[136]

It is legitimate to question how the Court could take judicial notice of the fact that Aboriginal peoples were treated as independent nations with sovereign or near-sovereign status in 1760 in *Sioui* and then find that the Aboriginal peoples were entirely subordinated to the Crown's sovereignty a mere three years later, as indicated by the Court's statements above in *Sparrow*. While the Court was dealing with different issues in each of these cases, on this limited point – the status of Aboriginal peoples in their interaction with the Crown – the Court's consideration ought to have been the same. The fact that neither judgment makes reference to the other suggests that the Court may not have paid attention to *Sparrow* when considering *Sioui* and vice versa simply because *Sioui* is a treaty rights case while *Sparrow* is an Aboriginal rights case. Nonetheless, the considerable distinction between these cases on this issue cannot be legitimately explained away on the basis that the cases were concerned with different forms of rights.

The issue of the "honour of the Crown" appears to have experienced a similar fate in its treatment by the Supreme Court. The "honour of the Crown" has

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130 For a brief commentary on this, see L.I. Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36 Alta. L. Rev. 1.

131 *Sioui*, *supra* note 71.

132 *Sparrow*, *supra* note 9.

133 *Sioui*, *supra* note 71 at 437.

134 *Ibid.* at 448.

135 *Ibid.*

136 *Sparrow*, *supra* note 9 at 404.

been referred to rather frequently by the Court in its post-*Sioui* treaty rights jurisprudence. However, as a result of the judicial compartmentalization of issues, treaty cases generally do not refer to cases decided on the basis of fiduciary obligations and vice versa. The curious result of this practice is that the notion of the "honour of the Crown" highlighted in treaty jurisprudence is generally not considered within fiduciary jurisprudence and understandings of the nature of the Crown's duties to Aboriginal peoples in fiduciary cases is not referred to in treaty case law. However, as indicated above, the honour of the Crown in the context of its treaty obligations duties shares a common foundation with the Crown's fiduciary duty; both are rooted in the historical interaction between the Crown and Aboriginals. Thus, in spite of the manner in which the Supreme Court has generally treated issues of fiduciary obligation and treaty relationships, there may be seen to be a considerable overlap between them. As indicated in *Aboriginal Legal Issues: Case, Materials & Commentary, 2nd. ed.*:

> ... some fiduciary relations stem from treaties, while treaties may be perceived as concrete manifestations of Crown fiduciary obligations. Therefore, while the Crown's fiduciary obligations encroach into these other relations, not every aspect of Crown-Native relations is tinged by fiduciary obligations. It is equally inappropriate to apply fiduciary standards to every aspect of Crown-Native interaction as it is to deny the existence of the Crown's fiduciary duty to aboriginal peoples.[137]

Also, in his commissioned 1995 report to then-Minister of Indian Affairs, Ron Irwin, the Hon. Justice A.C. Hamilton said that:

> The promises of protection and the creation of a fiduciary relationship to say nothing of the establishment of territories where Aboriginal peoples expected they could live their lives as they had done in the past, are essential to the relationship that Aboriginal peoples thought they had through earlier treaties.[138]

The historic nature of the Crown's fiduciary duty to Aboriginal peoples is inextricably linked with its treaty obligations; as a result, it is rather difficult to sever fiduciary duties from treaty obligations. In some circumstances, this cannot be done at all. Nonetheless, the strong taxonomic bent of Canadian Aboriginal and treaty rights jurisprudence has resulted in the treatment of treaty rights matters and fiduciary obligations in juridical vacuums. One noteworthy exception to this predilection may be seen in Lamer C.J.C.'s judgment in *Van der*

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137 J.J. Borrows and L.I. Rotman, eds., *Aboriginal Legal Issues: Cases, Materials & Commentary*, 2nd. ed., (Toronto: Butterworths, 2003) at 326 ["Borrows and Rotman"].

138 Hon. A.C. Hamilton, *A New Partnership* (Ottawa: Minister of Public Works and Governmental Services Canada, 1995) at 9 ["Hamilton"]. See also his warning, *ibid.* at 99: "I am convinced that the Government would not want a treaty to be challenged on the basis of a breach of its fiduciary duty. It must therefore give careful attention to its fiduciary obligation in the treaty making process."

Peet.[139] In that case, the former Chief Justice stated that, while the canons of treaty interpretation articulated by the Supreme Court of Canada were first formulated in the context of treaty rights, they arose from the fiduciary nature of Crown-Native relations.[140] In the process of combining the Crown's fiduciary obligation, the canons of treaty interpretation, and section 35(1) in *Van der Peet*,[141] Lamer C.J.C. stated that section 35(1) and all other constitutional or statutory provisions protecting Aboriginal interests had to be given generous and liberal interpretations and that the Crown-Native fiduciary relationship entailed that any doubt or ambiguity regarding what properly falls within section 35(1) was to be resolved in favour of the Aboriginal peoples.[142]

In spite of what was said in *Van der Peet*, the judiciary has not yet ruled specifically on the fiduciary character of treaties.[143] There have been definite hints, though, such as in the Supreme Court of Canada's judgment in *Bear Island*, where the Court implied that the Crown's fulfilment of treaty promises is an application of fiduciary obligation.[144] However, in recent treaty cases where there is discussion of "the honour of the Crown," no mention of the Crown's fiduciary obligations is made.[145] Perhaps the most prominent of these is *Marshall No. 1*,[146] where both the majority and dissenting judgments made important references to the notion of the "honour of the Crown," but nowhere was the word "fiduciary" found when discussing the nature of the Crown's relationship to the Mi'kmaq or the obligations created by the treaties in issue in that case.

Most recently, in *Wewaykum*, the Court made a rather curious statement when it said that 'Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the "honour of the Crown."'[147] What, precisely, this means, is uncertain; the ethical standards of a fiduciary in the context of Crown-Native relations most certainly require, at a minimum, the upholding of the Crown's honour.[148] Such an assertion is, indeed, axiomatic. Describing the Crown's ethical standards as a fiduciary as "somewhat associated" with the "honour of the Crown" is akin to saying that a corpse is "somewhat dead." More importantly, it

139 *Van der Peet*, *supra* note 34.

140 *Ibid.* at para. 24.

141 Something that may be witnessed earlier in cases such as *Sparrow*, *supra* note 9 at 408 and *R. v. Vincent*, [1993] 2 C.N.L.R. 165 at 179 (Ont. C.A.). Indeed, in *Vincent*, the Ontario Court of Appeal expressly held that the interpretive principles of treaty interpretation articulated in *Nowegijick v. The Queen* (1983), 144 D.L.R. (3d) 193 (S.C.C.) – namely, that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians": *ibid.* at 198 – were a fundamental aspect of the Crown's fiduciary duty.

142 *Van der Peet*, *supra* note 34 at paras. 24–5.

143 See also Hamilton, *supra* note 138 at 93–4.

144 *Bear Island, SCC*, *supra* note 23 at 575.

145 Note, for example, *Badger supra* note 42; *R. v. Sundown*, [1999] 1 S.C.R. 393.

146 *Marshall No. 1*, *supra* note 42.

147 *Wewaykum*, *supra* note 1 at para. 80.

148 See Arnot, *supra* note 17 at 67, who states that '... "the honour of the Crown" is not limited to the interpretation of legislation, or the application of treaties. Rather, I propose that "the honour of the Crown" also refers to the same essential commitment that First Nations echo when they call for "justice".'

suggests that the Supreme Court still views Crown fiduciary duties to Aboriginal peoples and the need to uphold the honour of the Crown in its dealings with the Aboriginals as rather distinct entities.

VI. CONCLUSION

Through its judgment in the *Guerin* case, the Supreme Court of Canada affirmed the existence of legally-binding governmental obligations of a fiduciary nature to Aboriginal peoples. The unanimous judgment of that same court in *Sparrow* further solidified this holding by constitutionally entrenching the Crown's duty in section 35(1). With the limited exception of the *Wewaykum* judgment, the inability or unwillingness of post-*Guerin*, post-*Sparrow* judicial responses to provide much more than rhetorical support for the Crown's fiduciary obligation to Aboriginal peoples is a profound failure of the Canadian judicial system to follow the implications of these cases through to their logical – and legally sanctioned – conclusions. Meanwhile, the inability or unwillingness of the federal government to fully acknowledge the existence of these duties or to live up to the standards required as a result of their existence reveals how the political process has failed Aboriginal peoples in Canada.

The most recent Supreme Court jurisprudence on the topic reveals that the promise held out by *Guerin* and *Sparrow* regarding the Crown's duty to Aboriginal peoples has yet to be realized to any significant degree. Thus, for example, in the Supreme Court's judgment in *Mitchell v. M.N.R.*,[149] Binnie J. retreated from the presumption that had been advanced in *Sparrow* in which the Court held that section 35(1), which was to be read in light of the Crown's fiduciary duty, "renounces the old rules of the game,"[150] substituting instead the lesser notion that section 35(1) "ushered in a new chapter ... it did not start a new book."[151] This characterization is consistent with Binnie J.'s reference in *Mitchell* to what he described as "the reality of Canadian sovereignty,"[152] a long-standing topic of concern among Aboriginal legal scholars which has become firmly entrenched in Canadian jurisprudence despite having never undergone serious scrutiny, nor having been subjected to the same method of inquiry as Aboriginal title claims. This latter fact certainly did not prevent the Supreme Court in *Sparrow* from issuing its important dictum, illustrated earlier, that:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown ...[153]

149 [2001] 1 S.C.R. 911 [*Mitchell*].
150 *Supra* note 43.
151 *Mitchell, supra* note 149 at para. 115.
152 *Ibid.* at para. 70.
153 *Sparrow, supra* note 9 at 404.

This statement, which has tremendous implications for Aboriginal rights, was not subjected to any form of judicial scrutiny, but was merely put forward as conventional wisdom.

According to Justice Binnie in *Mitchell*, while section 35(1) did not "renounce the old rules of the game," it did temper the excessive scope of the doctrine of sovereign incompatibility that had existed in Canadian jurisprudence. That did not entail that the doctrine of sovereign incompatibility no longer had any force, but that caution was required in its application.[154] As he explained, "In my opinion, sovereign incompatibility continues to be an element in the s. 35(1) analysis, albeit a limitation that will be sparingly applied."[155] The function of the doctrine of sovereign incompatibility in the face of Aboriginal rights claims was as "a limitation on the scope of aboriginal rights" where the existence of such rights was incompatible with the Crown's assertion of sovereignty.[156] Justice Binnie's understanding of Canadian sovereignty was echoed by McLachlin C.J.'s majority judgment in *Mitchell*, where she said:

> English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation ... however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown ...[157]

Mitchell, therefore, appears to indicate the Court's retreat from the tenor of *Sparrow* and its indication of the promise of section 35(1), including the Crown's fiduciary obligation to Aboriginal peoples. Meanwhile, *Osoyoos* and, particularly, *Wewaykum*, evidence more limited views of the strength of the Crown's fiduciary duty than what was articulated in *Guerin* and *Sparrow*. Nonetheless, the rhetoric of fiduciary obligation remains strong in Canadian Aboriginal and treaty rights jurisprudence – indeed, it often seems as if the use of the phrase is obligatory. One needs only look to the *Ross River* case, where LeBel J. raised the issue of fiduciary obligations when they had not been argued in the case, to notice this.[158] At the risk of sounding overly pedestrian, however, there is a profound distinction between the use of fiduciary rhetoric and making fiduciary pronouncements that have teeth.[159] The bulk of fiduciary discussions in existing jurisprudence fall into the former category.

Notwithstanding the implications of *Wewaykum*, the fiduciary nature of Crown-Native relations is the fundamental element of modern Canadian Aboriginal and treaty rights jurisprudence, with implications for potentially all

154 *Mitchell, supra* note 149 at para. 151.

155 *Ibid.* at para. 154.

156 *Ibid.* at para. 150.

157 *Ibid.* at para. 9.

158 *Ross River, supra* note 49.

159 Refer back to the discussion, *supra* note 14, its accompanying text, and, generally, the sources noted therein.

elements of Crown-Native interaction.[160] Its place within section 35(1) and resultant implications for Aboriginal and treaty rights, as well as for federal and provincial legislative competence in respect of those rights, has solidified this premise. Describing Crown-Native relations as fiduciary provides a substantive basis for understanding the legal implications of the parties' interaction. Further, this characterisation imposes exacting and enforceable duties on the Crown to act in the best interests of Aboriginal peoples in a variety of contexts.

Although discussion of the general content or extent of the Crown's fiduciary obligations to Aboriginal peoples may be seen in more detail elsewhere,[161] what may be said is that, as a relationship-based concept, the Crown's fiduciary duties to Aboriginal peoples has the potential to permeate a great many aspects of Crown-Native interaction, notwithstanding the limitations contemplated in *Wewaykum*. It applies to Aboriginal lands, but is not restricted to them. It is a part of section 35(1), but also exists independently of that section. As suggested in *Parallel Paths*,[162] the Crown's duty potentially applies also to: the management of Aboriginal moneys; Aboriginal self-government; hunting, fishing, trapping and agricultural rights; Aboriginal customs, languages and cultures; the resolution of land claims and treaty disputes; Aboriginal health, welfare and education issues; the range of issues dealt with in the *Indian Act*; Aboriginal economic self-sufficiency and development, and; any other rights which may exist by way of treaty, agreement, statute, constitutional enactment or amendment, Crown practice or judicial determination. In spite of the potential breadth of the Crown's fiduciary duty, it must be kept in mind that even where a relationship is properly described as fiduciary, not every component of those relations is necessarily fiduciary.[163]

From the discussion herein, it should be obvious that the law surrounding Crown-Native fiduciary relations remains a work in progress. *Guerin* and *Sparrow* have provided the basic foundation upon which the legal understanding of this relationship will be constructed. More is certainly required, though. As issues surrounding Crown-Native relations generally are being sifted through, new and emerging issues, such as those discussed herein, will also need to be worked out. In spite of the recent emphasis on Crown fiduciary duties in *Osoyoos* and *Wewaykum*, though, their articulation remains at a rather basic level. Consequently, when one considers the actual scope of the Crown's duty, one is necessarily engaging in conjecture without having much in the way of

160 Obviously, then, the author disagrees with the apparent limitation of the scope of the Crown's duties in *Wewaykum*.

161 See, in particular, Rotman, *Parallel Paths*, *supra* note 32. Note also the discussion in P.W. Hutchins and D. Schulze with C. Hilling, "When Do Fiduciary Obligations to Aboriginal Peoples Arise?" (1995) 59 Sask. L. Rev. 97. For cases and commentary on the Crown's duty, see Borrows and Rotman, *supra* note 137 at 227–326; K. McNeil, "Fiduciary Obligations and Aboriginal Peoples," in M.R. Gillen and F. Woodman, *The Law of Trusts: A Contextual Approach* (Toronto: Emond Montgomery, 2000) at 807–65.

162 See *Parallel Paths*, *supra* note 32 at 284–5.

163 See *New Zealand Netherlands Society 'Oranje" Inc. v. Kuys*, [1973] 2 All E.R. 1222 at 1225–6 (P.C.); *LAC Minerals*, *supra* note 91 at 597; *McInerney v. MacDonald* (1992), 93 D.L.R. (4th) 415 at 423 (S.C.C.); *Quebec (Attorney-Genera) v. Canada (National Energy Board)*, *supra* note 22 at 183; *Wewaykum*, *supra* note 1 at para. 83.

legally-sanctioned background to speculate from. It is much like sitting down to an after-dinner dessert when one has had neither dinner nor lunch.

As this paper has indicated, the *Guerin* judgment began the process of providing substance to the Crown's historical duties to Aboriginal peoples. By incorporating the Crown's fiduciary duties in section 35(1), the *Sparrow* judgment recognized the failures of the past and attempted to provide a more appropriate foundation for the affirmation and protection of Aboriginal and treaty rights, along with the special, *sui generis* relationship between the Crown and Aboriginal peoples.[164] Remarkably, almost twenty years after *Guerin*, this process is still in its infancy.

Owing to the considerable uncertainty and still-unresolved issues surrounding Crown-Native fiduciary relations, the current judicial articulation of its status in Canadian law can only be regarded as a fragment of the form that it will adopt in future years. Thus, considerable potential and promise remains in the fiduciary concept's application to Crown-Native relations in Canada. The length of time that it has taken for Canadian courts to fashion the limited judicial articulation of Crown-Native fiduciary relations that presently exists, combined with the apparent (and arguably *obiter*) limitation of the scope of the Crown's duties in *Wewaykum*, is cause for some concern. Nonetheless, such concern ought not detract from the fundamental premises of Crown-Native fiduciary relations established in *Guerin* and *Sparrow*, which have been consistently reaffirmed over the past two decades, in spite of their own inherent limitations.

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164 As the Supreme Court stated in *Sparrow*, *supra* note 9 at 409:

> Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with section 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any governmental regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principles enunciated in *Nowegijick* ... and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin* ...