First Among Equals: The Honour of the Crown, Aboriginal Title, and Fiduciary Duty in Canadian Aboriginal Law

by

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ABSTRACT

Canadian Aboriginal law, which I define as the study of the legal nature of the relationship between Indigenous peoples and the Crown, is for all practical purposes a development of the past 50 years. Over that time, three possible paradigms have emerged to guide the development of Aboriginal law. The first two of these, Aboriginal title and Crown fiduciary duty, date from the 1970s and 1980s respectively. While both of these were viewed as having great promise at their appearance, neither has come to apply to more than a narrow range of the broader Indigenous-Crown relationship. Aboriginal title is not a consideration where that title has been ceded or otherwise lost, and as developed by the Supreme Court of Canada, does not provide the exception to Crown allodial title and jurisdiction sought by Indigenous peoples asserting it. The Supreme Court's statement that the Indigenous-Crown relationship is broadly fiduciary has not resulted in the imposition of Crown fiduciary duty other than in cases where the Crown has assumed discretionary control over a cognizable, tangible, Indigenous interest.

Over the past 20 years, the Honour of the Crown has developed as a principle of general application across the entire range of Aboriginal law. It is not inconsistent with the Supreme Court's repeated confirmation of Crown allodial title and jurisdiction, and in fact it represents limits on Crown authority and obligations imposed on the Crown as a corollary to this title and jurisdiction. It is not limited to cognizable, tangible Indigenous interests, and applies across the entire range of the interaction between Indigenous peoples and the Crown. While initially applied to the interpretation and implementation of treaties, it has expanded to govern law relating to the Crown's duty to consult with Indigenous peoples and to require the fulfilment of Crown promises (unilateral or otherwise) of a constitutional nature and to provide a remedy to Indigenous peoples

when litigation regarding historic claims is otherwise precluded by the application of statutes of limitation.

There are references to the Honour of the Crown in Supreme Court decisions in cases relating to Indigenous peoples in the late nineteenth and early twentieth centuries. However, closer scrutiny suggests that these refences represent views that fall far short of the modern understanding of the Honour of the Crown. In the first modern decisions introducing the Honour of the Crown, judges reached back over the centuries to early seventeenth century decisions by Chief Justice Edward Coke, who himself described his decisions as arising out of the development of the common law in earlier centuries.

As a relatively new doctrine, the boundaries of the Honour of the Crown are still being explored. While earlier decisions did not apply it to impose positive obligations on the Crown arising out of treaties, recent developments, including the creation of the Specific Claims Tribunal suggest that decisions imposing these obligations may be more frequent in the future. The type of past Crown undertakings that give rise to the Honour of the Crown and relief from the application of statutes of limitation is a work in progress, and the breadth of this relief will be determined in future decisions.

Aboriginal title and Crown fiduciary duty have not been eclipsed by the Honour of the Crown and continue to apply in specific areas. There remain parts of Canada, which are frequently rich in resources, where there can be no credible assertion that Aboriginal title has been ceded. Although case law has determined that Crown fiduciary duty is a subset of the Honour of the Crown, issues related to the management of reserve lands and the funds received from the sale of surrendered reserve lands give rise to fiduciary duty. But neither of these considerations threaten the dominance of the Honour of the Crown in Canadian Aboriginal law.

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This document has also been informed by four decades of practicing law. While this experience was disillusioning in some ways, it was redeemed by some of the people I met along the way. Some, like me, were bureaucrats who helped me to see the Honour of the Crown in practice, while some were advocates for Indigenous peoples, pressing the Crown to show its honourable nature. Others were unfailing in the support they provided me in my work. In this regard, I thank Ken Boutillier, Lorne Ternes, the Honourable Justice John McCarthy, Steven Andres, Lisa Jensen, John McDonough, Alan Maitland, Susan Cartier, Sierra Lopetinsky, Jocelyn Stoate, Sharman Glynn, Perry Robinson, Kurt Sandstrom, Laird Hunter, Ron Maurice, Bob Potts, Troy Chalifoux, Jerome Slavik, Elizabeth Argall, Mitch McAdam, the late Gord Hannon, Heather Leonoff, Cole Pederson, Mira Bala, Amanda Read, Leslie Treseder, Mark Graham, Steve Bouris, Sean Kennedy, and the late Jim Prentice.

My greatest thanks go to my family. My daughter Erin has been a constant source of love, support and encouragement. After I received my MA 45 years ago, my wife Donna and I were faced with the question of pursuing a doctorate or attending law school. We decided on the latter, but Donna never forgot, and never let me give up, my dream of that doctorate. A decade ago, she shared in my decision to return to school and since that time she has supported me through significant challenges, health and otherwise, deferring the leisure and other benefits of retirement. She has been the one indispensable person in the completion of this dissertation, as she has been in all other aspects of my life for the past 48 years.

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INTRODUCTION AND OVERVIEW

INTRODUCTION

My Thesis

My thesis is that the Honour of the Crown has emerged as the dominant paradigm used by the Supreme Court of Canada in its explication of Canadian Aboriginal law,[1] and that it is likely that Canadian courts will continues to use the Honour of the Crown as the most fruitful paradigm in the future development of that law. The growth in importance of the Honour of the Crown has not been unchecked, however. In several decisions between 2004 and 2014 the Supreme Court of Canada not only set out the broad parameters for the application of the Honour of the Crown, but the doctrine has not completely displaced Aboriginal title and Crown fiduciary duty, earlier paradigms that emerged in the 1970s and 1980s respectively.

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[1] Before introducing my thesis, it is necessary to clarify the meaning of two of the terms that appear throughout this document. The term "Aboriginal" has a legal definition for the purposes of Canadian law, as *The Constitution Act, 1982* defines "aboriginal peoples of Canada" as including "Indian, Inuit and Métis peoples." *The Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11, s 35(2). More recently, the term "Indigenous" has emerged in part as a rejection of the pan-Aboriginal nature of that definition. In 2008 the Anishinabek Nation, which represents 39 Ontario first nations, condemned the term "Aboriginal" as a form of assimilation, adding that section 35 "was never meant to assimilate First Nations, Metis, and Inuit into a homogeneous group." Michaela Whitehawk, "Anishinabek Condemn Term 'Aboriginal,'" *First Nations Drum*, August 7, 2008. See also "Why we say 'Indigenous' instead of 'Aboriginal'", *Indigenous News River,* June 17, 2020. The etymological history of the term "Indigenous" illustrates that it has an internal consistency that "Aboriginal" lacks. The Latin root word *indigena* means "sprung from the land; native", which reinforces the description of Indigenous peoples as original peoples. Out of respect for the preference for the term "Indigenous" among self-identifying Indigenous peoples, I use that reference throughout this work.

However, in discussing the rights that receive the protection of section 35(1) of the *Constitution Act, 1982* or form the subject matter of litigation I refer to Aboriginal law, Aboriginal rights, and Aboriginal title. This reflects the dominant use of pan-Aboriginal terms in both section 35(1) and the jurisprudence of the Supreme Court of Canada.[1] Specifically, I define Aboriginal law as the study of the legal nature of the relationship between Indigenous peoples and the Crown. There is a second reason for referring to the legal nature of the bilateral relationship as Aboriginal law. Several decisions of the Supreme Court of Canada raise the suggestion that questions relating to Aboriginal title should be addressed not only by considering the common law alone, but rather by both the common law and the law and legal systems of Indigenous peoples. In this context I use the expression "Indigenous law" to describe such law and legal systems.

The suggestion that Aboriginal title could act as a paradigm to explain the general Indigenous-Crown relationship may appear counter-intuitive in light of the fact that most of Canada's population, business, and industry (other than extractive resource development) are found in parts of the country where Aboriginal title has either almost certainly or at least arguably been extinguished. However, the predominant themes in any field of law are ultimately determined by litigants, and much of Canadian Aboriginal law has been created in Aboriginal title claims. *Calder*[2], *Delgamuukw*[3], and *Tsilhqot'in*[4] were claims for the recognition of Aboriginal title. *Marshall/Bernard*[5] was a case in which Aboriginal title was raised as a defence against prosecution. In *Haida*[6] and *Taku River*[7] the issue between the parties arose within the larger context of Aboriginal title claims. Finally, the Supreme Court itself injected Aboriginal title considerations, albeit unnecessarily, into *Guerin*[8] and *Sparrow*[9].

Another factor is the energy provided by the assertion of Aboriginal title to the rights-based agenda that emerged among Indigenous peoples by the end of the 1960s. Paul McHugh, a Cambridge professor who began his Aboriginal law studies in his native New Zealand and who studied in Canada in the early 1980s, has observed that the doctrine of common law Aboriginal title made its first appearance as an "unformed legal argument", but between the 1970s and the 1990s it "shook the legal systems" of Canada, Australia, and New Zealand.[10]

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2 *Calder v Attorney General of British Columbia,* [1973] SCR 313, aff'g (1970), 13 DLR (3rd) 64 (BCCA), aff'g (1969), 8 DLR (3rd) 59 (BCSC).

3 *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at 1098-1101, Lamer CJC, rev'g (1993), 104 DLR (4th) 470 (BCCA), rev'g (1991) 79 DLR (4th) 185 (BCSC).

4 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, reversing *William v British Columbia*, 2012 BCCA 285, varying *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700.

5 *R v Marshall/Bernard*, 2005 SCC 43, [2005] 2 SCR 220, rev'g 2003 NBCA 55, aff'g 2002 NBQB 82, aff'g [2000] 3 CNLR 184 (NBPC) [*Bernard*], rev'g 2003 NSCA 105, 2002 NSSC 57, aff'g 2001 NSPC 2 [*Marshall*].

6 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, rev'g 2002 BCCA 462, var'g 2002 BCCA 147, rev'g 2000 BCSC 1280.

7 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550, rev'g 2002 BCCA 59, rev'g 2000 BCSC 1001.

8 *Guerin v the Queen*, [1984] 2 SCR 335 at 376-382, Dickson J, rev'g [1983] 2 FC 656 (FCA), aff'g on other grounds [1982] 2 FC 285 (FCTD).

9 *R v Sparrow,* [1990] 1 SCR 1075, aff'g [1987] 2 WWR 577 (BCCA).

10 Paul McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011) at ix.

Further, Aboriginal title represents the Indigenous interest in lands at its purest, untainted by the actions or interests of the Crown. Aboriginal title as it has been characterized by Indigenous claimants and academic commentators on the subject contains an assertion that is central to the Indigenous-Crown relationship. This is the contention that parts of the Indigenous-Crown relationship (commonly but not necessarily territorial) are beyond the boundaries of the Crown's radical title or Crown sovereignty and jurisdiction. This absence of jurisdiction would act an effective constraint on Crown authority. I discuss the significance of statements by the Supreme Court of Canada in cases prior to *Haida*, in *Haida* itself, and subsequently in *Tsilhqot'in* that the Court does not share the view that there are any circumstances that preclude the operation of Crown radical title or Crown sovereignty and jurisdiction anywhere within Canada.

The Supreme Court's 1984 decision in *Guerin* introduced fiduciary duty as a second potential paradigm to explain the Indigenous-Crown relationship. The immediate operative cause of the appearance of the Honour of the Crown was the attempt by Indigenous peoples to base demands for Crown consultation and accommodation regarding the potential impacts of Crown land use and resource development decisions of Indigenous rights and title on the Crown's fiduciary duty. In *Haida,* the British Columbia Court of Appeal had found that British Columbia had a freestanding fiduciary duty to Indigenous peoples to consult with them regarding the potential impact of provincial land use and resource development decisions on lands where Aboriginal title is asserted but unproven, and that this duty extended to resource developers.[11] This conclusion is symptomatic of the close and complex relationship between the Honour of the Crown and fiduciary duty. I discuss the relationship between the two concepts, beginning with emergence of fiduciary duty, which was followed by a period in

[11] *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 147, aff'd 2002 BCCA 462, rev'g 2000 BCSC 1280, var'd 2004 SCC 73, [2004] 3 SCR 511.

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which the application of fiduciary duty did not expand beyond cases dealing with reserve lands. I also discuss the initial appearance of the Honour of the Crown as a less significant adjunct of fiduciary duty and the gradual reinterpretation of this relationship resulting in the current characterization of fiduciary duty as a subset of the Honour of the Crown in that only in certain factual situations does the Honour of the Crown result in the creation of a fiduciary duty.[12]

In *Haida*,[13] the Supreme Court of Canada declined to base the Crown's duty to Indigenous peoples on fiduciary duty and instead relied on the Honour of the Crown, which it stated "is always at stake in its [the Crown's] dealings with Aboriginal peoples."[14] Because of its near-universal application, the Honour of the Crown imposes different duties on the Crown depending upon the circumstances.[15] Between the assertion of British sovereignty and the negotiation of treaties, the Crown must ensure that its actions do not infringe Aboriginal rights or title, even if these are asserted but unproven.[16] The Honour of the Crown also "infuses the process of treaty making and treaty implementation."[17] The Court added in *Mikisew Cree Nation v Canada (Minister of Canadian Heritage)*, decided the year after *Haida,* that in the implementation of treaties the Honour of the Crown is a source of Crown duty independent of express treaty obligations.[18] The Honour of the Crown is more than a matter of law, as the Supreme Court of Canada has referred to it as a "constitutional principle".[19] In its 2013 decision in *Manitoba Métis Federation Inc v Canada (Attorney General)*, the Court extended the application of the Honour of the Crown to the fulfilment of Crown promises of a constitutional

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12 *Ibid* at para 18.
13 *Haida*, *supra* note 6.
14 *Ibid* at para 17.
15 *Ibid* at para 18.
16 *Ibid* at paras 18, 20.
17 *Ibid.* at para. 19.
18 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 51, [2005] 3 SCR 388, rev'g 2004 FCA 66, aff'g 2001 FCT 1426.
19 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42, Binnie J, [2010] 3 SCR 103, aff'g *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*2008 YKCA 13, rev'g 2007 YKSC 28.

nature,[20] adding that constitutional promises that engage the Honour of the Crown can be found throughout Canada's constitutional documents, not only in section 35(1) and other provisions of the *Constitution Act, 1982*.[21] In *Manitoba Métis Federation* the constitutional promise was one made in section 31 of the 1870 *Manitoba Act* to create a Métis land base in Manitoba by distributing 1,400,000 acres of land among children of Manitoba Métis,[22] and the failure to show diligence in the implementation of this promise breached the Honour of the Crown.[23]

The Supreme Court of Canada's use of the Honour of the Crown has been the subject of considerable study over the past decade. Despite this work, there are significant questions relating to the Honour of the Crown that have either not been pursued or, if pursued, have not been answered fully. Why did the Honour of the Crown first come to prominence in the decision in the *Haida* case? What is the relationship between the Honour of the Crown and Crown fiduciary duty to Indigenous peoples? What role does Aboriginal title play with regard to lands not covered by treaties of cession? Why and how did the Honour of the Crown become so quickly the dominant paradigm defining the Indigenous-Crown relationship? What is the origin of the concept of the Honour of the Crown? Is its unique to Aboriginal law or a manifestation in Aboriginal law of broader common law principles? What Crown promises can be characterized as constitutional in nature so as to give rise to a duty of diligent fulfilment? How broad is the exception from the operation of statutory limitation periods that can be provided when dealing with the Crown's failure to fulfil promises of a constitutional nature? The purpose of my dissertation is to contribute to the process of answering these questions.

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20 *Manitoba Metis Federation v. Canada (Attorney General)*, 2013 SCC 14 at para 70, McLachlin CJC and Karakatsanis J, [2013] 1 SCR 623, rev'g 2010 MBCA 71, rev'g 2007 MBQB 293.

21 *Constitution Act, supra* note 1 at s 35(1).

22 *Manitoba Act, 1870,* SC 1870, c 3, reprinted in RSC 1985, Appendix II, No 8, s 31.

23 *Manitoba Métis Federation, supra* note 20 at paragraph 110.

Organization of my Dissertation

Later this chapter, I review the history of the Indigenous-Crown relationship between the *Royal Proclamation* in 1763 and the *Calder* decision in 1973,[24] setting out the "pre-history" of Aboriginal law. Prior to *Calder,* Canadian law and the Supreme Court did not directly consider the nature of the relationship between Indigenous people and the Crown. *Calder* was the first case in which the Supreme Court of Canada actively considered the relationship between Indigenous peoples and the Crown, and it was the first occasion that the majority of the Court (six out of seven Justices) concluded that the Nisga'a of northwestern British Columbia had held lands in Aboriginal title at the time of the assertion of British sovereignty, and three of these Justices expressed the view that this title had not been extinguished and the lands in question were still held by the Nisga'a as Aboriginal title lands.

There is no doubt that between *Calder* in 1973 and *Tsilhqot'in* in 2014, both the concept and the reality of Aboriginal title have made tremendous advances toward the recognition of Aboriginal title as amounting to virtual ownership of land. I discuss this process in Chapter II. In the decades since *Calder*, Aboriginal title has developed from a theoretical construct that was a burden on Crown title (that might or might not be proprietary) to an interest in land that can be equated, with minor differences, to fee simple ownership.[25] Accordingly, Aboriginal title does not amount merely to the right to occupy and use lands – it represents the exclusive right to do so. Subject to some limitations, Aboriginal title includes the right to choose the use to which lands can be put. Finally, there is an "inescapable economic component" to Aboriginal title, which must be reflected in remedies available to Aboriginal title holders in the event of impacts on their property.[26] This could be accomplished by providing the holder of Aboriginal

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24 *Calder, supra* note 2.

25 Kenneth Coates and Dwight Newman, *The End is Not Nigh: Reason over alarmism in analysing the Tsilhqot'in decision* Aboriginal Canada and the Natural Resource Economy Series, Number 5 (Ottawa: Macdonald-Laurier Institute, 2014) at 14.

26 *Delgamuukw, supra* note 3 at 1111-1112, Lamer CJC.

title with a priority in the use of a resource,[27] by providing Aboriginal title holders with input into resource use decisions through consultation,[28] or by appropriate compensation for the infringement of Aboriginal title.[29]

However, the emergence of an expansive characterization of Aboriginal title has been limited to the private law aspect of title, namely the recognition of Indigenous peoples as persons whose communal interest in property survived both the assertion of French sovereignty and the 1763 transition from French to British sovereignty.[30] The Court has shown no corresponding interest in recognizing a public law element of Aboriginal title. It has been uncompromising in its refusal to accept that British (and later Canadian) sovereignty is incomplete or compromised by the survival of any form of Aboriginal sovereignty as an element or a corollary of Aboriginal title.

The initial appearance of fiduciary duty, which I also review in Chapter II, suggested that the doctrine might have broad significance across Aboriginal law, but subsequent decisions have limited this potential. Although the first reference to fiduciary duty in an Aboriginal law context in *Guerin* in 1984 did not necessarily shake the Canadian legal system, a 1986 review of the case reported that it "has generated great excitement within the native community [and] great trepidation within government".[31] The 1990 *Sparrow* decision, with its reference to the "special trust relationship" between Indigenous peoples and the Crown[32] led to the contention that the decision represented a "unified approach to Canadian aboriginal rights jurisprudence"[33] that would result in fiduciary duties being imposed on the Crown that extended beyond the

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27 *Ibid* at 1112, Lamer CJC.

28 *Ibid* at 1112-1113, Lamer CJC.

29 *Ibid* at 1113-1114, Lamer CJC.

30 The difference between the private law and public law aspects of Aboriginal title is characterized by P G McHugh as the distinction between *dominium* (property rights) and *imperium* (sovereignty). McHugh, *supra* note 10 at 19.

31 William R McMurtry, QC and Alan Pratt, "Indians and the Fiduciary Concept: Self-Government and the Constitution: *Guerin* in Perspective" [1986] 3 CNLR 19 at 19.

32 *Sparrow, supra* note 9 at 1114.

33 Leonard Ian Rotman, "Solemn Commitments, Fiduciary Obligation, and the Foundational Principles of Crown-Native Relations in Canada" (JSD Dissertation, University of Toronto, 1998) at 210-211.

protection of reserve lands to include harvesting rights, self-government (including funding for health, welfare, and education), religion, culture, and language.[34] Had this prediction been borne out, there would have been far less need for the doctrine of the Honour of the Crown to regulate Crown conduct.

In Chapter III I also discuss the rapid expansion in the use of the concept of the Honour of the Crown, pointing out that in *Haida*, Chief Justice McLachlin built on Canadian jurisprudence of the previous 40 years, both in the Supreme Court and lower courts. The Honour of the Crown was first raised in a treaty rights context as an unsuccessful argument by counsel in the 1960s, which attracted support in a dissent in the Supreme Court of Canada,[35] and which, after a delay of more than a decade, succeeded in *R v Taylor and Williams*, a 1981 treaty rights decision of the Ontario Court of Appeal.[36] Two decades later, *Taylor and Williams* was cited by Justice Binnie in the Supreme Court of Canada in *R v Marshall,*[37] another treaty rights decision. When Chief Justice McLachlin extended the Honour of the Crown to include consultation and accommodation in *Haida*, she relied on *Marshall*.[38] Chapter III also summarizes the rapid expansion of the use of the Honour of the Crown in both treaty interpretation and consultation and accommodation scenarios. As mentioned earlier, the next significant expansion in the use of the Honour of the Crown was the determination that it had imposed a duty on the Crown to work diligently toward fulfilment of the promise in the *Manitoba Act, 1870* to distribute lands in Manitoba among children of the Manitoba Métis.[39]

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34 Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto, Buffalo, and London: University of Toronto Press, 1996) at 81.

35 *R v George,* [1966] 2 SCR 267 at 274-279, Cartwright J, dissenting, rev'g [1964] 2 OR 429 (CA), rev'g [1964] 1 OR 24 (HCJ).

36 *R. v. Taylor and Williams* (1981), 62 CCC (2d) 227 (ON CA), aff'g (1979), 55 CCC (2d) 172 (ON SCDC), leave to appeal to S.C.C. refused December 21, 1981. Jamie Dickson has pointed out the serendipitous coincidence that Associate Chief Justice McKinnon, who wrote the decision of the Ontario Court of Appeal, had appeared before the Supreme Court on Canada in *R v George* as one of the counsel for Calvin George. Jamie D Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich Publishing Limited, 2015) at 25.

37 *R v Marshall,* [1999] 3 S.C.R 456 at 497-498, Binnie J, rev'g [1997] 3 CNLR 209 (NSCA).

38 *Haida, supra* note 6 at para 16.

39 *Manitoba Métis Federation, supra* note 20 at paras 91-94, McLachlin CJC and Karakatsanis J.

Chapter IV lays out the Canadian and English jurisprudential histories of the Honour of the Crown. Two pre-*Haida* decisions invoking the Honour of the Crown in an Aboriginal law context, Justice Binnie's judgment in *Marshall* and Justice Cartwright's dissent in *George*, reached back into both late nineteenth and early twentieth century dissents in the Supreme Court to find authority for their interpretation of the Honour of the Crown. After analyzing the Supreme Court of Canada dissents by Justice Gwynne in The Supreme Court of Canada dissents in *Province of Ontario v Dominion of Canada and Province of Quebec. In re Land Claims*[40] and *Ontario Mining Company v. Seybold*[41], I question whether these comments are consistent with the concept of the Honour of the Crown. More significantly, both Cartwright and Binnie cited a seventeenth century decision by Sir Edward Coke, *The Case of The Churchwardens of St. Saviour in Southwark,*[42]decided while he was Chief Justice of the Court of King's Bench.[43] On its face, this decision deals with how to interpret two conflicting Crown grants in a situation where one interpretation would benefit the Crown to the disadvantage of a subject and the other would have the opposite effect. Chief Justice Coke decided the case by choosing the latter interpretation, following a decision he had made in an earlier case,[44] which Justice Binnie also cited.[45]

One analysis of the Honour of the Crown that I discuss later in this chapter and throughout my dissertation is rather dismissive of the seventeenth century cases, suggesting that Justices Binnie and Cartwright proposed to base the Honour of the Crown on a less than robust legal proposition.[46] For reasons I set out in more detail in Chapter IV, I disagree. First, Chief Justice Coke specifically cited the Honour of the Crown rather than rely on textual or

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40 *Province of Ontario v. Dominion of Canada and Province of Quebec. In re Land Claims* (1895), 25 SCR 434 at 472-477, Gwynne J, dissenting, aff'd [1897], AC 199 (JCPC).

41 *Ontario Mining Company v. Seybold* (1901), 32 SCR 1 at 3-23, Gwynne J, dissenting, aff'g (1900), 32 OR 301 (Ont Div Ct), aff'g (1899), 31 OR 386 (Ch.), aff'd [1903] AC 73.

42 *The Case of the Churchwardens of St. Saviour in Southwark* (1613), 10 Co Rep 66b, 77 ER 1025 (KB)

43 *George, supra* note 35 at 279, Cartwright J, dissenting; *Marshall, supra* note 37 at 493, Binnie J.

44 *Roger the Earl of Rutland's Case* (1608), 8 Co Rep 55a, 77 ER 555 (CP).

45 *Marshall, supra* note 37 at 493, Binnie J.

46 Dickson, *supra* note 36 at 29.

mechanical methods of interpreting the documents in question. Second, the context of the two cases is significant, as both were part of a longstanding struggle between Coke and James I, in which Coke was determined to limit the absolutist and self-serving tendencies of the King. In this regard, I note that in their judgment in *Manitoba Métis Federation*, Chief Justice McLachlin and Justice Karakatsanis cited the two Coke decisions in support of the proposition that the Honour of the Crown "requires the crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples".[47] Chapter IV ends with a discussion of how the Honour of the Crown acts as a limitation on Crown authority, how it draws on the past but operates in the present, and the remedies associated with it. I conclude that these considerations regarding the Honour of the Crown render it particularly appropriate for use in Aboriginal law.

In Chapter V I focus on the three areas of Aboriginal law that the Honour of the Crown has come to dominate – treaty interpretation, the duty to consult, and Crown promises of a constitutional nature, and discusses the potential for the continued or expanded application of the doctrine in each of these areas. With regard to treaty interpretation, the work of the decade-old Specific Claims Tribunal and the application of the duty of diligence shows promise of the application of the Honour of the Crown to questions of treaty fulfilment, including the satisfaction of positive treaty obligations relating to lands, material assistance, and other benefits. For two reasons, the likelihood of a similar expansion in the area of the duty to consult is less clear. First, the Honour of the Crown has already come to dominate this field of law. Second, too close an identification between the Honour of the Crown and the duty to consult can result in a conflation of the two concepts that is problematic.

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47 *Manitoba Métis Federation, supra* note 20 at para 73(4), McLachlin CJC and Karakatsanis J.

When compared to the use of the Honour of the Crown in addressing issues related to treaty interpretation and the duty to consult, the application of the requirement of diligence in the implementation of Crown promises of a constitutional nature is in its infancy and future development is more speculative and uncertain. Questions include the identification of the types of promises that give rise to the duty of diligence. At a practical level, the most important question is the extent to which the breach of constitutionally protected rights will provide future litigants with an exception to the application of statutory limitation periods, laches, and questions of standing. Specifically, I address in Chapter V the question of whether *Manitoba Métis Federation* represents a reversal of the Supreme Court of Canada's earlier position that the procedural defences of limitation periods and laches are available in Aboriginal law cases or creates an exception to this position, the breadth of which has yet to be determined. I consider this issue in the specific context of claims by the descendants of Indigenous persons who suffered from dishonourable Crown conduct a century or more in the past, including instances that resulted in the loss of both Indigenous land and identity. I also discuss more generally discuss the variables that will contribute to an answer to this question.

Chapter VI concludes my dissertation with the argument that while the Honour of the Crown is dominant as a consideration in Aboriginal law, it is not exclusive. The focus of some early cases considered by the Specific Claims Tribunal on fact situations that meet the criteria to give rise to of a fiduciary duty has led to a small but not insignificant growth in the use of a fiduciary analysis by the Tribunal. It is too early to determine the longer-term consequence of the finding in *Tsilhqot'in* that with the proof that certain lands are held by Aboriginal title, the Crown's management of lands and resources in those lands is no longer subject to the Honour of the Crown but rather gives rise to a fiduciary duty.[48] At the same time, *Tsilhqot'in* confirmed that the authority of the Crown, even the provincial Crown, does not disappear with the proof

[48] *Tsilhqot'in*, *supra* note 4 at para.77.

of Aboriginal title.[49] I assert in Chapter VI that despite the dominance of the Honour of the Crown throughout all areas of Aboriginal law, fiduciary duty and Aboriginal title continue to have roles to play in Aboriginal law. Finally, I review several recent decisions, including one by the Supreme Court of Canada,[50] that appeared too late to form part of the earlier chapters of my dissertation. These deal primarily with the ongoing relationship between fiduciary duty and the Honour of the Crown, including two trial court decisions finding, I believe incorrectly, that there may still be a role for fiduciary duty within the field of treaty implementation[51] and a more recent Ontario Court of Appeal decision reaching the opposite conclusion.[52]

Methodology

The primary methodology I employ, particularly in Chapters II and III, is close reading of both relevant Supreme Court of Canada decisions and academic commentary on them. My focus in each case is on what the Court decided, rather than what individual Justices said, a distinction that is particularly important because it is not infrequent that in Aboriginal law decisions, some of what is said bears little if any relationship to the actual decision on the merits of a case.

My approach is both doctrinal and positivist. However, I attempt to avoid some of what I view as unfortunate characteristics of formalism. The most significant of these are the association of formalism with natural law and the belief that law is an autonomous discipline, "isolated, to a degree, at least, from its social environment, unfolding petal by petal in accordance with developing notions of justice".[53] In an article published shortly before he was appointed Chief Justice of Canada, Brian Dickson challenged both of the associations when he

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49 *Ibid* at para 151.

50 *Southwind v Canada,* 2021 SCC 28, rev'g 2019 FCA 171, rev'g 2017 FC 906.

51 *Yahey v British Columbia*, 2021 BCSC 1287; *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City),* 2021 ONSC 1209. *Chippewas of Saugeen First Nation v Attorney General of Canada et al*, 2021 ONSC 4181 also deals with treaty negotiation and implementation.

52 *Restoule v Canada* (*Attorney General*), 2021 ONCA 779, var'g 2018 ONSC 7701, 2020 ONSC 3932.

53 Richard A Posner, *Law, Pragmatism, and Democracy* (Cambridge, Massachusetts and London: Harvard University Press, 2003) at 21.

criticized the view that the law "existed, and had existed, in some Platonic ideal world, and upon his appointment to the bench, the scales fell from a judge's eyes , enabling him to see and declare the 'law'".[54] The belief in a "Platonic ideal world" described by Dickson is not limited to the association of natural law with "metaphysical and/or religious premises" that are unacceptable in the modern world,[55] but is also reflected in the wholly secular view that law proceeds by deductive logic from immanent principles within it.[56] My approach in this dissertation does not reflect this view. I am more comfortable with the activity theory of law, which is commonly attributed to Judge Richard Posner,[57] but for which Posner himself credits Justice Oliver Wendell Holmes Jr.[58] The activity theory of law does not characterize law as a either a set of general propositions representing justice or the process of deductive reasoning from these propositions to achieve justice in individual cases. It views law as "something that licensed persons, namely judges, lawyers, and legislators, do, rather than a box they pull off the shelf when a legal question appears, in the hope of finding something in it."[59] It is distrustful of metaphysics and skeptical about the use of moral reasoning, and it encourages judges to make decisions at a relatively low level of generality in a manner that favours factual and empirical considerations over metaphysical ones.[60]

I am certainly not suggesting that legal principles are unimportant. The common law could not have developed without them. If all courts did was announce which party was the victor in a case, the decision would be of no use to future judges except in the very rare situation in which the facts were identical to those in the original decision (which in effect would mean

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54 Mr. Justice Brian Dickson, "The Judiciary – Law Interpreters or Law Makers" (1982-1983) 12:1 Man LJ 1 at 4.

55 Mark D Walters, "Legal Humanism and Law as Integrity" (2008) 67:2 Cambridge LJ 352 at 353.

56 Posner, *supra* note 53 at 19.

57 Charles L Barzum, "Three Forms of Legal Pragmatism" (2017-2018) 95:5 Wash U L Rev 1003 at 1005.

58 Peter F Lake, "Posner's Pragmatist Jurisprudence" (1994) Neb L Rev 345 at 457. Richard A Posner, *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1990 at 40-41.

59 Posner, *supra* note 58 at 225.

60 Barzum, *supra* note 57 at 1022-1024; Peter Halewood, "Law's Bodies: Disembodiment and the Structure of Liberal Property Rights" (1995-1996) 81:5 Iowa Law Rev. 1331 at 1381.

the judge in the later case had nothing to decide). It is the process by which principles are abstracted from the reasons for a judicial decision that directs the development of the common law.[61] But in this process the principles are generated within the jurisprudence and not introduced from external sources such as moral considerations.

As my discussion of academic commentary in the next section of this chapter and throughout my dissertation will reveal, some academic critics of Supreme Court of Canada decisions describe these judgments as offending moral principles. One example, which I discuss at length in Chapter II, is the complaint that a statement in the Supreme Court's *Sparrow* judgment offended against the equality of peoples by reflecting the view that Indigenous culture was inherently inferior to European culture. If true, this would be a legitimate complaint and a serious one. But Chapter II illustrates that the validity of the criticism depends on whether the Court's statement in *Sparrow* did in fact offend the equality of peoples, and there is a strong argument that it did not. Another consideration is that a case can generate conflicting (or at least offsetting) moral principles.[62] The Royal Proclamation of 1763 sets out a process by which Indigenous peoples could cede lands they held by Aboriginal title to the Crown. From this it is possible to derive the principle that if the process for extinguishing Aboriginal title as not followed, that title should be intact. But if the lands in question are currently owned by third parties who acquired them without notice of the flawed process by which Aboriginal title was ceded, there is also a legal principle that these innocent third parties should not lose title to their property. This is not only a valid moral statement, a decision undermining these property interests threatens the existing legal order.[63]

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61 This consideration is particularly significant in the case of Supreme Court of Canada decisions, because in order to decide to hear a case, the Court must consider that a case raises a matter of public importance beyond what is specific question raised by the facts of that case. The Honourable Malcolm Rowe and Leanna Katz, "A Practical Guide to *Stare Decisis*" (2020) 41 Windsor Rev Legal Soc Issues 1 at 9.

62 Terry Skolnik, "Precedent, Principle, and Presumption" (2021) 54:3 UBC L Rev 935 at 936-937.

63 Malcolm Lavoie, "Aboriginal Title Claims to Private Land and the Legal Relevance of Disruptive Effects" (2018) 83 SCLR (2d) 129 at 133.

This conflict was central to *Chippewas of Sarnia Band v Canada (Attorney General)*, a 1999 decision of the Ontario Supreme Court of Justice that was varied but essentially affirmed by the Ontario Court of Appeal the next year.[64] The Chippewas of Sarnia Band surrendered lands by Treaty 29, executed at Amherstberg in 1827.[65] The land terms of Treaty 29 differed from those of the "Numbered Treaties" executed in the late nineteenth and early 20th centuries. The later treaties involved the cession of all of the lands within the treaty boundaries on the promise that some of these lands would be set aside as reserves. Treaty 29 excepted 2,540 acres from those lands that were ceded. As such, the interest of the Chippewas of Sarnia in the excepted lands after Treaty 29 was identical to the interest held before 1827. The 2,540 acres were purportedly sold by the Chippewas of Sarnia to Malcolm Cameron in 1839 and an Order-in-Council confirmed the sale the next year.[66] A patent was issued to Cameron in 1853, and he disposed of the lands between then and 1861.[67] In 1995 the Chippewas of Sarnia Band brought an Aboriginal title claim against Canada, Ontario, Sarnia, and the current nominal owners of the 2,540 acres. Each of the Crown, the land owners, and the plaintiff brought applications for summary judgment.[68] After considering the case for 15 months, the motions judge issued his decision in April 1999. He began by noting that "this is a novel case," as he felt his only alternatives were to "divest of their homes and workplaces thousands of innocent people" or "to extinguish the aboriginal title of innocent First Nations people in unceded, unsurrendered reserve lands protected by a solemn treaty."[69]

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64 *Chippewas of Sarnia Band v Canada (Attorney General)*, (1999), 101 OTC 1 at para 1 (SCJ), var'd (2000) 51 OR (3d) 641 (CA), leave to appeal to Supreme Court of Canada refused, [2001] 3. SCR vi., application for reconsideration of leave to appeal to the Supreme Court of Canada dismissed with costs June 13, 2002. *Supreme Court of Canada Bulletin,* 2002 at 925.

65 *Ibid* at para 1.

66 *Ibid.*

67 *Ibid* at paras 2, 818.

68 *Ibid* at paras 5-7.

69 *Ibid* at para 3.

He held that the 1839 sale was void *ab initio* for a number of reasons, not least that it was contrary to the *Royal Proclamation*.[70] As such, "[T]he Chippewa interest in the disputed lands therefore continues intact to this day unless extinguished by some constitutionally applicable statute, rule of law, or principle of equity."[71] Accordingly, he dismissed separate applications by Canada and the current owners for summary judgment based on the validity of the 1853 patent while allowing the plaintiff's application for summary judgment regarding the invalidity of the 1839 sale and the 1853 patent.[72] However, he took a different approach to the direct issues between the plaintiff and the present owners. He acknowledged that a decision that would have the effect of declaring the interest of the Chippewas extinguished would be the most drastic possible infringement of aboriginal and treaty rights because it would be "the total destruction of the right, root and branch".[73] However, he also held that the alternative of allowing the action to proceed against the present owners would have been "unconscionable and would bring the administration of justice into disrepute."[74] Ultimately he elected to dismiss the action against the current owners as a result of the "compelling and substantial importance to the community as a whole that long settled purchasers for value, innocent of any wrongdoing and without prior notice of any claim, should be secure in the peaceable possession of their homes and workplaces, undisturbed by ancient title defects."[75]

A general rule provides good faith purchasers with protection upon purchase, the last of which was completed on August 26, 1861.[76] The circumstances of the case led the motions judge to conclude that the Chippewas were entitled to a 60 year extended equitable limitation period during which the title of the third party purchasers was subject to challenge.[77] At the

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70 *Ibid* at paras 805-807.
71 *Ibid* at para 809.
72 *Ibid* at para 828.
73 *Ibid* at para 824
74 *Ibid* at para 828
75 *Ibid* at para 825.
76 *Ibid* at para 829.
77 *Ibid* at para 830

expiration of this equitable limitation period on August 26, 1921 the interest of the title of the land owners at that time was perfected and the claim of the Chippewas of Sarnia "crystallized into a damage claim against the Crown."[78]

The Ontario Court of Appeal reduced six appeals and cross-appeals[79] to two questions. The first was whether the sale and patent were void. If the answer to that question was yes, the second question was the nature of the remedies to which the plaintiff was entitled.[80] On the first question, the Court of Appeal agreed with the motions judge that no surrender had taken place.[81] With regard to the second question, the Court of Appeal concluded, as had the motions judge, that no decision by it limited the right of the plaintiff to that of pursuing a claim for damages against the Crown.[82] However, the Court of Appeal also held that the other remedies sought by the plaintiff, including the declaration as to the invalidity of the sale and patent and a vesting order as against the present owners, were equitable remedies and as such subject to both equitable defences and the court's discretion.[83] The court further concluded that the assertion of Aboriginal rights was not exempt from equitable doctrines[84] such as laches or the protection of a *bona fid*e purchaser without notice, leading to the result that present owners were entitled to a dismissal of the action against them.[85] As such, the decision of the motions judge was affirmed as it applied to the present owners and the Crown's appeal of the declaration

78 *Ibid* at para 831

79 *Chippewas of Sarnia Band v Canada (Attorney General)* (2000), 51 OR (3rd) 641 at paras 12-14 (CA), var'g (1999), 101 OTC 1 (SCJ), leave to appeal to Supreme Court of Canada refused, [2001] 3. SCR vi., application for reconsideration of leave to appeal to the Supreme Court of Canada dismissed with costs June 13, 2002. *Supreme Court of Canada Bulletin,* 2002 at 925.

80 *Ibid* at para 17.

81 *Ibid* at para 185.

82 *Ibid* at para 275.

83 *Ibid* at paras 280-283.

84 *Ibid* at para 284.

85 *Ibid* at para 311. The Court of Appeal also held that the decision by the motions judge to impose a 60-year equitable limitation period was not supportable in law. *Ibid* at para 308.

was allowed.[86] An application for leave to appeal to the Supreme Court was refused in 2001[87] and an application for reconsideration of this appeal was dismissed the next year.[88]

My focus on what courts do rather than what judges say and my preference that the Supreme Court of Canada focus on principles that it has enunciated itself leads to the question of its handling of precedent, a consideration that has changed over time. When the Canadian Parliament was considering the 1949 legislation that abolished appeals to the Judicial Committee of the Privy Council and confirmed the Supreme Court of Canada as the nation's final court of appeal, there was limited discussion of whether the legislation "intended the abandonment of *stare decisis* with respect to Privy Council decisions". Despite the preference of a handful of Members of Parliament for such an interpretation, the evidence from the debate on the legislation is that there was no intention to do this.[89] The binding nature of Judicial Committee decisions was limited somewhat in 1966, with the announcement that the House of Lords would no longer be bound absolutely by its own earlier decisions.[90] Nevertheless, lower courts in Canada are still bound by Judicial Committee decisions that have not been subsequently overruled by the Supreme Court of Canada. However, since the Supreme Court has replaced the Judicial Committee as the final court of appeal in Canada, the former has the authority to treat the latter as a court of coordinate jurisdictions whose judgments are to be followed to the extent that they are persuasive.[91]

Turning to the issue of the binding nature of the Supreme Court of Canada's own decisions on itself, the situation at the beginning of the twenty first century was that every statement in a majority decision was binding as part of the Court's judgment whether or not it

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86 *Ibid* at para 311.

87 *Chippewas of Sarnia Band v Canada (Attorney General)*, [2001] 3 SCR vi.

88 *Chippewas of Sarnia Band v Canada (Attorney General)*, application for reconsideration of leave to appeal to the Supreme Court of Canada dismissed with costs June 13, 2002. *Supreme Court of Canada Bulletin,* 2002 at 925.

89 Mark R McGuigan, "Precedent and Policy in the Supreme Court" (1967) 45:4 Can Bar Rev 627 at 638.

90 *Ibid* at 657-659.

91 Debra Parkes, "Precedent Unbound: Contemporary Approaches to Precedent in Canada" (2006-2007) 32:1 Man LJ 135 at 138.

was necessary to that decision.[92] The Supreme Court reconsidered the matter in 2005 in *R v Henry*, when Justice Binnie clarified that the statement in *Sellars* reflected the consideration that the precise point of law raised in the case had been determined by the same court in a previous decision and that *Sellars* did not stand for the general proposition "that each phrase in a judgment of this Court should be treated as if enacted in a statute", a position that Binnie described as "inconsistent with the basic fundamental principle that the common law develops by experience."[93]

Working from the proposition that "[A]ll *obiter* do not have, and are not intended to have, the same weight," Justice Binnie cited Lord Halsbury's admonition that the *ratio decidendum* of a decision is rooted in the facts of that case, and as such the weight of a statement decreases from the binding to the helpful or persuasive the further it is from the ultimate decision, as analysis moves from the decision through the "wider circle of analysis" to "commentary, examples or exposition that are intended to be helpful."[94]

The binding nature of precedent has been loosened further by cases dealing with protections provided by the *Canadian Charter of Rights and Freedoms.*[95] In its 1990 decision in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (the *Prostitution Reference*), the majority of the Supreme Court of Canada held that the criminalization of "bawdy-houses" and communication for the purpose of engaging in prostitution did not "infringe the liberty interest of street prostitutes in not allowing them to exercise their chosen profession" and therefore did not

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92 *Sellars v R*, [1980] 1 SCR 527 at 529, aff'g *R v Sellars* (1978) 44 CCC (2nd) 448 (QCCA). There is some question whether the rule was ever absolute. A questionable translation of the judgment from French to English may have suggested that obedience to a majority decision was more mandatory than did the original French judgment. A 2006 article concluded that *Sellars* did not contain a "formal declaration concerning the binding nature of each and every principle of law enunciated by a majority of the Court." Mathieu Devinat, "The Trouble with *Henry*: Legal Methodology and Precedents in Canadian Law (2006-2007) 32 Queen's LJ 278 at 280-281.

93 *R v Henry*, 2005 SCC 56 at para 57, [2005] 3 SCR 609, aff'g 2003 BCCA 476.

94 *Ibid.*

95 *Constitution Act, 1982, supra* note 1, Part 1.

infringe their economic liberty, which is protected by s 7 of the *Charter.*[96] In 2010, a motions judge in Ontario did not follow this decision, holding that even if the provisions of the *Criminal Code* did not violate s 7 regarding economic liberty, they were forbidden by the consideration that they forced prostitutes to compromise their personal safety, which was also contrary to s. 7.[97] The Ontario Court of Appeal reversed the decision in part, holding that the motions judge had exceeded her authority by refusing to be bound by the Supreme Court precedent. The Court of Appeal acknowledged that the motions judge was empowered to gather evidence and submissions that could inform the Supreme Court of Canada were it to reconsider its earlier ruling, but the Supreme Court, and only that court, could overrule one of its own decisions.[98] Speaking for a unanimous Supreme Court of Canada, Chief Justice McLachlin restored the decision of the motions judge. She held that in *Charter* cases, a trial judge could refuse to follow a Supreme Court of Canada precedent in cases involving arguments based on *Charter* provisions not raised in the earlier case, where new legal issues are raised as the result of significant developments in the law, or where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the case.[99] In the words of Dwight Newman, the treatment of precedent in *Bedford* "liberates the Court from both *stare decisis* and having to offer any explanations for departures from *stare decisis.*"[100]

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96 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 at 1140-1143, Dickson CJC, aff'g (1987), 49 Man LR (2d) 1.

97 *Bedford v Canada*, 2010 ONSC 4264 at para 460, var'd 2012 ONCA 186, aff'd 2013 SCC 72, [2013] 3 SCR 1101.

98 *Bedford v Canada*, 2012 ONCA 186 at paras 75-76; var'g 2010 ONSC 4264, var'd 2013 SCC 72, [S013] 3 SCR 1101.

99 *Bedford v Canada*, 2013 SCC 72 at para 42, [S013] 3 SCR 1101, var'g 2012 ONCA 186, aff'g 2010 ONSC 4264. The reversal of the *Prostitution Reference* was presaged somewhat in the decision itself, when Chief Justice Dickson commented that the case did not provide an opportunity to address whether "security of the person" could "ever apply to any interest with an economic, commercial or property component." *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra* note 96 at 1140-1142, Dickson CJC (emphasis in original).

100 Dwight Newman, "Judicial Power, Living Tree-ism and the Alteration of Private Rights by Unconstrained Public Law Reasoning" (2017) 36:2 UQLJ 247 at 255.

In Chapter II, I note the significance of Justice Binnie's citation of Lord Halsbury's references to "circles of analysis" and "commentary, examples or exposition that are intended to be helpful" because of two significant Supreme Court of Canada decisions (*Guerin* and *Delgamuukw*) in which statements regarding the nature of Aboriginal title are made that have a tenuous relationship with the *ratio decidenda* in the cases. *Delgamuukw* is a classic example of a situation in which the Supreme Court of Canada intended its commentary to provide assistance to future courts. In that case, the Supreme Court held that notwithstanding the fact that the trial in the case had consumed 374 days, errors by the trial judge in the treatment of evidence introduced by the plaintiffs meant that the Supreme Court lacked the evidentiary basis to render a decision as to the validity of the plaintiffs' Aboriginal title claim. As such, the Court ordered a new trial.[101] However, in order to provide the new trial judge with assistance,[102] Chief Justice Lamer spent half of his judgment providing his views on the proof, nature, and elements of Aboriginal title.[103] Despite the *obiter* nature of these comments, Chief Justice McLachlin's judgment in *Tsilhqot'in* made two references to the "Delgamuukw test" for Aboriginal title,[104] and similar references were made in the lower court decisions in the same case.[105] This is pragmatic, reflecting the fact that lower courts take guidance from Supreme Court statements intended for that purpose.[106] It also reflects the somewhat informal nature of precedent, since *stare decisis* is not a constitutional or statutory requirement - precedents bind because judges consider themselves bound by them.[107] But if Supreme Court *obiter* were to be accepted as binding, "*stare decisis*, with its traditional

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101 *Delgamuukw, supra* note 3 at 1079, Lamer CJC.

102 *Ibid* at 1080, Lamer CJC.

103 *Ibid* at 1080-1124, Lamer CJC.

104 *Tsilhqot'in*, *supra* note 4 at paras 25, 31.

105 In his trial decision, Justice Vickers referred to the "test for Aboriginal title in *Delgamuukw"*. *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 454, rev'd *William v British Columbia*, 2012 BCCA 285, var'd *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257. The British Columbia Court of Appeal made reference to "the tests in *Delgamuukw* and *Marshall. William v British Columbia*, 2012 BCCA 285, rev'g *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, rev'd *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257.

106 Devinat, *supra* note 92 at 292.

107 Rowe and Katz, *supra* note 61 at 6.

ratio/obiter distinction, would have to be abandoned and replaced with another theory of precedent, one that would tend to assimilate judicial and legislative powers."[108] Supreme Court of Canada Justice Malcolm Rowe has recently advised that although identifying the *ratio* of a case may be difficult on occasion, it is a necessary step in working with precedent.[109] He adds that one benefit of *stare decisis* is stability, which "allows individuals to plan their affairs, lawyers to advise clients, and citizens to interact with the legal system based on a set of reasonable expectations."[110]

The list of cases I include and review may seem insular because of the absence of decisions from other common law jurisdictions, but this reflects the lack of reliance on them by the Supreme Court of Canada. Only two decisions refer to the seminal Australian decision in *Mabo v Queensland*,[111] which put an end to the Australian policy based on *terra nullius*.[112] In *Delgamuukw*, Chief Justice Lamer cited the decision while outlining his reasons why proof of Aboriginal title requires evidence of occupation that was both exclusive and continuing.[113] Both Chief Justice McLachlin and Justice Binnie referred to *Mabo* in *Mitchell v Minister of National Revenue.* McLachlin's used the case as support for the proposition that, subject to certain exceptions, "the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada" following the assertion of British sovereignty.[114] However, she did not rely exclusively on *Mabo*, citing *Calder* before it as the source of this proposition.[115] She again cited *Mabo* later in her decision, with the second reference putting more emphasis on the exception to the general rule of continuity in

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108 Devinat, *supra* note 92 at 293.

109 Rowe and Katz, *supra* note 61 at 8.

110 *Ibid* at 4. The seventeenth century English scholar Sir Matthew Hale wrote that the most important property we demand of laws is that they be certain and settled. Gerald J Postema, "Roots of Our Notion of Precedent" in Lawrence Goldstein, ed, *Precedent in Law* (Oxford: Clarendon Press, 1987) 9 at 24. With regard to the benefit of legal stability, see also Malcolm Lavoie, "Aboriginal Rights and the Rule of Law" (2019) 92 SCLR (2d) 159 at 166.

111 *Mabo v Queensland [#2]* (1992) 175 CLR 1 (HCA).

112 McHugh, *supra* note 10 at 91.

113 *Delgamuukw, supra* note 3 at 1103.

114 *Mitchell v Minister of National Revenue,* 2001 SCC 33 at para 10, McLachlin CJC, [2001] 1 SCR 911, rev'g [1999] 1 FC 375 (FCA), rev'g (1997) 134 FTR 1 (FCTD).

115 *Ibid,* McLachlin CJC.

situations where Indigenous interests are inconsistent with British sovereignty.[116] Binnie's reference to *Mabo* noted that the Australian High Court agreed with Justice Dickson's approval in *Guerin* of the citation by Justice Hall in *Calder* of the statement by United States Supreme Court John Marshall that Indigenous peoples were recognized by the common law of having a legal right to the possession of their tribal lands subject to British sovereignty.[117] Binnie cited a second Australian decision, *Wik Peoples v Queensland*,[118] in support of the same proposition.[119] Chief Justice McLachlin cited a third Australian decision in her 2014 judgment in *Tsilhqot'in*, using *Western Australia v Ward*[120] to support the position that the three tests for Aboriginal title (sufficient pre-sovereignty occupation, continuous occupation, and exclusive historic occupation) should be considered as a composite test to be determined as a whole rather than three separate tests, all of which must be satisfied.[121]

Justice Binnie's rather indirect citation of Chief Justice John Marshall of the United States Supreme Court reflects the fact that several of Marshall's judgments from the 1820s and 1830s were cited in early Canadian Aboriginal law decisions, although this practice ceased almost 20 years ago. In his dissent in *Calder*, Justice Hall repeatedly heaped praise on Chief Justice Marshall, describing the latter's 1823 decision in *Johnson v M'Intosh*[122] as "the outstanding judicial pronouncement on the subject of Indian rights,"[123] and he later described the same decision as "the *locus classicus* of the principles governing Aboriginal title.[124] Hall quoted Marshall's famous description of Aboriginal title at length.

> the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to

116 *Ibid* at para 62, McLachlin CJC
117 *Ibid* at para 146, Binnie J.
118 *Wik Peoples v Queensland* (1996), 187 CLR 1 (HCA).
119 *Mitchell v Minister of National Revenue, supra* note 114 at para 147, Binnie J.
120 *Western Australia v Ward* (2002), 213 CLR 1 (HCA).
121 *Tsilhqot'in, supra* note 4 at paras 30-32.
122 *Johnson v M'Intosh*, 21 US (8 Wheaton) 543 (1823).
123 *Calder, supra* note 2 at 346, Hall J, dissenting
124 *Ibid* at 380, Hall J, dissenting.

> their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied.[125]

This was the same section of *Johnson v M'Intosh* that Justice Binnie cited (through *Guerin* and *Calder*) in *Mitchell v Minister of National Revenue* in 2001.[126] The next year, Binnie cited the same statement in *Wewaykum*,[127] which was the final reference to Marshall in the Supreme Court of Canada's Aboriginal law jurisprudence.

The early reliance on the writing of Chief Justice Marshall reflected the absence of Canadian jurisprudence on Aboriginal title at the time *Calder* was decided. By the end of the twentieth century, a body of Canadian law had been created that, while largely consistent with the views of Chief Justice Marshall that Justice Hall had quoted in *Calder*, found expression in a Canadian context. That is likely why the twenty-first century Supreme Court of Canada has largely limited itself to seeking authority within its own jurisprudence.

Literature Review

I draw extensively on academic commentary in the field of Aboriginal law, which is also a product of the last 50 years. In contrast with the American experience,[128] there was almost no publication of scholarly articles dealing with Aboriginal law questions before the appearance of the 1969 White Paper, which I discuss in the next section. The response engendered by that document changed the very nature of the relationship between the Canadian

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125 *Johnson v M'Intosh, supra* note 122 at 574.

126 *Mitchell v Minister of National Revenue*, *supra* note 114 at para 146, Binnie J.

127 *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245, aff'g *Wewaykum Indian Band v Wewayakai Indian Band*, (1999) 171 FTR 320 (FCA), aff'g *Roberts v The Queen* (1995), 99 FTR 1 (FCTD).

128 Felix S. Cohen, "Original Indian Title" (1947) 32:1 Minn L Rev 28. Cohen, who taught law at Yale and at City College in New York, was associated with legal realism, which was championed by Columbia professor Karl Llewellyn. Cohen also referenced the work of John Dewey in promoting a pragmatic approach to the analysis of law that he described as "functionalism". Llewellyn traced functionalism back to English philosopher Jeremy Bentham in the late eighteenth century, and it also influenced the pragmatic approach to jurisprudence promoted in the 1920s by New York Court of Appeal and later United States Supreme Court Justice Benjamin Cardozo. Beryl Harold Levy, *Anglo-American Philosophy of Law* (New Brunswick, New Jersey: Transaction [Rutgers University], 1991).

government and Indigenous peoples. In the past, Indigenous leadership had focused its attention on the protection of treaty rights. An era of lobbying and working with government was replaced with one emphasizing the assertion, through litigation if necessary, of a rights-based agenda dealing with land ownership, jurisdiction, and self-government, a desire to explore the history of Indigenous–government relations, and the reluctance to accept uncritically Canada's interpretation of that history. This, together with the centennial of the signing of the first of the "Numbered Treaties" in the 1970s, contributed to a new way of looking at the background of the treaties and the negotiations that led to their execution. For Alberta treaties, this resulted in the publication of *One Century Later: Western Canadian reserve Indians since Treaty 7*[129] in 1978 and *The Spirit of the Alberta Indian Treaties*,[130] containing articles on Treaties 6, 7, and 8, in 1979. In content, these contrasted with earlier histories such as George Stanley's *The Birth of Western Canada: a history of the Riel Rebellions*,[131] which had characterized treaties as the grant of material benefits to a weaker party in the hope that this would result in in the settlement of western Canada in an atmosphere of peace and order.[132] The works of the 1970s began the process of interpreting treaty negotiations from the perspective of the Chiefs present, recognizing that Chiefs played an active role in negotiations and achieved some success in gaining better treaty terms than those in the Crown's initial offers. Some authors went in another direction, challenging the validity of treaties. This has been of particular significance with regard to Treaty 8, and began with Father René Fumoleau's *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939*.[133] Father Fumoleau's analysis is that the Canadian government was well aware of

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129 Ian Getty and Donald Smith, editors, *One Century Later: Western Canadian Reserve Indians since Treaty 7* (Vancouver: University of British Columbia Press, 1978).

130 Richard Price, ed, *The Spirit of the Alberta Indian Treaties* (Toronto: Butterworth, 1979).

131 George Stanley, *The Birth of Western Canada: a history of the Riel Rebellions* (Toronto: Longmans, Green, 1936).

132 *Ibid* at 213.

133 René Fumoleau omi, *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart, 1973).

the mineral potential of northeastern Alberta, including oil sands, and that the goal of Treaty 8 was to secure ownership and control of these at a low cost before the Indigenous peoples of the area knew of this economic potential.[134] This thesis has led to a number of (so far unsuccessful) challenges to the validity of Treaty 8, but in the end has come to very little as a large majority of Treaty 8 Chiefs have chosen instead to pursue their goals within the Treaty. [135]

Commentaries on the *Calder* case were among the first examples of Canadian academic literature on Aboriginal law.[136] Academic literature was also supported by the emergence of Indigenous political organizations, which had in turn been influenced by the Indigenous liberation movement. In 1970, *Native Rights in Canada*, edited by Douglas Sanders, was published by the Indian-Eskimo Association of Canada.[137] Peter A. Cumming and Neil H. Mickenberg replaced Sanders as the editors of a second edition, which appeared in 1972. Sanders went on to write a second book, *The Friendly Care and Directing Hand of the Government: A Study of Government Trusteeship of Indians in Canada*, which was published by the National Indian Brotherhood (the predecessor of the Assembly of First Nations) in 1979.[138]

Paul McHugh traces the genesis of Aboriginal title scholarship in Canada to the University of Saskatchewan in the 1970s and early 1980s. In a personal and academic description, McHugh writes,

> I was lucky enough to be at a particular place – the College of Law in the University of Saskatchewan 1980-1981-where the intellectual fervour was considerable and where major figures were at the outset of their careers (Brian Slattery – my inspirational LLM supervisor who for over thirty years has

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134 *Ibid* at 24-110, *passim*.

135 Gabrielle Slowey, *Navigating Neoliberalism: Self-determination and the Mikisew Cree First Nation* (Vancouver, University of British Columbia Press, 2008) at 69.

136 K. Lysyk, "The Indian Title Question in Canada: An Appraisal in Light of *Calder*" (1973) 51:3 Can Bar Rev 450; J.C. Smith, "The Concept of Native Title" (1974) 24:1 UTLJ 1.

137 Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972).

138 Douglas E. Sanders, *The Friendly Care and Directing Hand of the Government: A Study of Government Trusteeship of Indians in Canada* (Ottawa: National Indian Brotherhood, 1977).

> commanded this field with deep scholarship and compassion…)[139]

Brian Slattery's doctoral dissertation from Oxford University was the first prominent Canadian academic analysis of Aboriginal law. This dissertation, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territories*,[140] was completed in 1979. McHugh credits Slattery with injecting "rigorous scholarship and intellectual *gravitas* into the notion of aboriginal title"[141] and describes his dissertation as a "compelling synthesis of law and the Crown's historical behaviour [that] gave aboriginal title even more plausibility within the logic of the common law and the historical circumstances of the settlement of Canada."[142] Slattery's dissertation is the first analysis that was based on the belief that Aboriginal law is related intimately with history, particularly the eighteenth-century interaction between Indigenous North Americans and the agents of British colonialism.[143] Slattery's specific interest is the way in which Indigenous land tenure at the time of contact was viewed and treated by English law.

Slattery repeats on several occasions that the implications of his suggestions regarding unresolved questions related to the *Proclamation* would need to be worked out in the future. But it is undeniable that the answers that started to emerge to these questions in his dissertation consistently favour the position that the *Proclamation* would assist Indigenous peoples asserting land-related rights. Slattery's explanation of the doctrine of Continuity is crucial both

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139 McHugh, *supra* note 10 at ix. Although Slattery's primary contribution to Aboriginal law is as an author, he also worked with Sheila Steick and David Knoll to edit *Canadian Native Law Cases*, a nine-volume compilation of Aboriginal law cases from 1763 to 1978. Brian Slattery and Sheila Steick with the assistance of David Knoll, *Canadian Native Law Cases* (Saskatoon, Saskatchewan: University of Saskatchewan Native Law Centre, 1980-1991).

140 Brian Slattery, "The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territories" (D Phil Thesis, University of Oxford, 1979).

141 Mchugh, *supra* note 10 at 85.

142 *Ibid* at 86.

143 While not ignoring the fact that throughout most of colonial Canada, British rule had been preceded by up to one and a half centuries of French colonization, Slattery dealt with issues that first appeared after the 1763 Treaty of Paris, which confirmed the transfer of sovereignty over all French colonies in North America to Great Britain.

to his dissertation and to the subsequent development of academic commentary. This provides that upon the appearance of British sovereignty, it is presumed that pre-existing private property remained in the hands of its owners.[144] This was of course subject to the British Crown's power to seize the property unilaterally, but Slattery points out that the only time at which the Crown was empowered to displace pre-existing landholders through an "act of state" was at the acquisition of sovereignty. The opportunity to take this action was terminated by the introduction of the English common law, since from that point forward, the peoples of a newly-acquired territory were entitled, as subjects of the British Crown, to the protection of the common law.[145] The common law constrains the actions available to the Crown as well as those of its subjects, and one of the law's provisions is that the Crown lacks the capacity to seize the land of its subjects by act of state.[146] This leads Slattery to the position that once Aboriginal title lands were confirmed at the introduction of the common law, those lands could only be surrendered to the Crown, and the Crown could only acquire these lands through a voluntary surrender in accordance with the provisions of the *Royal Proclamation*.[147]

A decade after Slattery's dissertation, the doctrine of Continuity received a more comprehensive treatment by Kent McNeil, a colleague of Slattery at both the University of Saskatchewan and Osgoode Hall Law School, who remains prominent as a leading Aboriginal law commentator.[148] It is impossible to overstate the significance of McNeil's 1989 book *Common Law Aboriginal Title*[149] in the development of Canadian Aboriginal law. The book posited (but did not endorse) a theory of Aboriginal title in a private law sense that has largely been adopted by the Supreme Court of Canada as its own view of the subject.[150]

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144 Slattery, *supra* note 140 at 351.
145 *Ibid.*
146 *Ibid* at 353.
147 *Ibid* at 312.
148 McNeil's most recent book is *Flawed Precedent: The St Catherine's Case and Aboriginal Title* (Vancouver and Toronto: UBC Press,2019).
149 Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).
150 McHugh, *supra* note 10 at 87.

McNeil's treatment of Aboriginal title begins with the recognition that by the eighteenth century, the British Crown had been expanding its authority and building an empire for more than a millennium. Centuries of English expansion within the British Isles had led to the development of colonial policies that dealt with the survival of private land interests among, *inter alia*, the Kentish, Cornish, and Welsh. In terms of expansion beyond the geographic borders resulting from its island status, England had been ruling Ireland as a colony for 600 years when it acquired France's North American empire.[151] The common law's approach regarding the legal impact of colonial expansion on the occupation of land mirrored that of English domestic law. In both scenarios, the common law maintained the principle, dating from the days of the Roman Empire, that occupation equates to possession and that possession in turn equates to ownership. This principle was so sacrosanct that it was considered one of the rules of natural law that was immune from challenge.[152] Present possession was assumed to be "rightful" in the absence of evidence that it was "wrongful".[153] McNeil adopts Brian Slattery's doctrine of Continuity, and interprets it as holding that if *de facto* occupation was established and this occupation was not in violation of natural law or unconscionable by British standards, it was recognized and confirmed.[154] Further, the ownership arising out of this possession was protected and enforced in accordance with the common law, which provided access to all remedies available at law or in equity.[155]

Common Law Aboriginal Title makes use of, rather than conflicts with, the historically impossible but, for the common law of property, essential fiction of Crown radical title. This holds that the Crown is possessed of the ultimate or radical title to all of the lands and resources

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151 Brian Donovan, "Common Law Origins of Aboriginal Entitlements to Land" (2002-2003) 29:3 Man LJ 289 at 295-296.

152 Gordon I. Bennett, "Aboriginal Title in the Common Law: A Stony Path through Feudal Doctrine" (1977-1978) 27:4 Buff L Rev 617 at 619.

153 McNeil, *supra* note 149 at 73-75.

154 Kent McNeil and David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?" (2003) 37 SCLR 177 at 206.

155 The Honourable Mr. Justice Douglas Lambert, "Van der Peet and Delgamuukw: Ten Unresolved Issues" (1998) 32:2 UBC L Rev 249 at 261.

within England and all other lands that become subject to English rule, and that all other interests in land are lesser and are held by way of a grant from the Crown.[156] In the case of territories over which the Crown established sovereignty, this principle began to operate from the assertion of that sovereignty.[157]

Most theorists of Aboriginal title, including McNeil, have been firm in their denunciation of the application of this principle to those parts of Canada occupied by Indigenous peoples at the time the British Crown acquired sovereignty, focusing their criticism on the fictitious nature of both the Crown's ultimate title and the notional Crown grant of lesser interests in lands to subjects.[158] While leaving no doubt that in his view that there is no historic basis for the doctrine of allodial Crown title, McNeil introduces a corollary to it in *Common Law Aboriginal Title* that was supportive of his thesis regarding Aboriginal title.

> One could not…accord the Crown a fictitious title by occupancy to indigenously occupied lands without accordingly fictitious grants to indigenous occupiers. The two would go hand in hand, providing the rationale for the paramount lordship which the Crown, by virtue of the doctrine of tenures, has over lands held by its subjects. This is the purpose for which the fiction was invented and that is the extent of its application…a Crown claim to the lands themselves would have to have some other basis.[159]

McNeil's analysis is elegant in its simplicity in constructing a theory that is a complete answer to any doubt as to the survival of Aboriginal title in a private law occupation/ possession/ownership sense notwithstanding British sovereignty. In fact, its simplicity may be

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156 Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 12. Studies in Aboriginal Rights, No. 2.

157 *Ibid.*

158 Bennett, *supra* note 152 at 629-631; Julie Cassidy, "Aboriginal Title: 'An Overgrown and Poorly Excavated Archaeological Site', (1998), 10:1 Int Leg Persp 39 at 45-47; Brian Slattery, "Aboriginal Sovereignty and Imperial Claims," (1991) 29:4 Osgoode Hall LJ 681at 688-691; Kevin Williams, "Critique: A Historian said *Terra Nullius* was an invention – I'm a blackfella lawyer who has serious concerns about his lack of knowledge and understanding of the common law" (2006-8), 10:1 Newcastle L Rev 37 at 38-39.

159 McNeil, *supra* note 149 at 218. McNeil's statement has not been accepted unanimously. Patrick Macklem rejected the proposition that the continuing Indigenous interests in lands resulted from a notional grant from the Crown, suggesting instead that the Crown and the common law simply acknowledged the reality of the pre-existing patterns of landholding. Patrick Macklem, "What's Law Got to Do with It?" (1997) 35:1 Osgoode Hall LJ 125 at 133.

too seductive. In *Common Law Aboriginal Title* McNeil did not suggest that Aboriginal title was limited to a private law interest, as he referred to the recognition of both interests in land and the Indigenous legal systems that created and regulated them. A 1991 review of *Common Law Aboriginal Title* acknowledges this but focuses almost exclusively on the former. In discussing McNeil's proposal that Indigenous interests in land be protected as meeting the common law requirements for occupation, the reviewer agrees and comments that there is "no need to invoke vague concepts of customary law title or some form of aboriginal title to find indigenous rights."[160] At the same time the reviewer acknowledges that the recognition of Aboriginal title as a corollary of Crown radical title is an imperfect vehicle for establishing the continuity of pre-contact interests in land. Accordingly, he speculates that the approach may be "tactically sound but ideologically suspect" as an effort to "use the colonial system to redress the injustices of colonialism."[161] In Chapter II I discuss McNeil's response to the use of his work by the Supreme Court of Canada, which can be described as being at best ambivalent.

Over the past several decades, Slattery and McNeil have been joined by dozens of peers, and the faculty of virtually every law school in Canada boasts one or more specialists in Aboriginal law, while the field also benefits from the work of academics engaged in the study of anthropology, archaeology, history, political science, sociology, and native studies. In the course of completing this dissertation, I have consulted approximately 300 books, book chapters, articles, case comments, dissertations, theses, and online journals on the subject of Aboriginal law, written by approximately 75 authors. They form a diverse group, including both Indigenous and non-Indigenous scholars. A majority are either academics (or in some

160 Jim Phillips, "Review of *Common Law Aboriginal Title*" (1991), 41:1 UTLJ 287 at 289.

161 *Ibid*. at 290. McNeil has expressed similar ambivalence over the recognition of Aboriginal title as a corollary of Crown radical title. He has described the assumption of Crown title without subjecting that claim to examination of the substantive basis of the claim as unfair. At the same time, he has conceded that it is "very unlikely" that the Supreme Court of Canada will reconsider its recognition of this Crown title. Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37:4 Osgoode Hall LJ 775 at 782; Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33:2 Ottawa L Rev 301 at 317-318.

cases, students) who teach or study in law faculties. Others are or were practitioners, who during their careers have represented Indigenous peoples, industry, or the Crown. The list of authors includes both former judges and current judges whose commentary usually but not always dates from the years before their appointment to the bench.

While this community is not monolithic, it does share certain tendencies. As the remaining chapters illustrate, most authors are supportive of the aspirations of Indigenous peoples in litigation, whether this arises out of assertions of Aboriginal title, self government, and initiatives such as the duty to consult. Decisions of the Supreme Court of Canada receive some (scattered and mostly faint) praise, while criticism is far more common. In discussing the harsh criticism of the decision in *Marshall/Bernard* by Kent McNeil and two other authors, Dwight Newman comments that to the extent that these critiques represent a results-based interpretation of the decision rather than one of legal principle, McNeil and the others "endanger their own cause."[162] The commentary on *Delgamuukw* and *Tsilhqot'in*, discussed in Chapters II and III respectively suggests that the phenomenon identified by Newman is not rare and is in fact common. Another theme that is illustrated in the same chapters is the academic response to the Supreme Court's subsequent treatment of its own decisions in *Guerin* and *Delgamuukw.* Commentary on these decisions describes them as promising potential future jurisprudence favourable to an expansive application of fiduciary duty, the recognition of Indigenous legal orders arising out of the *sui generis* nature of Aboriginal law, and limitations on provincial jurisdiction, and subsequent decisions (*Wewaykum* after *Guerin* and *Marshall/Bernard* and to a lesser extent *Tsilhqot'in* after *Delgamuukw*) have been interpreted as retreats from the earlier decisions. But subsequent decisions were less limits on the

[162] Dwight G Newman, "Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title" (2006-2007) 44 Alta L Rev 779 at 781.

application of *Guerin* and *Delgamuukw* and more results that were inconsistent with academic speculation on the implications of these decisions.[163]

Because of my focus on the relationship between the Supreme Court and academic commentary, I am particularly interested in those commentators that the Court has found most influential. In this regard, the Court has relied on Brian Slattery and Kent McNeil far more than it has on any of their peers. In Peter McCormick's study of the citation of periodical literature by the Supreme Court of Canada between 1985 and 2004, Slattery was third on the list of most-cited authors, and his 1987 work "Understanding Aboriginal Rights" was tied for first on the list of most-cited articles.[164] In addition to eight citations of "Understanding Aboriginal Rights" between 1990 and 2002,[165] the article has been cited six more times since 2005, most recently in 2020.[166] The significance of the article in the eyes of the Supreme Court is illustrated by the fact that while "Understanding Aboriginal Rights" has been cited by the Court 14 times, only four other works have been cited as many as four times. Slattery is author of one of these, his 2005 article "Aboriginal Rights and the Honour of the Crown."[167] Kent McNeil is the author

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163 *Ibid* at 783; McHugh, *supra* note 10 at 142. In McHugh's words, "hopes were less dashed than dowsed with greater realism and apprehension of the inherent limitations of the adjudicative process. Too much had been hoped for, the courts had been overladen with an expectation on which, in retrospect, they could never have delivered." McHugh, *supra* note 10 at ix.

164 Peter McCormack, "The Judges and the Journals: Citation of Periodic Literature by the Supreme Court of Canada, 1985-2004" (2004) 83:3 Can Bar Rev 633 at 653, 655.

165 *R v Sparrow*, *supra* note 9, *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, aff'g (1986), 39 Man R (2d) 180 (CA), aff'g (1983), 22 Man R. (2d) 286 (QB), *R. v Van der Peet*, [1996] 2 SCR 507, aff'g [1993] 4 CNLR 221 (BCCA), rev'g [1991] 3 CNLR 161 (BC SC), aff'g [1991] 3 CNLR 155 (BC PC), *R v Pamajewon,* [1996] 2 SCR 821; aff'g (1994), 120 DLR (4th) 475 (O.A.C.), *R v Côté*, [1996] 3 SCR var'g [1994] 3 CNLR 98 (QCCA); var'g [1991] 1 CNLR 107 (QCCS), var'g [1989] 3 CNLR 141 (QCPC), *Delgamuukw v British Columbia, supra* note 3, *R v Sundown,* [1993] 1 SCR 393, aff'g [1997] 4 CNLR 241 (Sask CA), aff'g [1995] 3 CNLR 152 (Sask QB), rev'g [1994] 2 CNLR 174, (Sask. PC), *Mitchell v Minister of National Revenue*, *supra* note 114, *Wewaykum Indian Band v Canada, supra* note 127.

166 *R v Marshall/Bernard, supra* note 5, *R v Sappier; R v Gray,* 2006 SCC 54, [2006] 2 SCR 686, aff'g 2004 NBCA 56, 2004 NBCA 57, aff'g 2003 NBQB 389, aff'g 2003 NBPC 2, *Bastien Estate v Canada*, 2011 SCC 38, [2011] 2 SCR 710, rev'g 2009 FCA 108, rev'g 2007 TCC 625, *Manitoba Métis Federation, supra* note 20, *Tsilhqot'in Nation v British Columbia, supra* note 4, *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam*), 2020 SCC4, aff'g 2017 QCCA 1791, aff'g 2016 QCCS 5133.

167 *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCC 43, rev'g *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67, *Bastien Estate v Canada, supra* note 166, *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40, [2018] 2 SCR 765, aff'g *Canada (Governor General in Council) v Mikisew Cree First Nation,* 2016 FCA 311, rev'g

of two of other three works, *Common Law Aboriginal Title*[168] and "The Constitutional Rights of the Aboriginal People of Canada",[169] a 1982 article. The only other academic writing to be cited in four separate Aboriginal law decisions of the Supreme Court of Canada is *The Duty to Consult: New Relationships with Aboriginal Peoples*,[170] a book by Dwight Newman.

The second-generation scholars whose works I have consulted most are John Borrows, Leonard Rotman, and Gordon Christie. Borrows, whose doctoral dissertation at Osgoode Hall Law School was supervised by Kent McNeil,[171] is one of the leading figures, if not the leading figure, of a generation of Indigenous scholars who work with both Indigenous law and Aboriginal law.[172] Borrows was one of the first scholars to explore the possibility of giving practical effect to the *sui generis* nature of Aboriginal rights and title, particularly the need to take into account Indigenous legal perspectives.[173] While he expressed some early optimism that the common law may be capable of recognizing the implications of the *sui generis* nature of Aboriginal rights,[174] he quickly abandoned this view, concluding that a common law approach must be rejected as a matter of principle, since allowing "an alien culture" to judge the meaning of Indigenous narratives and culture would rob Indigenous peoples of some of their power of self-identification and self-determination.[175] At the same time, he has recognized

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Courtoreille v Canada (Aboriginal Affairs and Northern Development), 2014 FC 1244, *R v Desautel*, 2021 SCC 17, aff'g 2019 BCCA 151, aff'g 20178 BCSC 2389, aff'g 2017 BCPC 84.

168 *R v Van der Peet, supra* note 165, *Delgamuukw v British Columbia, supra* note 3, *R v Marshall/Bernard, supra* note 5, *Tsilhqot'in Nation v British Columbia, supra* note 4.

169 *R v Sparrow, supra* note 9, *R v Van der Peet, supra* note 165, *Delgamuukw v British Columbia, supra* note 3, *R v Kapp,* 2008 SCC 41, [2008] 2 SCR 483, aff'g 2006 BCCA 277, aff'g 2004 BCSC 958, rev'g 2003 BCPC 279.

170 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council, supra* note 167, *Beckman v Little Salmon/Carmacks First Nation, supra* note 19, *Behn v Moulton Contracting Ltd,* 2013 SCC 26, [2013] 2 SCR 227, aff'g 2011 BCCA 311, aff'g 2010 BCSC 506, *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, [2017] 1 SCR 1069, rev'g 2015 FCA 179.

171 Kent McNeil, *Curriculum Vitae*, online: Osgoode Hall Law Scheel, York University online <www.osgoode.yorku.ca/wp-content/uploads/2014/08/McNeil_Kent.pdf>.

172 McHugh, *supra* note 10 at 185.

173 John Borrows and Leonard I Rotman, "The *Sui Generis* Nature of Aboriginal Rights; Does It Make a Difference" (1998) 36:1 Alberta L Rev 22 at 26.

174 *Ibid.*

175 John Borrows, *Recovering Canada: The Resurgence of Indian Law* (Toronto: University of Toronto Press, 2002) at 92.

the danger of attempting to work completely outside the common law, because to do so might place the aspirations of Indigenous peoples beyond the reach of Canada's Constitution, since constitutional law is a subset of the common law.[176] His attitude toward litigation by Indigenous peoples is complex. While he acknowledges that Indigenous peoples cannot eschew litigation in the hope that a future world will be more enlightened, he has expressed scepticism about the benefit of pursuing a rights-based agenda.[177] With regard to Aboriginal title, Chapters II and III refer to the fact that Borrows is known for his strong and repeated criticism of comments by the Supreme Court of Canada regarding Crown radical title and jurisdiction and the statement by Chief Justice McLachlin in *Tsilhqot'in* that *terra nullius* has never applied in Canada.[178]

Leonard Rotman was the co-author of an early article by Borrows regarding the *sui generis* nature of Aboriginal rights and title, but his greater significance for my dissertation is as the most prolific author supporting the broad application of the concept of fiduciary duty in areas of Aboriginal law reaching far beyond the protection of reserve land or property in general. I review Rotman's writings on this topic, which include three book-length works and more than a dozen articles. Gordon Christie overlaps with both Borrows and Rotman in that like Borrows, he is a prominent Indigenous scholar and, like Rotman, his writings in the late 1990s called for an expansive characterization of Crown fiduciary duty.

I owe a particular debt to two works that appeared during the decade in which I was researching and writing this dissertation. The first is Paul McHugh's "biography" of the

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176 John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR (2nd) 351.

177 John Borrows, "Unextinguished Rights and the *Indian Act* (2016) 67 UNBLJ 3 at 19. Borrows specifically rejects litigation challenging the validity of treaties as a means of asserting a claim to Aboriginal title. While recognizing that the design, execution, and implementation of treaties include "many and often grievous flaws, he concludes that treaties "are usually better than other available alternatives" for advancing the Indigenous-Crown relationship. John Borrows, "Ground-Rules: Indigenous Treaties in Canada and New Zealand" (2006) 22:2 NZULR 188 at 191, 202.

178 John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia* (2015) 48:3 UBC L Rev 701. Chief Justice McLachlin's statement is at *Tsilhqot'in Nation v British Columbia, supra* note 4 at para 69.

doctrine of Aboriginal title, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights*.[179] McHugh's introduction of the distinction between *dominium* (ownership) and *imperium* (jurisdiction) is reflected in my thesis that the nature of Aboriginal title claims changed between *Calder* and *Delgamuukw* from assertions of private rights to claims of public law authority and that academic criticism of the Supreme Court's Aboriginal title jurisdiction results from the fact that this public law assertion has been rejected consistently by the Court.

The second work is Jamie Dickson's 2015 book *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada*,[180] which had its origin in Dickson's 2014 Master of Laws thesis from the University of Saskatchewan.[181] I agree fully with Dickson that the application of the concept of fiduciary duty in *Guerin* to circumstances in which the Crown assumed discretionary control over reserve land held by the Musqueam Nation (what Dickson refers to as a "conventional" fiduciary duty) was unfortunate and that the introduction in *Sparrow* of a broad, almost plenary fiduciary relationship between the Crown and Indigenous peoples increased dramatically the original dysfunction introduced into Canadian law by *Guerin*. However, I differ from Dickson on two points. The first relates not to Dickson's fiduciary analysis but rather to his discussion of the Honour of the Crown. As noted earlier, my analysis of the possible common law origins of the Honour of the Crown in Chapter IV does not share Dickson's view that the seventeenth century decisions by Chief Justice Coke that were cited in two Supreme Court of Canada decisions that described the Honour of the Crown represented a less than robust legal proposition.[182] Second, Dickson expresses the hope that future decisions of the Supreme Court of Canada will limit references to fiduciary duty to what he describes as instances of "conventional fiduciary law"[183] (in other words in cases where the

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179 McHugh, *supra* note 10.
180 Dickson, *supra* note 36.
181 Jamie D. Dickson, "The Honour of the Crown: Making Sense of Crown Liability in Crown/Aboriginal Law in Canada" (LLM Thesis, University of Saskatchewan, Faculty of Law, 2014).
182 Dickson, *supra* note 36 at 29.
183 *Ibid* at 149.

Crown has assumed discretionary control over a cognizable Indigenous interest). As discussed in Chapter VI, the years that have passed since the publication of Dickson's book confirm that the Supreme Court has rejected this suggestion. Since the Court has continued to refer to a nebulous *Sparrow*-like Crown "fiduciary duty" to Indigenous peoples, those studying Aboriginal law need to be tolerant of ambiguity resulting from the use of a single word that has two distinct meanings depending upon the context in which it is used.

THE PRE-HISTORY OF CANADIAN ABORIGINAL LAW

I began this chapter by defining Aboriginal law as the study of the legal nature of the relationship between Indigenous peoples and the Crown. By this definition, Aboriginal law is a product of the last 50 years, dating from the 1973 decision of the Supreme Court of Canada in *Calder v Attorney General of British Columbia.*[184] In the remainder of this chapter, I summarize the Indigenous-Crown relationship in the two centuries prior to *Calder* and review that decision

Indigenous-Crown Relations as Policy Issues

Until about 1970, both the British and Canadian governments treated matters related to Indigenous peoples as matters of policy rather than law, although this policy was expressed in the form of documents of a legal nature. The first and most important of these was the *Royal Proclamation*,[185] issued in 1763, the same year that Great Britain obtained, in the *Treaty of Paris*, almost all of France's North American colonies.[186] The first goal of the *Proclamation* was the creation of four colonies (in addition to creating the colonies of Quebec, East Florida, and West Florida, the *Proclamation* dealt with Grenada, also obtained from France) out of the

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184 *Calder, supra* note 2.

185 George R, Proclamation [*Royal Proclamation*], 7 October 1763 (3 Geo III), reprinted in RSS 1985, Appendix II, No 1.

186 *The definitive Treaty of Peace and Friendship between his Britannick Majesty, the Most Christian King, and the King of Spain. Concluded at Paris the 10th day of February 1763. To which the King of Portugal acceded on the same day,* Article IV. The treaty left New Orleans in French hands, until it was revealed in 1764 that New Orleans and the lands west of the Mississippi (known as Louisiana) had been ceded by France to Spain on November 3, 1762, by the *Definite act of cession of Louisiana by the King of France to the King of Spain.*

lands obtained in the *Treaty of Paris* and the establishment of governments for each of them. The *Proclamation* also provided for land grants to soldiers who had served in the Seven Years' War and who wished to remain in North America, and confirmed the jurisdiction of Crown officials to apprehend and extradite persons charged with "Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors" who had fled the colony in which those offences had occurred. Between the sections of the *Proclamation* dealing with land grants and the apprehension and extradition of criminals, the document reserved "under our Sovereignty, Protection, and Dominion" the remaining lands acquired from France to "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection" as their "Hunting Grounds." It also provided that "if at any Time any of the Said Indians should be inclined to dispose of the said Lands," the Crown (and only the Crown) would purchase the lands in accordance with a process set out in the *Proclamation*.[187]

The *Royal Proclamation* had the authority of a statute,[188] but the wording of the document itself brought into question whether it was intended to be permanent. The provisions of the *Proclamation* were responses to the policy concerns of the moment that would remain in effect "until our further Pleasure be known."[189] At the same time, the provisions of the *Proclamation contain* unexpressed implications regarding the rights of Indigenous peoples in the lands reserved to them, which were later recognized as being crucial in Aboriginal law. As Brian Slattery points out, the references to the purchase of lands by the Crown "presume the

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187 *Royal Proclamation, supra* note 185.

188 *R v Easterbrook,* [1931] SCR 210 at 217.

189 *Royal Proclamation*, *supra* note 185. It took only five years for the "further Pleasure" of the Crown to reduce the territory "reserved" in 1763. By the 1768 Treaty of Fort Stanwix signed by the British Crown and the Six Nations as claimants of all lands west of the Appalachians, the *Royal Proclamation* line was moved from the crest of the Appalachians to the left bank of the Ohio River. This had the effect of establishing a more enforceable boundary, but it removed from the lands reserved the western one-third of the modern states of Pennsylvania and Virginia as well as the entire modern states of Kentucky and West Virginia. but it also legitimized purchases of land that prominent colonists, including George Washington, had previously entered into with Indigenous peoples. William Hogeland, *Autumn of the Black Snake: George Washington, Mad Anthony Wayne, and the invasion that opened the West* (New York: Farrar, Straus and Giroux, 2017) at 61; Robert Allen, *Her Majesty's Indian Allies* (Toronto: Dundurn Press, 1992) at 36.

existence of interest susceptible of being ceded and bought, that is interests amenable to transfer."[190]

The longstanding impact of the *Proclamation* is illustrated by the fact that just more than a century after the is appearance, the treaties of surrender covering an area bounded by Lake Huron, the Rocky Mountains, and the northern boundaries of Ontario and the Prairie Provinces, which were signed between 1850 and 1930[191] followed a procedure set out in the *Proclamation* that imposed legal obligations on the Crown. However, the Crown all too often treated the fulfilment of these obligations as discretionary and subject to periodic policies of fiscal restraint and expenditure reduction.[192]

In 1867, the *British North America Act* included "Indians, and lands reserved for the Indians" among those matters within the exclusive federal jurisdiction.[193] There is no indication that the management of the Indigenous-Crown relationship was seen as a matter of any controversy in the meetings and debates resulting in Confederation. In the Confederation debates in the Parliament of the Province of Canada, there was no reference to Indigenous

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190 Slattery, *supra* note 140 at 218.

191 Although the last of the "Numbered Treaties" in the five provinces covered by them was Treaty 10 in northwest Saskatchewan in 1906, the northern boundary of Treaty 5 was extended in 1912 to take in the entire province of Manitoba and the northern boundary of Treaty 9 was extended in 1930 to Hudson's Bay and James Bay to take in all of northern Ontario. Kenneth S Coates and William R Morrison, *Treaty Research Report: Treaty 10 (1906)* (Ottawa: Indian and Northern Affairs Canada, 1986); Kenneth S Coates and William R Morrison, *Treaty Research Report: Treaty Five (1906)* (Ottawa: Indian and Northern Affairs Canada, 1987); William R Morrison, *Treaty Research Report: Treaty No 9 (1905-1906)* (Ottawa: Indian and Northern Affairs Canada, 1986). The procedure for the purchase of lands is also reflected in the surrender provisions of the *Indian Act*. As Justice Estey pointed out in his judgment in *Guerin*, the fact that cessions of Aboriginal title lands and the surrender of reserve lands are both characterized as "surrenders" can cause [and has caused] confusion. *Guerin, supra* note 8 at 392, Estey J.

192 Treaty Six, signed in 1876, included provision for Crown assistance in the event of widespread famine. Within four years of the signing, the final disappearance of the buffalo led to conditions that not only threatened but resulted in starvation throughout the areas covered by both Treaty Six, Treaty Four, and Treaty Seven. However, in the intervening years, the Liberal government that had negotiated Treaty Six was replaced in 1878 by a Conservative government under Sir John A Macdonald. Far from honouring the famine clause of Treaty Six, the Canadian government enacted a policy of expenditure reduction as a policy response to its fiscal condition following the economic decline of the mid-1870s. See Blair Stonechild and Bill Waiser, *Loyal to Death: Indians and the North-West Rebellion* (Markham, Ontario: Fifth House, 1999) at 32-40; James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013) at 109-122.

193 *British North America Act, 1867,* (UK), 30 & 31 Victoria, c 3, s 91(24).

peoples other than in section 29(29) of the Quebec Resolutions tabled at the beginning of the debate, which provided that "Indians and Lands reserved for the Indians" would be within the jurisdiction of the "General Government".[194] This was a continuation of pre-existing colonial policy, which was that Indigenous peoples should not be subject to the jurisdiction of "adverse local interests."[195]

St Catherines Milling and Lumber Company v the Queen

At first glance, *St Catherines Milling and Lumber Company v the Queen*,[196] which dates from the 1880s, appears to bring into question my proposition that Canadian Aboriginal law is a recent development. However, at least in the eyes of the courts hearing the case, *St Catherines Milling* was not concerned with Indigenous-Crown relations but actually dealt with the division of powers under the *British North America Act.* The case was one episode in a decades-long contest between the governments of the Dominion of Canada and Ontario regarding the ownership of and jurisdiction over Crown lands.[197] The case related to lands that were included within Ontario's borders at the time of Confederation in 1867, but which were still subject to Aboriginal title until the signing of Treaty 3 in 1873. The outcome of the litigation would be determined by whether or not the Aboriginal title extinguished in Treaty 3 (and therefore title that the Indigenous signatories to Treaty 3 continued to possess between 1867 and 1873) had been an interest in land "other than that of the Province" under section 109 of the *British North America Act.*[198] If the answer to that question was yes, the lands were not legally "provincial

194 Province of Canada, Legislature, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces,* 1865 at 3.

195 J Timothy S McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham, Ontario: Lexis Nexis Canada Inc, 2005) at 3.

196 *St Catherines Milling and Lumber Company v the Queen,* [1888] UKPC 70, aff'g (1887), 13 SCR 577, aff'g (1886), 13 Ont AppR 148 (CA), aff'g (1885), 10 OR 196 (Ch).

197 David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Ojibwa, 1800-1940", (PhD dissertation, University of Ottawa, 1999) at 103.

198 *British North America Act, supra* note 193 at s 109.

lands" in 1867 and upon the signing of Treaty 3, they became federal Crown lands and remained the same at the time of the litigation.[199]

Three levels of Canadian courts agreed that the lands in question had been Ontario Crown lands since 1867 and that Treaty 3 merely perfected Ontario's title by removing a burden on it. Surprisingly, all three courts reached their respective judgments without making any effort to define Aboriginal title notwithstanding the fact that this title was the substance of any imperfection in Ontario's title between 1867 and 1873 and that the nature of the Indigenous interest in land had been raised by the parties and by one of the two dissenting judges in the Supreme Court of Canada. In the Factum supporting its appeal to the Supreme Court of Canada, counsel for St. Catherines Milling contended that "these Indigenous peoples were the direct successors or descendants of the Algonquin who occupied the area north of Lake Superior prior to the arrival of Europeans." As such, the Indigenous peoples living in the Treaty 3 lands "had a valid title to the soil" that was surrendered to Canada in 1873. In an argument foreshadowing the modern description of Aboriginal title as *sui generis,* the Factum stated the Indigenous interest in land had yet to be determined using "the language of the Common Law."[200] Nevertheless, it claimed that "the lands in question were as much private property as any individual parcel of land in this Province, at the time of Confederation."[201]

Justice John Wellington Gwynne, one of the two dissenting judges in the Supreme Court of Canada began his judgment with what he perceived as a possible misconception regarding the history of "Indian policy" in the lands that came to be Canada. He acknowledged that France had not recognized the legal existence of any form of "Indian title," but Gwynne argued that the French policy simply ignored but did not extinguish Aboriginal title to lands

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199 *St. Catherines Milling and Lumber Company v. the Queen* (1885), 10 OR 196 (Ch), aff'd (1886), 13 Ont AppR 148 (CA), aff'd (1887), 13 SCR 577. aff'd Apr. [1888] UKPC 70.

200 The materials filed with the Judicial Committee of the Privy Council included pleadings and materials filed by the parties at the original hearing and the Canadian appeals. *St Catherines Milling*, *supra* note 196, Appellant's Factum before Supreme Court of Canada at 5, 7.

201 *Ibid* at 69-70.

during the life of New France. As a result, that title remained in effect and nothing prevented the British Crown from choosing in 1763 to deal with Indigenous peoples on a more "fair and equitable" basis, which it in fact did.[202] He then reviewed more than a century of what Gwynne characterized as acknowledgement by the British Crown that Indigenous peoples had an "estate, title, and interest" in unsurrendered lands.[203] Gwynne concluded that in light of all of the considerations set out by him, particularly the final one, the lands at issue in the litigation were Indian lands and not Ontario public lands.[204]

Ultimately, the Judicial Committee of the Privy Council made a passing reference to Aboriginal title in its affirmation of the Canadian decisions, concluding that "the tenure of the Indians was a personal and usufructuary right, dependent on the good will of the Sovereign."[205] Even at that point, Lord Watson, who wrote the Judicial Committee's decision, was unwilling to take responsibility for the description, attributing it to the words of the *Royal Proclamation.*[206] Watson added that his mention of Aboriginal title was made out of respect for the "great deal of learned discussion" generated by counsel regarding the Indigenous interest in unsurrendered land rather than out of any need to define that title in order to determine the outcome of the litigation.[207]

The Judicial Committee's decision has been described as one of the three constitutional cases that have defined Canada as a nation.[208] Notwithstanding Lord Watson's explanation that the judgment did not require an inquiry into the nature of Aboriginal title,[209] for more than 80 years the Supreme Court of Canada treated the *St. Catherines Milling* decision as the definitive statement on the subject. In 1984, when Justice Dickson discussed Aboriginal title in *Guerin*,

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202 *St. Catherines Milling and Lumber Company v. the Queen* (1887), 13 SCR 577 at 651, Gwynne J, dissenting, aff'g (1886), aff'g 13 AppR 148 (CA), aff'd. aff'd Apr. [1888] UKPC 70.
203 *Ibid*. at 664, Gwynne J, dissenting.
204 *Ibid.* at 666, Gwynne J, dissenting.
205 *St Catherines Milling*, *supra* note 196 at 5.
206 *Ibid at* 5-6.
207 *Ibid.*
208 Karen Drake, "The Impact of St Catherines Milling" (2018) *Articles & Book Chapters,* 2682.
209 *St Catherines Milling, supra* note 196 at 5.

Justice Estey wrote in a concurring judgment that the "nature of the interests of the Indian Band, the Federal Crown and the Crown in the right of the Province has been long ago settled in *St. Catherines Milling and Lumber Co. v. The Queen*."[210]

The 1960s: Background to *Calder*

A century after Confederation, frustration with the intractable nature of the social and economic challenges facing Indigenous peoples led the Hawthorn Report,[211] the first full-scale survey of these challenges, to propose that matters relating to Indigenous peoples, including reserve land and persons registered pursuant to *Indian Act*, become matters within provincial jurisdiction. This proposal reflected the consideration that the majority of issues that had an impact on Indigenous peoples (health, education, housing, child welfare, care of senior citizens, social assistance, and the operation of the courts) fall within provincial jurisdiction.[212] In the end, nothing came of this proposal, as it was rejected by the Liberal government that had appointed the commission.[213]

While a few Indigenous political organizations had existed as early as the 1930s, the 1960s saw the birth of new and significant bodies. The Federation of Saskatchewan Indians was formed in 1961, and the National Indian Brotherhood, the forerunner of the Assembly of First Nations was created in 1968.[214] During that decade, Indigenous leaders began to be influenced by events and theories that originated on other continents. The anti-colonialist movement, which began shortly after the end of the Second World War, saw a dramatic increase in the pace of creating independent nations in what had been colonies. In Africa alone,

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210 *Guerin, supra* note 8 at 291, Estey J.

211 Harry W. Hawthorn, *A Survey of the Contemporary Indians of Canada*, two volumes (Ottawa: Queens's Printer, 1967.

212 Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press 1981) at 21.

213 Barry Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 54.

214 Elizabeth A. Kerr, "Pierre Trudeau's White Paper and the Struggle for Aboriginal Rights in Canada: An Analysis of the Extent to Which the White Paper was a Turning Point in the Struggle for Aboriginal Rights and Land Claims in Canada" (2017) 5:1 The Great Lakes Journal of Undergraduate History 49 at 54.

more than 25 new states were created in the 1960s.[215] Aspects of the theory of decolonization were adapted to be used in parts of the world (North America, Australia, and New Zealand) where circumstances did not call for national liberation.[216] Professor Howard Adams turned to Third World political theory to explain the background and proposed course of Indigenous "liberation" in Canada. For example, when his work *Prison of Grass* was published in the 1970s, Adams acknowledged that his thinking on Canada's treatment of its Indigenous population had been informed by the Marxist analysis of late colonial African life found in Frantz Fanon's *Wretched of the Earth*.[217] Adams was one of the organizers of the American Indian Movement in the 1960s and acted as a leader in the spread of its Red Power Movement into Canada.[218] He envisioned Indigenous nationalism as control by Indigenous peoples of their own economic, political, social, and cultural lives.[219]

George Manuel, President of the National Indian Brotherhood reached out to Maori leaders while part of a Canadian government delegation to New Zealand. This contact provided both the Maori and Manuel with a counter-narrative to the positive description of Maori-New Zealand relations by both governments.[220] Manuel also visited Tanzania for a 10th anniversary celebration of that nation's independence, and the Canadian government received reports that he had reacted positively to the suggestion that armed struggle might be a useful strategy for Indigenous peoples in Canada.[221]

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215 The list is provided at the beginning of John Springhall, *Decolonization Since 1945: The Collapse of European Overseas Empires* (New York: Palgrave, 2001).

216 Scott Rutherford, "Canada's Other Red Scare: Rights, Decolonization, and Indigenous Political Protest in the Global 1960s" PhD Dissertation, Queen's University, 2011) at 107. Rutherford's dissertation has been published as Scott Rutherford, *Canada's Other Red Scare: Indigenous Protest and Colonial Encounters during the Global Sixties* (Montreal and Kingston: McGill-Queen's University Press, 2020). My page references are to the dissertation.

217 *Ibid.* at 124-125.

218 *Ibid.* at 123.

219 *Ibid* at 126.

220 *Ibid.* at 123.

221 *Ibid* at 123-124.

In 1969, the Canadian government released a *Statement of the Government of Canada on Indian Policy*, or, as it was more commonly known, the 1969 White Paper. The document was immediately, and almost universally, condemned by Indigenous political organizations. The proposals in the White Paper and their dramatic and catalytic effect on the growth of Indigenous political organizations and on the assertion of Aboriginal rights are well-documented, so I will only touch on this topic very briefly. Specific policy proposals such as the repeal of the *Indian Act* and the disappearance of the Department of Indian Affairs[222] are of little significance in their own right, in part because they were abandoned quickly. What is significant is the background justification for the approach proposed in the document, the set of principles that guided the development of the policy. The entire policy set out in the White Paper appears to have evolved from one principle - that all Canadians, indeed all peoples, are equal before the law and have equal rights.[223] It was a corollary of this principle that there should be no legislative or constitutional distinctions among citizens.[224] These principles acted as the prism through which the authors of the White Paper viewed Canadian society. The *Indian Act* was "discriminatory legislation" and to argue for its retention was to "argue for discrimination, isolation and separation."[225]

In her in-depth study of the development of federal policy in the late 1960s and early 1970s, Sally Weaver identified the influence of the ahistorical approach to policy that characterized the thought of then-Prime Minister Pierre Trudeau, particularly his opposition to "special status" for minorities that he felt should properly be considered to be cultural groups.[226] The White Paper reflected this belief, and minimized the significance of complaints about historic injustice by taking the position that other than a few occasions when it cannot be

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222 *Statement of the Government of Canada on Indian Policy* ("White Paper"), *1969* (Ottawa: Queen's Printer, 1969) at 7-8.
223 *Ibid* at 6.
224 *Ibid* at 7.
225 *Ibid* at 11.
226 Weaver, *supra* note 212 at 53.

ignored, history does not matter. The document did undertake that where it could be established that the Canadian government had not fulfilled completely the "limited and minimal" specific promises made in historic treaties, these shortcomings would be rectified.[227] But even these actions were part of a larger process of closing the book on treaties, which were characterized as historic anomalies that created a relationship that should be terminated.[228] In all other circumstances, matters between the Crown and Indigenous peoples would be addressed as current issues, untroubled by reference to the past. With specific reference to "Aboriginal claims to land", the White Paper was uncompromising, asserting that these claims were "so generalized and undefined" that "it is not realistic to think of them as specific claims capable of remedy" other than through the adoption of policies and programs "that will end injustice to Indians as members of the Canadian community."[229] As Weaver notes, the rejection of negotiations based on the concept of Aboriginal title was consistent with the Prime Minister's belief that a society could not be built on historical "might-have-beens."[230]

While the Hawthorn Report had recommended the assimilation of Indigenous peoples into the general population,[231] the White Paper stopped short of that. It considered three options and rejected what it called the two "extreme" possibilities of the continuation of reserves and complete assimilation. Instead, the White Paper proposed that Indigenous peoples play "a full role in Canadian society and the economy while retaining, strengthening and developing an Indian identity which preserves the good things of the past and helps Indian people to prosper and thrive."[232] Critics of the proposed policy showed little appreciation of this attempt to make a fine distinction between that policy and assimilation. Harold Cardinal, in his book *The Unjust*

227 White Paper, *supra* note 222 at 19.
228 *Ibid* at 19-20.
229 *Ibid* at 20.
230 Weaver, *supra* note 212 at 179.
231 *Ibid* at 21.
232 White Paper, *supra* note 222 at 11.

Society raised the spectre of "cultural genocide."[233] The opposition from Indian organizations across Canada was reflected in *Citizens Plus*, released by the Indian Chiefs of Alberta and described by Weaver as the document that "set the tone and parameters of the Indian response".[234] The Chiefs began their "counter-policy" with the statement "the recognition of Indian status is essential for justice."[235]

Of the two fundamental principles (elimination of legal distinctions among citizens and the irrelevance of history) reflected in the White Paper, the former was the first to be abandoned by the Canadian government. Before the end of 1970, the general understanding within the federal government was that if the White Paper had not been shelved, it had certainly been suspended.[236] In a speech in March 1971, then-Minister of Indian Affairs Jean Chrétien announced that the government would not be proceeding on the basis of that document,[237] although he indicated that the government's position regarding the illegitimacy of land claims and the unimportance of history would continue to inform Crown policy.[238]

CALDER AND ITS IMPACT

The Case

The more assertive tone in advancing a rights-based strategy in the late 1960s and early 1970s was first reflected in litigation asserting Aboriginal title in areas such as northern Quebec, the Northwest Territories, and northwestern British Columbia, where treaties had never been signed. *Calder* arose more than 80 years after the Judicial Committee's judgment in *St. Catherines Milling*, and in that time Canadian jurisprudence had not suggested any dissatisfaction with that decision. But this precedent was not the sole cause of governmental

233 Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1969) at 139.
234 Weaver, s*upra* note 212 at 188.
235 Indian Chiefs of Alberta, *Citizens Plus* (June 1970) reprinted in (2001) 1:2 Aboriginal Policy Studies 186 at 192.
236 Weaver, *supra* note 212 at 188.
237 *Ibid* at 187.
238 *Ibid* at 192.

complacency regarding potential Aboriginal title claims. Barry Strayer, Director of Constitutional Law with the federal Department of Justice later reminisced that among his colleagues and peers, Indigenous claims to land were not viewed as posing the slightest threat to the Crown. The accepted view of Strayer and his colleagues was that Canadian sovereignty, based on earlier British sovereignty, trumped any claim by Indigenous peoples to continuing title to land in Canada.[239]

It was this unpromising atmosphere that confronted the Aboriginal title claim of the Nisga'a to the Nass Valley north of Prince Rupert, bordering on the boundary between British Columbia and Alaska. Since at least 1913, the Nisga'a had been pursuing a claim for "territorial rights" containing elements of both ownership and jurisdiction.[240] As the culmination of these efforts, the Nisga'a filed a Statement of Claim in the Supreme Court of British Columbia seeking a declaration that their Aboriginal title over a 1,000 square mile area centred on the Nass Valley had never been extinguished.[241] At trial, Justice Gould held that any Aboriginal title the Nisga'a might have once possessed had been extinguished during the colonial era, although he did not feel the need to determine whether Aboriginal title had ever been recognized under Canadian law.[242] The outcome for the Nisga'a did not improve in the British Columbia Court of Appeal. Justice Tysoe agreed expressly with the reasoning of the trial judge,[243] and Justice MacLean added that "if there ever was an 'Indian title,' it was

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239 Strayer, *supra* note 213 at 57.

240 Although the Nisga'a had disputed British Columbia's authority to deal with lands within the Nass Valley since 1887, the first litigation was a petition claiming "territorial rights" filed by the Nisga'a with the Privy Council in May 1913. The case was never heard because the Privy Council determined that it could only hear cases referred to it by the government of Canada, which refused to do so. Canada took the position that the assertions by the Nisga'a were precluded by the definition of Aboriginal title in *St. Catherines Milling*. Daniel Raunet, *Without Surrender Without Consent: A History of the Nisga'a Land Claims* (Vancouver: Douglas & McIntyre, 1984) at 94, 137-139.

241 *Ibid* at 150-151.

242 *Calder et. al. v Attorney-General of British Columbia*, (1969), 8 DLR (3rd) 59 at 82, (BCSC), aff'd (1970), 13 DLR (3rd) 64 (BCCA), aff'd [1973] SCR 313; Douglas Sanders, "The Nishga Case" (1973) 19 BC Studies 1 at 13.

243 *Calder et. al. v Attorney-General of British Columbia*, (1970), 13 DLR (3rd) 64 at 69, Tysoe JA (BCCA), aff'g (1969), 8 DLR (3rd) 59 (BCSC), aff'd [1973] 3 SCR 313.

extinguished by the pre-Confederation legislation of the Colony."[244] Chief Justice Davey concurred, and added a description of the Nisga'a at the time of European settlement as "a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property."[245]

In the Supreme Court of Canada Justices Martland, Judson, and Ritchie agreed with the trial decision that Nisga'a title had been extinguished, but it was at that point that the similarity with the trial decision ended. In a judgment written for himself and his two colleagues, Justice Judson acknowledged the historic existence of Aboriginal title. He differed from the longstanding definition of Aboriginal title provided by the Judicial Committee of the Privy Council in *St. Catherines Milling.* Judson disagreed with the Judicial Committee's statement that the source of Aboriginal title was the *Royal Proclamation of 1763,* concluding that it was "clear" that the *Proclamation* was not the source of Aboriginal title either in British Columbia or elsewhere in Canada.[246] Rather, Aboriginal title found its origin in the occupation of lands prior to the first appearance of Europeans. Incorporating both this conclusion and a criticism of the Judicial Committee's definition of Aboriginal title as a "usufructuary right," Judson saw as the crucial issue the fact that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries." This was "Indian title", and what the Nisga'a were claiming was the "right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished."[247] On the facts of the case before him, Judson concluded that history established that Aboriginal title had been extinguished in British Columbia.[248] Justices Hall, Spence, and Laskin disagreed, and

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244 *Ibid* at 110, MacLean JA.

245 *Ibid* at 66, Davey CJBC

246 Even had the *Royal Proclamation* been the source of Aboriginal title, Judson would have viewed it as unrelated to the lands claimed by the Nisga'a, as he agreed with those who argued that these lands were outside the boundaries of the *Proclamation*. However, Judson concluded that the *Proclamation* was not the source of Aboriginal title even where it was applicable. *Calder, supra* note 2 at 328-329, Judson J.

247 *Ibid.* at 328, Judson J.

248 *Ibid.* at 338, Judson J.

their views were summarized in a dissent by Hall arguing that not only had the Nisga'a established a historic claim to Aboriginal title, that title survived to the present day.[249] Of course, this contention lost some of its significance when Hall added that as to substance, the definition of Aboriginal title in *St. Catherines Milling* as "usufructuary" remained the law of the land.[250]

The seventh member of the Supreme Court panel that heard *Calder*, Justice Pigeon, did not address the subject of Aboriginal title in his judgment, although he did refer to the decisions of the British Columbia Supreme Court and the British Columbia Court of Appeal regarding the topic.[251] Instead, he relied on a consideration that had been addressed by both these courts but not treated as determinative by them. Throughout the litigation, the Attorney General of British Columbia had taken the position that the Nisga'a claim could not proceed because the British Columbia Supreme Court did not have the jurisdiction to hear an action for the declaratory judgment sought by the Nisga'a in the absence of a fiat under the *Crown Procedure Act*,[252] which counsel for the Nisga'a had not obtained. The trial judge acknowledged that the objection by British Columbia was correct, although he elected to consider the case on its merits because, in his view, "the comity of our courts as an institution would have suffered" if the Nisga'a were told that their claim was dismissed "because it had been brought in the wrong form."[253] In the Court of Appeal, both Justice Tysoe and Justice Maclean acknowledged the validity of British Columbia's objection but considered it moot given their respective conclusions on the merits of the case.[254] Pigeon expressly rejected the trial judge's assertion that the absence of the necessary fiat was simply a matter of form, concluding that the issue

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249 *Ibid.* at 422, Hall J, dissenting.
250 *Ibid.* at 352, Hall J, dissenting.
251 *Ibid.* at 423-424, Pigeon J.
252 *Crown Procedure Act*, RSBC 1960, c 89.
253 *Calder*, *supra* note 242 at 83.
254 Although Pigeon only credited Maclean with even mentioning the issue of the fiat, Tysoe JA referred to the other "interesting" issues raised by British Columbia. *Calder, supra* note 243 at 98, Tysoe JA.

was determinative of the jurisdiction of the British Columbia Supreme Court to consider the case.[255] As such, he addressed that issue and only that issue in rejecting the Nisga'a appeal. As a result, only six of the seven Supreme Court of Canada justices had addressed the issue of Aboriginal title, with three holding that it had been extinguished and three that it was subsisting. Since Justice Judson (on behalf of Martland, Spence, and himself) concurred in Pigeon's conclusion regarding the necessity of the fiat[256] and Pigeon declined to address the issue of Aboriginal title, Pigeon's solitary and entirely procedural judgment became the decision of the majority of the Court. As a result, none of the commentary by either Justice Judson or Justice Hall on the subject of Aboriginal title received the formal *imprimatur* of the Supreme Court.

Other *Calder*-era Aboriginal Title litigation

An early phase of hydroelectric development of northern Quebec was the background for Canada's first (temporarily) successful application for an injunction as part of an Aboriginal title claim. Before Justice Malouf of the Quebec Superior Court granted the Grand Council of the Cree an injunction restraining the construction of the James Bay Hydro Project it was necessary, in his own words, that that he be convinced of "the establishment of aboriginal title at common law."[257] The injunction he issued was evidence that he had been convinced. One week after this order, the injunction was suspended by the Quebec Court of Appeal. A review of the Court of Appeal decision by Kent Roach concludes that the decision to suspend the injunction "relied on the notion of the balance of convenience and conceived that balance in crudely majoritarian (2,000 Cree compared to the population of Quebec), if not implicitly, racist terms."[258] The next year the Court of Appeal reversed Malouf's judgment in a decision

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255 *Calder, supra* note 2 at 424, Pigeon J.

256 *Ibid*. at 344, Judson J.

257 Richard H. Bartlett, "Aboriginal Land Claims at Common Law" (1983) 15 UWA L Rev 293 at 301; *Gros-Louis v Société de developpement de la Baie-James* (1973) 8 CNLC 188 (Que SC), rev'd *Société de developpement de la Baie James v Kanatewat* (1974), 8 CNLC 373 (Que CA), leave to appeal to the Supreme Court of Canada dismissed, [1975] 1 SCR 48.

258 Kent Roach, "Remedies for Violation of Aboriginal Rights" (1992) 21:3 Man LJ 498 at 502-503.

that imposed a burden of proof on the Cree that, according to Roach, was much higher than the standard that reflected the existing law of injunctions.[259]

However, in addition to the ongoing litigation surrounding Justice Malouf's decision, the James Bay Energy Corporation and the Cree, together with the James Bay Development Corporation and Hydro-Quebec began negotiations and convinced the governments of Quebec and Canada to join them. Later, these negotiations were combined with a separate process regarding the Inuit of northeastern Quebec[260] On November 11, 1975, the seven parties reached agreement on the *James Bay and Northern Quebec Agreement*. In return for removing their objection to the hydro project and discontinuing the litigation begun in 1973, the Cree received ownership of approximately 5,600 km^2 of land around their communities,[261] the rights to exclusive harvesting of animals and fish in an additional 64,750 km^2 of land,[262] $225,000,000 for economic development, and additional benefits.[263]

A Northwest Territories case, *re Paulette's Application to File a Caveat*[264] actually dealt with lands that were notionally covered by treaties. The lands in question were within the boundaries of Treaty 8 and Treaty 11 in the Northwest Territories,[265] but the case included the assertion that neither Treaty 8 nor Treaty 11 could legally terminate "Indian land rights" within their borders.[266] It began with the attempt by 16 Northwest Territories Chiefs to register a caveat on more than 1,000.000 km^2 of Crown land.[267] The Registrar of Land Titles sought the

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259 Roach, *supra* note 258 at 504; *Société de developpement de la Baie James v Kanatewat* (1974), 8 CNLC 373 (QC CA), rev'g (1973), 8 CNLC 188 (QC SC), leave to appeal to the Supreme Court of Canada dismissed, [1975] 1 SCR 48.

260 James R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989) at 252-254.

261 John Ciaccia, "The Settlement of Native Claims" (1977) 15:4 Alta L Rev 556 at 558. Ciaccia, a former member of the Quebec National Assembly, had represented Quebec in the negotiations.

262 *Ibid* at 559.

263 *Ibid.*

264 *Re Paulette's Application to file a Caveat*, [1973] 6 WWR 97 (NWTSC), rev'd. [1976] 2 WWR 193 (NWTCA), rev'd *Paulette v the Queen*, [1977] 2 SCR 628.

265 *Ibid* at 140.

266 *Ibid* at 138.

267 *Ibid* at 98.

advice of the Northwest Territories Supreme Court as to whether he should accept or reject the caveat.[268]

After hearing oral evidence from Chiefs, Elders, and two anthropologists and reviewing documentary evidence regarding Treaty 8 and Treaty 11, Justice W.R. Morrow was satisfied that the interest in land held by the Indigenous people represented by the 16 Chiefs satisfied the criteria for Aboriginal title. He described this as a communal and inalienable possessory right, allowing them to use and exploit the lands referenced in the proposed caveat.[269] He further concluded that it was at least arguable that aspects of the negotiation of Treaties 8 and 11 rendered the Treaties incapable of extinguishing Aboriginal title.[270] Finally, he determined that the interest in land represented by Aboriginal title justified the filing of a caveat protecting it.[271] Accordingly, Justice Morrow ordered that the Registrar of Land Titles accept the caveat and record its filing in the "day-book" maintained by the latter as a record of all registered instruments.[272] Morrow stressed that his order did not allow the caveat to be registered on Crown lands. However, anyone who acquired a private interest in these lands and who applied to have their new title registered would receive notice and "warning" of the litigation.[273] Like *Kanatewat, Paulette* was overturned on appeal and had little lasting impact on Canadian Aboriginal law. Both cases were ultimately decided by technical and procedural questions regarding the law of injunctions[274] and the operation of a land registry[275] respectively, with little reference to considerations related to Aboriginal title.

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268 *Ibid* at 103-104.
269 *Ibid* at 135.
270 *Ibid* at 141.
271 *Ibid* at 145.
272 *Ibid* at 146.
273 *Ibid* at 147.
274 *Société de developpement de la Baie James v Kanatewat* (1974), 8 CNLC 373 (QC CA), rev'g (1973), 8 CNLC 188 (QC SC), leave to appeal to the Supreme Court of Canada dismissed, [1975] 1 SCR 48..
275 *Re Paulette et al and Registrar of Land Titles*, [1976] 2 WWR 193 (NWTCA), rev'g [1973] 6 WWR 97 (NWTSC], aff'd *Paulette v the Queen*, [1977] 2 SCR 628.

Academic Commentary on *Calder*

Because the *ratio* of the Supreme Court was expressed in Justice Pigeon's judgment that the Supreme Court of British Columbia had no jurisdiction to hear the case because counsel for the Nisga'a had not obtained a fiat from the provincial Attorney General before commencing the action, both Brian Slattery and Kent McNeil were largely dismissive of *Calder*.[276] Slattery's primary focus on the case was to support Justice Hall's position that the provisions of the *Royal Proclamation* extended to British Columbia,[277] although Slattery also agreed with both Hall and Judson in their rejection of the conclusion in *St Catherines Milling* that the *Proclamation* was the source of Aboriginal title.[278] McNeil's primary substantive comment was to disagree with Justice Hall's acknowledgment that lands subject to Aboriginal title were nonetheless Crown lands.[279]

The most prominent commentary on *Calder* was a 1973 *Canadian Bar Review* article by Ken Lysyk, who recognized the significance of the decision, noting that "[F]ollowing a period of dormancy, the Indian title question has re-emerged as a live legal and political issue in Canada."[280] However, he stressed that while the case established that the issue of what he called "Indian title" was unresolved in Canadian law, the decision did little to further resolution. He observed that the *ratio* of the decision, set out in Justice Pigeon's judgment, was very narrow.[281] Lysyk's review of the Judson and Hall judgments noted the consensus that the *Royal Proclamation* acknowledged pre-existing Aboriginal title,[282] which reversed that part of the decision in *St Catherines Milling* holding that the *Proclamation* was the source of Aboriginal title. But Lysyk concluded that the Judson and Hall judgments effectively cancelled

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276 Slattery is equally dismissive of *Paulette*, which was also decided on procedural grounds and *Gros-Louis (Kanatewat)*, which was settled in negotiations. Slattery, *supra* note 140 at 4; McNeil, *supra* note 149 at 277.

277 Slattery, *supra* note 140 at 190, 238, 340.

278 *Ibid.* at 62.

279 McNeil, *supra* note 149 at 277-278.

280 Lysyk, *supra* note 136 at 450.

281 *Ibid* at 451-452.

282 *Ibid* at 453-454

each other out, and in the final analysis the decision shed little light on the nature of Aboriginal title or the means of extinguishing it.[283] He ended his commentary with the statement that "authoritative answers to a number of fundamental questions relating to Indian title must await future consideration by the court."[284]

Crown Response

The Canadian government did not feel any relief resulting from the dismissal of *Calder*. To it, the significance of the decision was that six of the seven members of the Supreme Court of Canada panel deciding the case agreed that contrary to the analysis on which the White Paper had been based, Canadian Indigenous peoples had at one time possessed Aboriginal title to their lands, and that three of the six Justices expressed the view that they still did. The Canadian government was absolutely unprepared for the decision by the Supreme Court's decision. In fact, the Crown response provoked by the *Calder* decision was of more practical significance than the decision itself. Gérard La Forest (later Justice La Forest of the Supreme Court of Canada), who was at that time an Assistant Deputy Minister in Justice Canada, undertook a paper on the legal aspects of land claims.[285] The outcome of this was the release, in early August 1973, of a new Comprehensive Claims Policy.[286] The Comprehensive Claims Policy was formalized in a 1981 publication, *In All Fairness: A Claims Policy For Canada*.[287] This policy was amended in 1986 and 1993, and an ongoing review of it suggests further changes may be made.[288] Canada separates land claims into two categories. Comprehensive claims are pursued in parts of the country that are not covered by treaties of sale or surrender, and in most

283 *Ibid* at 479-480.
284 *Ibid* at 480
285 Strayer, *supra* note 213 at 57.
286 Department of Indian Affairs and Northern Development, "Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People", *Communique*, August 8, 1973.
287 Indian and Northern Affairs Canada, *In All Fairness: A Claims* Policy *for Canada* (Ottawa: Indian and Northern Affairs Canada, 1973).
288 Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Ottawa: Aboriginal Affairs and Northern Development Canada, 2014) at 6.

cases can also be characterized as Aboriginal title claims. Specific claims, on the other hand, are filed when a party to a treaty of sale or cession asserts that the Crown has failed to implement the terms of that treaty. The policy dealing with specific claims was set out in 1982 in *Outstanding business: a native claims policy: specific claims*.[289] This policy was updated by the *Justice at Last* initiative announced in 2007.[290] This included changes to the review and assessment of claims to reduce the backlog of claims under review and a guarantee that claims would be accepted or rejected within three years.[291] The centrepiece of *Justice at Last* was the creation of the Specific Claims Tribunal, which created a body to consider the rejection of claims and make binding compensation orders against the Crown.[292] Despite these refinements since the 1980s, the entire machinery of responding to claims made by Indigenous peoples, whether they relate to Aboriginal title and can only be addressed through modern treaties or they deal with claims that Canada has refused or failed to live up to the commitments made in historic treaties was built from the ground up in less than a decade.

289 Indian and Northern Affairs Canada, *Outstanding Business: a native claims policy: specific claims* (Ottawa: Indian and Northern Affairs Canada, 1982).

290 Indian and Northern Affairs Canada, *Specific Claims: Justice at Last* (Ottawa: Indian and Northern Affairs Canada, 2007).

291 *Ibid* at 5-6, 10.

292 *Specific Claims Tribunal Act,* SC 2008, c 22.

CHAPTER II

ABORIGINAL TITLE AND FIDUCIARY DUTY, 1984-2002

As I noted in Chapter I, the Crown response to *Calder* was out of all proportion to the rather ambivalent practical outcome in the case itself. The litigation was decided in the Crown's favour by all three of the courts that considered it, and since the only judgment that secured the support of a majority of the Supreme Court was that of Justice Pigeon, the ultimate result is that the judgments of both Justice Judson and Justice Hall were reduced to *obiter*. The recollection of Barry Strayer suggests that the Crown response focused less on the outcome of the case than on the fact that six of the seven Justices had acknowledged the historic existence of Aboriginal title, something that federal officials had not even considered possible before the *Calder* decision.[1]

Notwithstanding the fear that *Calder* struck in the Crown, the case did not open the floodgates to Aboriginal title litigation. In the decade after *Calder*, the Supreme Court was only invited to address the subject of Aboriginal title once, in *R v Kruge*r in1977.[2] Aboriginal title had not been raised at a trial of two members of the Penticton Indian Band for killing four deer during a closed season, which ended in their conviction.[3] These were overturned by County Court, which held that the *Royal Proclamation* "immunized Indians from the reach of the *Wildlife Act* while hunting for food on unoccupied Crown land."[4] The British Columbia Court of Appeal restored the convictions, finding that the British Columbia *Wildlife Act*'s prohibition on hunting deer in a closed season was a law of general application applicable to

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1 Barry Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 57.

2 *Kruger et al v the Queen*, [1978] 1 SCR. 104, affirming (1975), 60 DLR (3rd) 145 (BCCA). Although the decision of the Supreme Court of Canada was not reported until 1978, it was delivered on May 31, 1977.

3 *Ibid* at 106.

4 *Ibid* at 107.

Indigenous hunters pursuant to section 88 of the *Indian Act*.[5] Before the Supreme Court, counsel for the hunters raised the application of the *Royal Proclamation* in British Columbia not only to argue that the decision of the County Court had been correct but to raise the issue of whether Aboriginal title had been extinguished in the Province.[6] The second question had not been raised in any of the courts below, there was virtually no documentary record before the Supreme Court regarding either question, and the only authority cited was Justice Hall's dissent in *Calder*. In speaking for a unanimous court and holding that the *Wildlife Act* did apply to Indigenous hunters as a law of general application,[7] Justice Dickson acknowledged that the nature, if any, of Aboriginal title in British Columbia was an important constitutional issue, but not one that he was prepared to address in *Kruger*. He explained that Aboriginal title had not been placed in issue until the case reached the Supreme Court, and he cited the consideration that the question of title should wait to be decided until a case in which it was "directly in issue."[8] This would allow interested parties an opportunity to adduce evidence in detail bearing upon the resolution of the particular dispute.[9] He concluded that "[C]laims to aboriginal title are woven with history, legend, politics and moral obligations" and that if Aboriginal title to particular land was to be treated as a justiciable issue rather than a political one, "it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis."[10] Dickson added that even assuming, without deciding, that Hall's interpretation of Aboriginal title was correct, "it has been conclusively decided that such title, as any other, is subject to regulations imposed by validly enacted federal laws",[11] which was

5 *R v Kruger and Manuel*, 60 DLR (3rd) 145 at 147 (BCCA), aff'd [1978] 1 SCR. 104.
6 *Kruger, supra* note 1 at 108.
7 *Ibid* at 116.
8 *Ibid* at 108
9 *Ibid* at 108-109.
10 *Ibid* at 109.
11 *Ibid* at 110.

the case since the relevant provisions of the *Wildlife Act* had been incorporated referentially by section 88.

After the caution Justice Dickson had exercised at the end of his *Kruger* judgment, it could have been expected that he would choose to defer a discussion of Aboriginal title until confronted with in a case in which that issue had , to use his words in *Kruger*, "been placed in issue"[12] so the case could "be considered on the facts pertinent to that Band and to that land, and not on any global basis."[13] As I describe in Chapter II, the outcome when the Supreme Court of Canada was confronted with the *Guerin* case could not have been more contrary to this expectation.

GUERIN v THE QUEEN

Lower Court Decisions

The decisions of the Federal Court Trial Division and the Federal Court of Appeal in *Guerin v the Queen* contained no suggestion that the case met the criteria set out by Justice Brian Dickson in *Kruger* for the Court of consider the question of Aboriginal title. It was not directly in issue.[14] The parties had neither adduced evidence nor made argument at trial regarding Aboriginal title.[15] *Guerin* arose out of the surrender and subsequent lease to a golf course of 162 acres forming part of the Musqueam Indian Reserve #2, which is located in Vancouver, British Columbia.[16] The plaintiffs, Musqueam Chief Delbert Guerin and five Councillors initiated the lawsuit on their own behalf and on behalf of all of the members of Musqueam Indian Band.[17] The claim alleged that the surrender provisions of the *Indian Act* and the surrender document approved by Musqueam members and executed by Chief and

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12 *Ibid* at 108.
13 *Ibid* at 108-10.
14 *Ibid* at 108.
15 *Ibid* at 108-109.
16 *Guerin v the Queen*, [1984] 2 SCR 335, rev'g *R v Guerin* [1983] 2 FC 656 (FCA), aff'g on other grounds *Guerin v R*, [1982] 2 FC 385 (FCTD).
17 *Guerin v R*, [1982] 2 FC 385 at 388 (FCTD), rev'd *R v Guerin* [1982] 2 FC 656 (FCA); aff'd *Guerin v the Queen,* [1984] 2 SCR 335.

Council had the effect of creating a trust in which Indian Affairs was the trustee and the Musqueam Band was the beneficiary, and the decision by Indian Affairs officials to lease the surrendered land to the golf course on terms that were prejudicial to the Musqueam (and which had in fact been rejected in discussions prior to the surrender vote) breached this trust.[18]

The 1951 *Indian Act* contained provisions that set out in considerable detail the necessary conditions for a valid surrender of reserve land for either sale or lease. These provided that for a surrender to be valid, it must be approved by the majority of electors in a meeting, certified by the federal official attending the meeting and the Chief, submitted to the federal Cabinet, and approved.[19] These provisions include a number of discrete requirements, and the failure to comply with any one of them would have the effect of invalidating a surrender. However, the *Guerin* plaintiffs and their legal counsel elected not to make any reference to a potential breach of the *Indian Act*'s surrender provisions, even as an argument in the alternative. The sole contention raised in the litigation was that the Crown was "in all the circumstances and at the material times, a trustee", and that the Crown had breached this trust.[20]

After hearing detailed evidence covering the period between the first suggestion of a conditional surrender and the renewal of the lease of the lands at the end of the term of the original lease, trial judge Frank Collier agreed fully with the plaintiffs.[21] He based his decision on the application of section 18(1) of the *Indian Act*, which provides that "reserves are held by Her Majesty for the use and benefit of. the respective bands for which they were set apart."[22] Collier based his entire decision on the belief that the interest of the Musqueam Band in the

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18 *Ibid* at 391.
19 *Indian Act,* RSC 1952 at s 39.
20 *Guerin*, *supra* note 17 at 391.
21 *Ibid* at 413.
22 *Indian Act, supra* note 19 at s 18(1).

surrendered reserve land was a product of the *Indian Act.*[23] He made a finding of fact that had the Musqueam members known of the terms of the lease between the Crown and the golf course, the proposal to surrender the lands for lease would have been rejected.[24] Collier's analysis led him to the conclusion that prior to the surrender the Crown did not hold Musqueam reserve lands in trust, but that the surrender vote had set aside the surrendered reserve lands in trust. He also found that the Crown had breached that trust when it entered into a lease with the golf course that was contrary to the conditions discussed at the surrender meeting, holding that the Musqueam conditions discussed at the surrender meeting were terms of the trust notwithstanding the fact that they were not written into the surrender document.[25]

Although the Federal Court of Appeal unanimously reversed Collier's decision, it agreed with the latter's conclusions that the interest of the Musqueam Band in its reserve land arose out of the *Indian Act*[26] and that the lands surrendered for lease could form the subject of a trust.[27] However, the Court of Appeal disagreed with Collier's conclusion that what was created was a "true trust" in the private law sense, finding that the trust relating to surrendered lands was instead an unenforceable "political trust".[28] The Musqueam appeal to the Supreme Court of Canada was heard in June 1983, but the Court's decision was not rendered until

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23 *Guerin, supra* note 17 at 415-416. Collier justified his decision by referring not only to s. 18(1) of the *Indian Act* but also to s. 61(1), which imposed the same duties on the Crown with regard to "Indian moneys.

24 *Ibid* at 415-416.

25 *Ibid* at 417-418.

26 *R v Guerin*, [1983] 2 FC 656 at 711 (FCA), rev'g *Guerin v R*, [1982] 2 FC 385 (FCTD); rev'd *Guerin v the Queen*, [1984] 2 SCR 335.

27 *Ibid* at 709-711.

28 The Federal Court of Appeal cited a line of cases that had concluded that where the Crown or a servant of the Crown assumes equitable obligations involving the exercise governmental functions, the result is not a "true" [legally enforceable] trust" but rather what is variously referred to as an unenforceable "political trust" a "trust of a higher order." *Ibid* at 713-718 Most significant for the Court of Appeal was what it viewed as the binding authority of a 1950 Supreme Court of Canada decision that described Crown obligations under the *Indian Act* as a "political trust of the highest order" but not legally enforceable. *St. Ann's Island Shooting and Fishing Club Limited v His Majesty the King*, [1950] 2 SCR 211 at 219, Rand J, aff'g [1949] 2 DLR 17 (FC). The Court of Appeal also disagreed with the trial judge's conclusion that the surrender contained the oral conditions imposed at the surrender meeting, holding that the terms of the surrender were those approved by Cabinet, which did not contain the oral conditions. *Guerin, supra* note 13 at 700.

November 1, 1984, almost 18 months later.[29] Although the Court was unanimous in its decision to allow the appeal, three separate judgments were issued, and none of these reflected the views of a majority of the Court.[30]

Supreme Court of Canada – Aboriginal Title

Given that the issue of the nature of the Musqueam interest in the surrendered land prior to the surrender vote had not been a controversial issue either at trial or in the Court of Appeal, it might have been expected that it would play an unimportant role in the Supreme Court's consideration of the case. However, after reviewing the facts of the case and the decisions in the courts below, Justice Dickson, writing for a plurality of the Court, began his analysis of the Musqueam interest in its reserve land and the obligation this imposed on the Crown to them by advising that "it is first necessary to consider the basis of aboriginal title and the nature of the interest in land which it represents."[31] He added that the reason for this is that the interest in reserve land is the same as that in "unrecognized aboriginal title in traditional tribal lands."[32] To the extent that this suggested a beneficial interest in Aboriginal title lands that appeared to conflict with the decision in *St. Catherine's Milling*, Dickson added that the focus on whether Aboriginal title was personal and usufructuary on the one hand or beneficial ownership on the other created a false distinction that did not represent a difference. He explained that any apparent inconsistency was because past efforts by courts to define a unique interest in land had almost inevitably found themselves applying inappropriate terminology drawn from general property law. Dickson concluded that this interest embodied the legal right of the Musqueam to possess and occupy certain lands, the ultimate title to which is the Crown's, and

29 *Guerin, supra* note 16.

30 Justice Dickson wrote the plurality decision, in which Justices Beetz, Chouinard, and Lamer concurred. Wilson wrote a judgment on behalf of herself and Justices Ritchie and McIntyre, while Justice Estey added his own judgment. *Ibid.*

31 *Ibid* at 376, Dickson J.

32 *Ibid* at 379, Dickson J.

that this right exceeded a personal right but did not extend to beneficial ownership.[33] Rather, Dickson described it as a *sui generis* right characterized by inalienability other than to the Crown. Having concluded that past jurisprudence had not characterized the Indian interest in land properly, Dickson expressed no desire to add layers of complexity to the description of that *sui generis* interest, explaining that it could be characterized by inalienability as well as the fact that the Crown "is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered." Dickson added that "any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading."[34] This conclusion played no role in the remainder of Dickson's judgment, which reversed the decision of the Federal Court of Appeal and restored the trial judgment.

Supreme Court of Canada - Fiduciary Duty

It is rare that it is possible to identify with precision the first appearance of a significant legal paradigm. In *The Common Law,* Oliver Wendell Holmes Jr. summarizes the process, over centuries, by which the distinction between criminal law and tort law came to be recognized by the distinction between intentional and negligent wrongs.[35] However, in the case of the suggestion that the Crown owes a fiduciary duty to Indigenous peoples, it is possible to trace the appearance of the concept to a single day – November 1, 1984, the day the Supreme Court of Canada announced its decision in *Guerin v the Queen*.[36] Further, there is no need for speculation about the operative cause for this event, as Justice Dickson's personal papers set out that reason in detail.

The consideration of *Guerin* by the Supreme Court took place during the time period in which Justice Dickson had assumed the *de facto* role of Chief Justice during Chief Justice Laskin's final illness but before Dickson had been appointed Chief Justice after Laskin's

33 *Ibid* at 382, Dickson J.
34 *Ibid.*
35 Oliver Wendell Holmes Jr, *The Common Law* (New York: Barnes & Noble, 2004) at 39-61, 85-91.
36 *Guerin, supra* note 16.

death.[37] After hearing oral argument the Court met, decided unanimously that the decision of the Federal Court of Appeal should be overturned and the trial judgment restored, and Justice Bertha Wilson began drafting what was expected to be a fairly straightforward decision.[38] Shortly after Justice Wilson circulated her draft judgment, one of Justice Dickson's clerks identified what the clerk believed to be a legal error in that draft. This related to Wilson's proposal to reinstate the trial judge's decision that the surrender by Musqueam had created a trust that had been breached by federal officials.[39] Dickson's clerk was convinced that this approach did not take into account the just-released Supreme Court of Canada decision in *Smith v the Queen*,[40] which held that the surrender of reserve land destroyed any interest the surrendering Indigenous peoples had in the lands that were surrendered.[41] Justice Dickson must have shared his clerk's concern about the destruction of the interest in surrendered land, as his judgment in *Guerin* cited *Smith* as authority for his conclusion that the Musqueam interest in the surrendered land disappeared with the surrender.[42] This rendered the existence of a trust impossible, for "even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met."[43] This conclusion necessitated Dickson's adoption of a fiduciary approach, which he viewed as creating a trust-like relationship although not a trust.[44]

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37 Chief Justice Bora Laskin participated in the oral argument of the case, but his participation in the Court's activities was irregular for the second half of 1983, and he never returned to work between surgery in December 1983 and his death on March 26, 1984. Three weeks after Laskin's death Brian Dickson, the author of the plurality decision in *Guerin*, was appointed as Chief Justice. Philip Girard, *Bora Laskin: Bringing Life to Law* (Toronto: University of Toronto Press, 2015) at 534-535.

38 Robert J Sharpe and Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 445.

39 *Ibid* at 446.

40 *Smith v the Queen*, [1983] 1 SCR 554, rev'g *The Queen v Smith*, [1981] 1 FC 346 (FCA), aff'g [1978] 1 FC 653 (FCTD).

41 *Ibid* at 578.

42 *Guerin, supra* note 16 at 386, Dickson J.

43 *Ibid.*

44 *Ibid.*

It is understandable that *Smith* would have been one of the decisions considered by the Supreme Court in deciding *Guerin.* Not only did both cases deal with surrenders of reserve lands, the decision in *Smith* had been released on May 17, 1983,[45] less than a month before *Guerin* was argued. But *Smith* was not relevant in the least to Justice Wilson's draft judgment, as *Smith* was not applicable to the surrender in *Guerin*. It dealt with a surrender that the Supreme Court of Canada characterized as absolute and unconditional, and it was for that reason that the surrender destroyed any interest in the surrendered lands.[46] Justice Dickson's judgment confirms that he recognized the difference between absolute and conditional surrenders,[47] and he did not explain his reasons for concluding that there was no trust *res* and that the existence of a trust was precluded.[48] As noted earlier, the trial judge specifically made findings of fact that the surrender of reserve lands was conditional, that it created a trust, and that this trust had been breached by federal officials.[49] Although the trial decision was set aside by the Federal Court of Appeal, the decision of that court agreed that a trust had been created and breached.[50]

Rather than finding that the Crown could be characterized as a trustee, Justice Dickson drew attention to the *Indian Act*, which "interposed" the Crown between the Musqueam and potential purchasers of their land, so as to prevent exploitation by third parties.[51] Thus while the Crown was not a trustee, it owed the Musqueam the same fiduciary duty that a trustee would. In this regard, he noted that one of the *indicia* of a fiduciary relationship is that one party has broad discretionary power over the interests of the other party.[52] He acknowledged that fiduciary duties generally arise in a private law context but added that there was nothing

45 *Smith, supra* note 40.
46 *Ibid* at 571, 578.
47 *Guerin, supra* note 16 at 365, Dickson J.
48 *Ibid* at 386, Dickson J.
49 *Guerin, supra* note 17 at 417-418.
50 *Guerin, supra* note 26 at 711.
51 *Guerin*, *supra* note 16.at 383, Dickson J.
52 *Ibid* at 384, Dickson J.

in the Crown's nature that excluded it from owing fiduciary obligations and concluded that in *Guerin* the Crown was carrying out a private rather than a public law duty.[53]

Dickson conceded that the fiduciary relationship he was describing was outside the "standard categories of agent, trustee, partner, director, and the like" that were normally viewed as owing fiduciary obligations to others. However, he expressed the view that "it is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed."[54] While he had earlier made the observation that the *Guerin* case could not be decided within the confines of trust law,[55] he characterized the fiduciary relationship as being "trust-like in character," with the Crown as fiduciary being subject to the full range of "equity's tools" should this fiduciary duty be breached.[56] The final result illustrated that after rejecting the suggestion that a trust was created, Justice Dickson circled back to describing a relationship that was analogous to that between a trustee and a beneficiary.[57]

Justice Wilson's judgment on behalf of herself and two other members of the Court suggested that she was unimpressed by Justice Dickson's concern about the binding effect of *Smith*, and there was nothing in her judgment to suggest that she had altered her original position that the trial judge's decision should be reinstated. She expressly agreed with the Court of Appeal that, prior to the surrender, the Crown was not a trustee in its management of reserve lands since these lands were not the subject of a trust.[58] However, whereas Dickson agreed with the Federal Court of Appeal that the Crown's obligation regarding Musqueam interest in its reserve land did not crystallize into a "true" trust at the time of surrender,[59] Wilson

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53 *Ibid* at 385, Dickson J.
54 *Ibid* at 384, Dickson J.
55 *Ibid* at 376, Dickson J.
56 *Ibid* at 387, Dickson J.
57 *Ibid*, Dickson J.
58 *Ibid* at 350, Wilson J.
59 *Ibid* at 386, Dickson J.

concluded that the surrender of reserve land had the effect of converting the Crown into a "full-blown trustee",[60] and she rejected the Court of Appeal's finding of a "political" trust.[61] She concluded that the consideration that the "beneficial interest" of the Musqueam in their reserve land had to be respected was sufficient to render the concept of "political" trust inapplicable.[62] This same conclusion could have been used as a response to Dickson's conclusion that there was no trust *res* and therefore no trust, as could her observations that there was "no magic" to the creation of a trust.[63]

While not disagreeing with the result, Justice Estey differed from Dickson with regard to the identical nature of the interest in Aboriginal title lands and reserves by concluding that these interests were not the same. His continued endorsement of *St. Catherine's Milling* indicated that he would characterize the Indigenous interest in Aboriginal title land as a personal and usufructuary right and as such insufficient to form the *res* of a trust. However, he acknowledged that a different situation had been created by the conditions the Musqueam had included in the surrender.[64] At that point, Estey differed from both Dickson and Wilson in that he hesitated "to resort to the more technical and far-reaching doctrines of the law of trusts and the concomitant law attaching to the fiduciary."[65] Estey would have dealt with the case by treating the Crown as agent of the Musqueam,[66] and he agreed that the obligations of a person playing that role had not been met.[67] The final difference between Justices Dickson and Estey was that while Dickson felt he was bound by *Smith*, Estey, who was the author of *Smith*, concluded that his earlier judgment could be distinguished from *Guerin.*[68]

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60 *Ibid* at 355, Wilson J.
61 *Ibid* at 352, Wilson J.
62 *Ibid* at 351-352, Wilson J.
63 *Ibid* at 355, Wilson J.
64 *Ibid* at 392-393, Estey J,
65 *Ibid* at 394-395, Estey J.
66 *Ibid* at 391, Estey J.
67 *Ibid* at 394, Estey J.
68 *Ibid* at 392, Estey J. Justice Estey's view was that Musqueam "clearly, and beyond any argument here, did not release their interest in the lands in the *St. Catherine's* sense but appointed the Crown in the right of Canada to carry out the commercial exploitation of the Indian interest." *Ibid* at 393, Estey J.

Academic Commentary

In a commentary written shortly after the *Guerin* decision, William McMurtry and Alan Pratt described *Guerin* as a "decision that establishes a sound conceptual foundation for Canadian Aboriginal law that is strongly founded in principle".[69] Dickson's conclusion that the respective interests in reserve land and Aboriginal title land are identical and the fact that the process of giving up both of these interests is described as "a surrender"[70] led to the suggestion that the federal Crown assumed fiduciary obligations with regard to all lands contained in treaties of surrender such as the "Numbered Treaties", including the duty "not to remain passive but to act positively in support of native peoples" in their dealings with "recalcitrant provincial governments."[71] Some commentators asserted that this fiduciary duty would extend to negotiations leading to a treaty,[72] and would include the obligation to disclose the existence of valuable mineral prospects in the lands that would be surrendered.[73] Whatever interests related to land and self-government that were notionally surrendered in a treaty did not disappear but were held by the Crown in trust for its treaty partners.[74]

Whether or not treaty rights give rise to fiduciary obligations was subject to differing views. Leonard Rotman, the leading academic proponent of the broad application of fiduciary principles to the Indigenous-Crown relationship,[75] contends that the Crown's fulfilment of

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69 William R. McMurtry Q.C. and Alan Pratt, "Indians and the Fiduciary Concept: Self-Government and the Constitution – *Guerin* in Perspective [1986] 3 CNLR 19 at 20.

70 *Guerin, supra* note 16 at 392, Estey J.

71 John Hurley, "The Crown's fiduciary duty and Indian title: *Guerin v the Queen*" (1985) 30:3 McGill LJ 559 at 595.

72 J. Paul Salembier, "The Crown as Fiduciary and the Conflict of Interest Inherent in Using Indian Lands for Public Purposes" (LLM Thesis, University of Ottawa, 1994) at 109-110.

73 Leonard Ian Rotman, "Solemn Commitments, Fiduciary Obligations, and the Foundational Principles of Crown-Native Relations in Canada" (JSD Dissertation, University of Toronto, 1998) at 210-211.

74 McMurtry and Pratt, *supra* note 69 at 32; Hurley, *supra* note 71 at 595; Peter W. Hutchins, David Schulze, and Carol Henning, "When Do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59:1 Sask L Rev 97 at 100.

75 Between 1993 and 1998, Rotman authored three book-length works on the application of fiduciary principles to aboriginal-Crown relations. In his 1993 LLM thesis "Duty, the Honour of the Crown, and *Uberrima Fides*: Fiduciary Doctrine and the Crown-Native Relationship in Canada" (LLM thesis, York University, 1993), he set out the main ideas that he would develop over the next decade. Rotman's 1996 book *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto, Buffalo, and London: University of Toronto Press, 1996) was an expanded version of his 1993 LLM

treaty obligations is fiduciary in nature,[76] a position supported by a number of other commentators.[77] However, even before the Supreme Court of Canada established in 2005 that treaty obligations are non-fiduciary,[78] other commentators disagreed with Rotman. Peter Hutchins and two colleagues point out that treaty rights do not impose fiduciary obligations because treaty terms are not unilateral Crown promises but rather are the result of negotiations leading to an exchange of commitments.[79] Richard Bartlett agrees, concluding that "treaties did not create trust obligation … that the land surrendered to the Crown was not subject to the equitable interest of the Indians in the setting aside of reserve lands."[80] A review of Rotman's 1996 book *Parallel Paths* charges that in it Rotman did not explain why treaty obligations are fiduciary rather than contractual.[81]

Rotman interprets *Guerin* as establishing that the existence of the Crown's fiduciary duty to Indigenous peoples results from the early Indigenous-Crown interaction and that the obligation has existed since early eighteenth century or even earlier.[82] For Rotman, it follows from this conclusion that decades of Aboriginal law decisions that had not considered the consequences of this hitherto-unknown fiduciary obligation were of questionable validity. Rotman identifies two Supreme Court of Canada decisions to which these considerations could

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thesis. In 1998 he completed his SJD dissertation "Solemn Commitments: Fiduciary Obligations, Treaty Relationships, and the Foundational Principles of Crown-Native Relations in Canada." Rotman, *supra* note 73.

76 Leonard I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test (1997) 36:1 Alta L Rev 149 at 152.

77 McMurtry and Pratt *supra* note 69 at 36; Hurley, *supra* note 71 at 595; Ardith Walkem, "Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning" in Ardith Walkem and Halie Bruce, eds. *Box of Treasures or Empty Box: Twenty Years of Section 35* (Vancouver: Theytus Books Ltd., 2003) 196 at 211; Michael Coyle, "Loyalty and Distinctiveness: A New Approach to the Crown's Fiduciary Duties toward Aboriginal Peoples (2003) 40:4 Alta L Rev 841 at 860; Mark L. Stevenson, "Visions of Certainty: Challenging Assumptions" in *Speaking Truth to Power: A Treaty Forum* (Ottawa: Law Commission of Canada, 2001) at 115; James [Sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241 at 263.

78 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 51, [2005] 3 SCR 388, rev'g 2004 FCA 66, aff'g 2001 FCT 1426.

79 Hutchins, Schulze, and Henning *supra* note 74 at 126-127.

80 Richard H. Bartlett, "Indian Reserves on the Prairies" (1985) 23:2 Alta L Rev 243 at 270.

81 Dennis R. Klink, "Book Review: *Parallel Paths* (1997) 29:1 Ottawa L Rev 215 at 222.

82 Leonard I. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism, and Fiduciary Rhetoric in *Badger* and *Van der Peet*" (1997) 8:2 Const Forum 40 at 45.

be applied. The first of these was *R v Horseman*,[83] a challenge to the validity of the Alberta *Natural Resources Transfer Agreement (NRTA)*, which was executed in 1929 but which did not come into effect as a Schedule 2 to the *Constitution Act, 1930* the next year.[84] The effect of the *NRTA* was to modify the treaty right to hunt for any purpose within the borders of each of Treaty 6, Treaty 7, or Treaty 8 into the right to hunt for food (but not for commercial purposes) anywhere in Alberta. The challenge to the *NRTA* in *Horseman* was based on the fact that the federal Crown had modified the treaty right to hunt without consultation with the other signatories to (in the case of *Horseman*) Treaty 8. Speaking for a majority of the Supreme Court of Canada, Justice Cory expressed some sympathy for that position, but he rejected the challenge, citing two reasons. First, there was a true *quid pro quo* in the document, since the right to harvest for food was extended to the entire province rather than being limited to treaty boundaries and this harvesting could be conducted throughout the year irrespective of closures in exchange for the limitation of harvesting to non-commercial purposes on unoccupied Crown lands. The second reason given by Justice Cory was that although it might well be politically and morally unacceptable in the 1990s to take such a step as that set out in the *NRTA* without consultation with the Indigenous peoples affected, the authority of the federal government to make such a modification unilaterally was unquestioned in 1930.[85] The second case mentioned by Rotman was *R v Badger*, which followed *Horseman* in concluding that the limitation of hunting for food to unoccupied Crown lands was valid.[86]

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83 *R v Horseman*, [1990] 1 SCR 901, aff'g (1987), 78 AR 351 (CA), aff'g (1986), 69 AR 13 (QB), rev'g [1986] 1 CNLR 79 (Prov Ct).

84 The Alberta *Natural Resources Transfer Agreement* was signed by the Dominion of Canada and Alberta on December 14, 1929. Paragraph 25 of the Agreement provided that the Agreement would not come into effect until the first day of the first month after His Majesty gave his Assent to the approval of the Agreement by the Parliament of the United Kingdom. As the *Constitution Act, 1930*, 20-21 Geo. V, c 26 received Royal Assent on July 10, 1930, the Alberta Agreement came into effect on August 1, 1930, as the Alberta Schedule (Schedule 2) to that legislation..

85 *Horseman, supra* note 83 at 936, Cory J.

86 *R v. Badger*, [1996] 1 SCR 771, aff'g (1993), 135 AR 286 (CA). *R v. Badger*, [1996] 1 SCR 771, aff'g (1993), 135 AR 286 (CA).

The legitimacy of the *NRTA* is a matter of considerable significance for Rotman, as the issue is integral to his contention that fiduciary duties to Indigenous peoples are owed not just by the federal Crown but also by the various provincial Crowns.[87] Brian Slattery agrees that fiduciary obligations to Indigenous peoples are owed by provinces in appropriate circumstances,[88] but both Slattery and Rotman acknowledge that they can could cite no definitive case law supporting the proposition.[89] In *Haida Nation v British Columbia (Minister of Forests)*, the Supreme Court rejected this suggestion, finding that the duty to consult extended to both the federal and provincial governments, but that this duty was not fiduciary in nature.[90]

In attempting to craft an appropriate resolution to the case before him, Justice Dickson was faced with two challenges, both of them self-inflicted. First, he believed that he could not treat the case as a breach of trust, which was incorrect. Second, he mused about the significance of the nature of Aboriginal title to the case, which was irrelevant. But in reaching a decision, he overcame these difficulties by treating the case as one that was a breach of trust in every sense other than in name. That conclusion mandated what the Supreme Court did in the case. However, Justice Dickson's success in getting past two flawed working assumptions was undermined by commentators who took one of these and used it as a springboard for speculation that bore no resemblance to the issue decided by the Court.[91] *R v Sparrow*, decided

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87 Leonard Rotman, "Provincial Fiduciary Obligations to First Nations" (1994) 32:4 Osgoode Hall LJ 735 at 762-763.

88 Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71:2 Can Bar Rev 261 at 275.

89 *Ibid*; Rotman, *supra* note 87 at 783.

90 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18, [2004] 3 SCR 511, rev'g 2002 BCCA 462, var' g 2002 BCCA 147, rev'g 2000 BCSC 1280. In 2014, the Supreme Court held in *Tsilhqot'in* that in dealing with resources in Aboriginal title land, a province does have a fiduciary duty. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 rev'g *William v British Columbia*, 2012 BCCA 285, var'g *William v British Columbia*, 2007 BCSC 1700.

91 The one exception to the academic emphasis on matters entirely unrelated to the actual issue decided in the case is Richard Bartlett, who openly questions the correctness of Justice Dickson's conclusion that it was impossible to find a trust in the case. Bartlett contends that there is no doubt that surrendered lands could be the *res* of a trust until they were sold, when the money paid for them by the purchaser would replace them as the *res*. Richard H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53:2 Sask L Rev 301 at 318-319.

six years after *Guerin*, was the first of a number of cases to illustrate that this response to *Guerin* is far from an isolated occurrence.

SPARROW

Decision

The Supreme Court of Canada's 1990 decision in *Sparrow*[92]resembled the *Guerin* decision in four ways. First, both cases involved the Musqueam Nation, which was the plaintiff in *Guerin* while a Musqueam member was charged with a fishing offence in *Sparrow*. Second, Chief Justice Dickson had a hand in both decisions as the author of the plurality decision in *Guerin* and as joint author (with Justice La Forest) in *Sparrow*. Third, the path from the oral argument to the release of the unanimous decision was anything but smooth and uneventful. Finally, both decisions contain statements about the nature of Aboriginal title that have little if any apparent connection with the remainder of the judgments.

In *Sparrow*, the Musqueam member charged with using an illegal fishing net was convicted at trial. Upon appeal to the British Columbia Court of Appeal, the conviction was set aside, and a new trial was ordered.[93] The *per curiam* decision of the Court of Appeal treated the issue as simply one of Aboriginal rights, involving first the question of whether such a right existed and if it did, the authority of the Crown to regulate that right. The decision held first that the Musqueam possess an Aboriginal right to fish for food, and since the fishing that gave rise to the charges in the case was for that purpose, that fishing was protected by s 35(1) of the *Constitution Act, 1982*.[94] The Court of Appeal further held that this Aboriginal right was subject to regulation,[95] so the issue became that of whether the capacity of the Crown to regulate Indigenous fishing extended to the size of nets. It was not possible for the Court of Appeal to answer this question, as the trial judge had heard no evidence regarding the nature

92 *R v Sparrow,* [1990] 1 SCR 1075, aff'g [1987] 2 WWR 577(BCCA).
93 *R v Sparrow*, [1987] 2 WWR 577 (BCCA); aff'd [1990] 1 SCR 1075.
94 *Ibid* at 606.
95 *Ibid* at 606, 610.

and impact of the regulations in question. It was for that reason that the conviction was set aside and the case remitted for trial.[96]

In the Supreme Court of Canada, Justice La Forest was assigned to write the Court's judgment dismissing the Crown's appeal. However, his initial draft would have done the opposite and restored the conviction at trial.[97] Within the Court, Justice Wilson in particular objected to the suggestion that the decision of the Court of Appeal be reversed. [98] Chief Justice Dickson found himself mediating between La Forest and Wilson, and it was during this process that Wilson first raised both the fiduciary issue and the argument that the test to justify an infringement of an Aboriginal right should be robust.[99] Somehow the disagreement was resolved when Dickson and La Forest became the co-authors of a decision that was composed of two propositions first suggested by Wilson as objections to La Forest's draft judgment.

The word "fiduciary" appears only four times in the *Sparrow* decision,[100] with three of the references being in a paragraph summarizing Justice Dickson's judgment in *Guerin*. These confirm that in *Guerin* the Court had found that the Crown "owes a fiduciary obligation to the Indians with respect to the lands" and that the sources of this fiduciary obligation are the *sui generis* nature of Indian title and the historic powers and responsibility assumed by the Crown.[101] The fourth reference interprets section 35(1) as imposing on the Crown the responsibility to act in a manner consistent with the "trust-like, non-adversarial relationship with respect to aboriginal peoples"[102] and importing "some restraint on the exercise of sovereign power by the Crown."[103] In addition to *Guerin* and section 35(1), the Chief Justice

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96 *Ibid* at 620.
97 Sharpe and Roach, *supra* note 38 at 499.
98 *Ibid.*
99 *Ibid* at 500.
100 The Supreme Court of Canada decision in *Sparrow* is about 80% of the length of *Guerin*, and the term "fiduciary" is used four times in Sparrow and 57 times (45 of them by Justice Dickson) in *Guerin*.
101 *Sparrow, supra* note 92 at 1108.
102 *Ibid.*
103 *Ibid* at 1108-1109.

applied *R v Nowegijick*[104]and *R v Taylor and Williams*,[105] two pre-*Guerin*, pre-section 35(1) decisions that made no reference to fiduciary duty. In discussing justification, the second step in the "*Sparrow* test" the Court again cited *Taylor and Williams* as authority for the conclusion that the "special trust relationship" between the Crown and Indigenous peoples means "the honour of the Crown is at stake in dealings with aboriginal peoples".[106]

Although *Sparrow* has played a leading role in increasing the understanding of the impact of Aboriginal rights on Canadian law, there was one freestanding statement in the decision that referred, somewhat anomalously, to Aboriginal title. In discussing the development of British Aboriginal policy, particularly as this was reflected in the *Royal Proclamation*, the judgment stated that "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."[107]

This was not the Supreme Court's first reference to the Crown's radical title and sovereignty. In *Calder*, Justice Hall indicated that his conclusion regarding Aboriginal title "does not in any way deny the Crown's paramount title as it is recognized by the law of nations."[108] Justice Dickson added in *Guerin* that "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown."[109]

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104 *Nowegijick v the Queen*, [1983] 1 SCR 29, rev'g [1980] 1 FC 462 (FCA), aff'g [1979] 2 FC 228(FCTD).

105 *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 (CA), aff'g (1979), 55 CCC, (2d) 172 (Div Ct), leave to appeal to SCC refused December 21, 1981.

106 *Sparrow, supra* note 92 at 1114. The deliberations among Supreme Court Justices may provide a clue as to why the focus of *Sparrow* is on justification. In his dealings with Dickson and Wilson, Justice La Forest expressed concern about anything in the decision that might detrimentally affect the public's good will toward Indigenous Canadians. Sharpe and Roach, supra note 38 at 500. In focusing on the justification for Crown regulation of an Aboriginal right to fish that was largely conceded without discussion, the decision was less about Aboriginal rights and more about Crown conduct. In this regard, one commentator observed that by being a limitation on the Crown's regulating power, the fiduciary duty in *Sparrow* was not one that could be enforced by Indigenous peoples themselves. David W. Elliott, "Aboriginal Peoples in Canada and the United States and the Scope of the Special Fiduciary Relationship" (1996) 24:1 Man LJ 137 at 163.

107 *Sparrow, supra* note 92 at 1103.

108 *Calder et. al. v Attorney-General of British Columbia*, [1973] SCR 313 at 352, Hall J, dissenting, aff'g (1970), 13 DLR (3rd) 64 (BCCA), aff'g (1969), 8 DLR (3rd) 59 (BCSC).

109 *Guerin supra* note 16 at 382 (Dickson J).

Academic Commentary

In general, academic commentators praised the cryptic references to fiduciary duty and condemned the even more cryptic comment about Crown radical title and jurisdiction. Leonard Rotman's reaction to the apparently open-ended fiduciary reference is that *Sparrow* "should have put to rest the argument in favour of restricting the Crown's fiduciary duty to situations involving the Crown's fiduciary duty to situations involving the surrender of reserve lands."[110] Rotman argued that the entire Indigenous-Crown relationship is governed by fiduciary principles, but the fiduciary nature of the relationship remains passive as long as "the integrity of the relationship" is maintained. However, upon a breach of that duty by the Crown, the relationship is "tainted" and its fiduciary nature became active.[111] Rotman predicted that the circumstances in which fiduciary duties would be imposed on the Crown that extend beyond Indian lands to include harvesting rights, self-government (including funding for health, welfare, and education), religion, culture, and language.[112] While not all academic commentators shared Rotman's view about the possible breadth of a fiduciary approach to Aboriginal law, *Sparrow* has been characterized at a minimum as expanding the circumstances in which the Crown acts as a fiduciary in the regulation of fishing and hunting rights.[113]

However, some academic commentary on *Sparrow* mentioned the inherent conflict between the Crown's obligation to focus solely on the best interests of Indigenous peoples as beneficiaries of a fiduciary relationship and the Crown's duty to all citizens.[114] In private law,

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110 Rotman, *supra* note 73 at 123. Kent McNeil credits *Sparrow*, not *Guerin* for the conclusion that the Indigenous-Crown relationship is inherently fiduciary, since in his view *Guerin* did little to expand Crown fiduciary duty beyond the management of surrendered lands. Kent McNeil, "Envisioning Constitutional Space for Aboriginal Governments" (1993) 19:1 Queen's LJ 95 at 109.

111 Leonard Rotman, "Duty, the Honour of the Crown, and *Uberrima Fides*: Fiduciary Doctrine and the Crown-Native Relationship in Canada", (LLM thesis, York University, 1993) at 18.

112 Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto, Buffalo, and London: University of Toronto Press, 1996) at 109.

113 Michael J Bryant, "Crown-Aboriginal Relationships in Canada – The Phantom of Fiduciary Law (1993) 27:1 UBC L Rev 19 at 39.

114 Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011) at 34.

a fiduciary's duty to a beneficiary is the zealous advocacy of the latter's interests, whereas the obligation of public officials is to be "assiduously impartial in the exercise of distinctively public fiduciary powers."[115] There has been little support in Canadian law for the suggested recognition of a public law fiduciary duty in which a duty of loyalty is owed separately to each citizen,[116] and this counterpart to a private law duty would not be satisfactory to Indigenous peoples in an Aboriginal law context in any event.

Gordon Christie has been outspoken regarding the significance of the possible conflicts facing the Crown as fiduciary. In 2000, Christie acknowledged the existence of a conflict between absolute loyalty to the interests of Indigenous peoples the balancing interests of Indigenous and non-Indigenous peoples, but he insisted that this be dealt with within fiduciary doctrine rather than compromising that duty with other considerations. With regard to the suggestion that the duty of the Crown to all citizens might require the characterization of the Crown's duty to Indigenous peoples as non-fiduciary, his response was that "[I]t is not open to the courts to tinker with the underlying theory and subverting equity."[117] Christie expressed impatience with the reluctance to apply fiduciary doctrine more broadly, arguing that the courts "must stop tinkering with underlying fiduciary theory and must hold the Crown to normal constraints imposed on fiduciaries."[118] He rejected the suggestion that a fiduciary could limit its duties to Indigenous persons by balancing interests and demanded the courts hold the Crown to its obligations.[119] Further, he characterized the Crown's obligation as extending to protecting "the interests of First Nations as these interests are understood by First Nations as

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115 Miller, Paul B., "Principles of Public Fiduciary Administration", A Scolnicov & T Kahana, eds., *Boundaries of State, Boundaries of Rights* (Cambridge: Cambridge University Press, 2016).

116 Sheikh Shaghaf, "The Empire Strikes Back: A Critique of Ronald Dworkin's Law's Empire" (April 2007). Available at SSRN: https://ssrn.com/abstract=976312 or http://dx.doi.org/10.2139/ssrn.976312. Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005-2006) 31:1 Queen's LJ 259.

117 Gordon Christie, "*Delgamuukw* and the Protection of Aboriginal Land Interests" (2000) 32: Ottawa L Rev 85 at 112.

118 *Ibid*

119 *Ibid* at 108.

beneficiaries."[120] But only two years later, Christie acknowledged that it is extremely unlikely that the approach to fiduciary obligation he favoured would be recognized by the courts:

> no matter how twisted, tweaked, or perfected, fiduciary doctrine cannot meaningfully be applied to Crown-Aboriginal relationships. The basic point is clear enough: the Crown cannot be held to the standard principles of fiduciary doctrine, for it cannot act to promote in an appropriate manner the best interests of Aboriginal peoples given its public duties.[121]

Two contemporary papers echoed Christie's revised position regarding the future of fiduciary concepts in Aboriginal law. Andrée Lajoie characterized fiduciary duty toward Indigenous peoples as an "oxymoron", stating that it is impossible to balance the interests of the "aboriginal minority and those of the non-aboriginal majority when the primary fiduciary duty to the minority is to protect its rights against infringements by the majority".[122] Patricia Monture-Angus added that the reluctance to broaden the scope the fiduciary relationship may be "because the Supreme court's initial selection of the fiduciary relationship was merely a bridge to venture across a legal gap in a case where the courts felt the Crown had breached its honour and the facts had exposed unfairness and created indignation."[123]

Another significant caveat identified by academics undermining enthusiasm regarding the fiduciary reference in *Sparrow* is the association of a fiduciary relationship and paternalism. Shortly after the decision, an article in the *Saskatchewan Law Review* expressed concern that the fiduciary reference in *Sparrow* was a reaffirmation that "Indigenous peoples are wards of the state."[124] In contrast to efforts of Rotman and others to maintain that

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120 *Ibid* at 113.

121 Gordon Christie, "Considering the Future of the Crown-Aboriginal Fiduciary Relationship" in Law Commission of Canada and the Association of Iroquois and Allied Indians", in *In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin, 2002) 269 at 289.

122 Andrée Lajoie, "With Friends Like These: Two Perspectives on Fiduciary Relationships, in Law Commission of Canada and the Association of Iroquois and Allied Indians" in *In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin, 2002) 57 at 71.

123 Patricia Monture-Angus, "The Experience of Fiduciary Relationships: Cain nada's First Nations and the Crown" in *In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin, 2002) 151 at 160.

124 Brad Berg, "Introduction to Aboriginal Self-Government in International Law" (1992) 56:1 Sask L Rev 375 at 380.

recognizing a fiduciary relationship is not proof of a severe power imbalance[125] that is neither antithetical to aboriginal self-determination[126] nor a justification of colonialism,[127] the "paternalistic overtones" of a fiduciary approach have been cited in a concurring judgment in the Supreme Court of Canada.[128] . Further acknowledgments of this risk include Gordon Christie's reference to the close connection between fiduciary doctrine and colonialism[129] and his statement that the underlying vision of the Supreme Court of Canada "is of the Crown in control of the legal and practical interests of the Musqueam."[130]

As to the academic response to the reference to Crown radical title and sovereignty in *Sparrow*, a 1991 *Alberta Law Review* article by Michael Asch and Patrick Macklem interpreted the reference as a rejection of the inherent right of self-government,[131] which in turn reflected a rejection of inherent Aboriginal rights.[132] Asch and Macklem went on to attribute this position to the Supreme Court's characterization of Musqueam society as inherently inferior to that of European nations,[133] reflecting a belief in the inequality of peoples that the article characterized as racism in everything but name.[134] The authors took particular offence to the suggestion that the Court interpreted the word "existing" in s. 35(1) by reference to "actions by the Canadian state" that could be taken to represent extinguishment.[135] Asch and Macklem

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125 Rotman, *supra* note 112 at 13.

126 Leonard Rotman, "Conceptualizing Crown-Aboriginal Fiduciary Relations" in Law Commission of Canada and the Association of Iroquois and Allied Indian, *In Whom We Trust: A Forum on Fiduciary Relations* (Toronto: Irwin, 2002) 25 at 52.

127 Rotman, *supra* note 112 at 14.

128 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 105, 142, Deschamps J, concurring, [2010] 3 SCR 103, aff'g 2008 YKCA 13, rev'g 2007 YKSC 28.

129 Christie, *supra* note 117 at 106.

130 Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow, Delgamuukw,* and *Haida Nation*" (2005) 23:1 Windsor YB Access Just 17 at 37.

131 Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow."* (1991) 29:2 Alta L Rev 498 at 507.

132 *Ibid* at 508.

133 *Ibid* at 510.

134 *Ibid* at 510 – 511.

135 *Ibid* at 507-508.

saw this approach as an impoverished view of section 35(1) of the *Constitution Act* that fell short of that section's promise to recognize inherent rights as part of the equality of peoples.[136]

The next volume of the *Alberta Law Review* included an article by Thomas Isaac with the title "A Commentary on Asch and Macklem".[137] Isaac took particular aim at the contention by Asch and Macklem that the unquestioned acknowledgment of Canadian sovereignty must by definition reflect a belief in European superiority to Indigenous peoples, which Isaac rejected completely. In his view, the Supreme Court accepted Canadian sovereignty because Canadian sovereignty "is a well-established fact in the political and legal framework of Canada."[138] There is no doubt that in times past a belief in this sovereignty was associated with unsavoury racial stereotypes that have not been expunged completely, but what the modern Court recognizes is simply "legal and political reality."[139] In turn, the acceptance of Canadian sovereignty means that "inherent aboriginal sovereignty" is by definition a chimera, since inherent sovereignty cannot exist within the sovereignty of another.[140]

Isaac also defended the Court's use of "existing" when describing Aboriginal rights. While Asch and Macklem contended that in *Sparrow* the Supreme Court had recognized an Aboriginal fishing right because it was "central" to Musqueam society,[141] Isaac responded that the Court has recognized the right because it was existing in that it had not been extinguished.[142] This recognition could extend to a wide variety of other activities, but not sovereignty, because British sovereignty had extinguished it.[143]

The Asch and Macklem article and Tom Isaac's response encapsulate in fewer than thirty total pages the chasm separating the Supreme Court from the overwhelming majority of

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136 *Ibid* at 512.
137 Thomas Isaac, "Discarding the Rose-Coloured Glasses: A Commentary on Asch and Macklem" (1992) 30:2 Alta L Rev 708.
138 *Ibid* at 709.
139 *Ibid*
140 *Ibid*
141 Asch & Macklem, *supra* note 131 at 506.
142 Isaac, *supra* note 137 at 711.
143 *Ibid* at 712.

its academic critics regarding the sovereignty issue. Asch and Macklem set out the strongest possible condemnation of the Court's position regarding this subject, which is that a belief in the sovereignty of the Crown can only be explained by cultural or racial beliefs that are emblematic of a different century and are out of place in a modern society committed to diversity and respect for all citizens.[144] Asch and Macklem stress that they are reluctant to attribute this attitude to the Court, insisting that they are, despite all appearances, confident that the tenor of the decision was consistent with a more positive attitude.[145] However, the only action that the Court could take to justify that confidence would be to reverse its stated position and recognize Indigenous as opposed to Crown sovereignty. For his part, Isaac staked out what is in practical terms an equally absolutist position, although he played the role of an observer of reality more than a partisan taking a position.

John Borrows is among those who have spoken to the interpretation of Crown radical title and sovereignty in *Sparrow*. Borrows, whose doctoral dissertation at Osgoode Hall Law School was, as noted earlier, supervised by Kent McNeil,[146] is one of the leading figures, if not the leading figure, of a generation of scholars in Canada who work with both Indigenous law and Aboriginal law. More than a decade after the exchange between Asch/Macklem and Isaac, Borrows acknowledged that *Sparrow*'s creation of a stringent test to justify any infringement of Aboriginal rights (which were constitutionally protected but less than absolute) within the overall legal framework of Crown title was the Court's attempt to find the path of least resistance to the protection of Aboriginal rights while maintaining social peace.[147] But more recently he has written that even if this balance explains the decision in *Sparrow*, it does not

144 Asch & Macklem, *supra* note 131 at 510, 512, 517.

145 It is impossible to take seriously this caveat, since it is followed by the statement that the Court's comments on sovereignty "can only be supported by a belief in the inherent superiority of European nations." *Ibid* at 521.

146 Kent McNeil, *Curriculum Vitae*, online: Osgoode Hall Law Scheel, York University online <www.osgoode.yorku.ca/wp-content/uploads/2014/08/McNeil_Kent.pdf>.

147 John Borrows, "Measuring a Work in Progress: Canada, Constitutionalism, Citizenship, and Aboriginal Peoples" in Ardith Walkem and Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Vancouver: Theytus Books, 2003) 223 at 234.

excuse it.[148] He has characterized the reference to underlying Crown title in *Sparrow* as "the most troubling paragraph ever penned by the Supreme Court of Canada" that "may have done more to terminate aboriginal rights than any single action in Canadian history."[149] The impact of the recognition of radical Crown title is of such significance to Borrows that he finds it difficult more than 25 years later to characterize *Sparrow* as a victory for Indigenous peoples.[150]

BLUEBERRY RIVER

I will not spend much time on *Blueberry River Indian Band v Canada*,[151] since it did not expand the use of fiduciary duty, and while it hinted at future contraction in that use, it did not do so at the time. Like *Guerin*, the arose out of the surrender of reserve lands (and more importantly in the case of *Blueberry River*, minerals). It also resembled *Guerin* in that it involved particularly egregious conduct by Crown officials. In 1948, the Department of Indian Affairs sold approximately 18,000 acres of reserve land that had been surrendered by the Fort St John Indian Band[152] to another Crown agency, the Director of *The Veterans' Lands Act*, for $70,000. The purpose of the sale was to facilitate the latter's distribution of the land among returning veterans of the Second World War. By failing to reserve mineral rights in the lands in the sales document, the transaction inadvertently (and illegally) included them in the sale. After learning of this error in 1949, but Indian Affairs took no action to rectify the situation. This decision became significant in 1976, when a major oil find occurred, and the purchasers

148 John Borrows, "Unextinguished: Rights and the *Indian Act*" (2016) 67 UNBLJ 3 at 19.

149 *Ibid.*

150 *Ibid.*

151 *Blueberry River Indian Band v Canada* [1995] 4 SCR 344, rev'g [1993] 3 FC 28, rev'd [1995] 4 SCR 344 (FCA), rev'g *Apsassin v Canada* [1988] 1 CNLR 70 (FCTD),

152 The Fort St John Indian Band was a Treaty 8 signatory band for which the surrendered reserve land had been set aside. *Ibid* at 367, McLachlin J In 1977, the Fort St John Indian Band was divided into two successor bands, Blueberry River and Doig River. The litigation was brought by the successor bands. *Ibid* at 368, McLachlin J.

of the surrendered reserve land, who had combined their mineral interests in a pooling arrangement, received royalties totalling about $300 million.[153]

The trial judge[154] and a majority of the Federal Court of Appeal[155] held that the action, which had been filed in September 1978, was statute-barred, since the sale that gave rise to the claim took place March 30, 1948, which meant that the 30-year ultimate limitation period in the British Columbia *Limitations Act* had expired on March 30, 1978.[156]

The Supreme Court of Canada unanimously decided that the Federal Court of Appeal should be reversed but divided as to how to accomplish that. Justice McLachlin held that the breach of fiduciary duty took place not when Indian Affairs sold the lands, but rather in August 1949 when Indian Affairs employees learned both that they had inadvertently included the minerals in the sale and that oil and gas companies were showing considerable interest in the lands included in the sale. It was still possible to rectify the situation, as none of the lands had been distributed to World War II veterans. Justice McLachlin concluded that by doing nothing, Indian Affairs had in effect included the minerals in the transaction with the Director of *The Veterans' Lands Act* for no consideration whatsoever, which fell below the standard of "a man of ordinary prudence managing his own affairs."[157] Since this breach took place in 1949, limitations were no longer an issue.[158]

Justice Gonthier agreed with both McLachlin's conclusion that the effective date of the breach was in 1949[159] and her analysis of the limitations issue.[160] For the long-term application of fiduciary principles, the most significant part of his judgment was that he expressed the view

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153 *Ibid* at 368, McLachlin J.
154 *Apsassin v Canada* [1988] 1 CNLR 70 at para 56 (FCTD), aff'd *Blueberry River Indian Band v Canada* [1993] 3 FC 28, rev'd [1995] 4 SCR 344.
155 *Blueberry River Indian Band v Canada* [1993] 3 FC 28 at para 135, Marceau JA and at para 210, Stone JA (FCA), aff'g [1988] 1 CNLR (FCTD), rev'd [1995] 4 SCR 344.
156 *Limitations Act*, SBC 1975, c 37.
157 *Blueberry River, supra* note 151 at 401, McLachlin J.
158 *Ibid* at 406-407, McLachlin J.
159 *Ibid* at 365-366, Gonthier J.
160 *Ibid* at 366, Gonthier J.

that the most appropriate way to describe the surrendered mines and minerals that formed the basis of the litigation was as "trusts in Indian lands."[161] Justice Gonthier's judgment represented the views of four members of the Court, while Justice McLachlin spoke for three justices. However, because Gonthier concurred in McLachlin's judgment[162] and McLachlin did not concur in Gonthier's, the minority judgment has been viewed as that of the majority.

Blueberry River received less academic interest than either *Guerin* or *Sparrow*, likely because of the straightforward nature of the case. The decision by Indian Affairs officials to include the mines and minerals in the sale of the surrendered lands with no compensation whatsoever was at least as egregious as the conduct in *Guerin*. It must be remembered that in neither *Guerin* nor *Sparrow* was the binary outcome of the case as between the parties controversial. In both cases commentary on the decisions related to the interpretation, praise, or condemnation of *obiter* comments. One commentator on *Blueberry River* did suggest that Justice Gonthier's reference to trust law "may indicate that he is ready to reconsider Dickson J's rejection of the trust model in *Guerin*."[163]

WEWAYKUM INDIAN BAND v CANADA

Decision

Although it dealt exclusively with fiduciary duty, *Wewaykum Indian Band v Canada*[164] differed from *Guerin* and *Blueberry River* in two ways. First, the first Supreme Court decision arose out of an attempt to expand fiduciary duty beyond the management of Indian lands. Second, unlike the previous two cases, which dealt with fact situations in which the conduct

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161 *Ibid* at 362, Gonthier J.

162 *Ibid* at 354, Gonthier J.

163 J. Paul Salembier, "Crown Fiduciary Duty, Aboriginal Title and the Lost Treasure of IR 172" [1996] 3 CNLR 1 at 20.

164 *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245, aff'g *Wewaykum Indian Band v Wewayakai Indian Band*, (1999) 171 FTR 320 (FCA), aff'g *Roberts v The Queen* (1995), 99 FTR 1 (FCTD).

of Crown officials had been egregious, the claims made in the two actions that were dealt with together in *Wewaykum* were striking in their absence of merit.

The case involved the Campbell River and Cape Mudge Indian Bands, each of which occupies one of two small reserves (Campbell River IR 11 and Cape Mudge IR 12 respectively) about two kilometres apart in Campbell River, on the east coast of Vancouver Island.[165] In a lawsuit filed shortly after the announcement of the *Guerin* decision, the Campbell River First Nation, believing that *Guerin* created a cause of action for it, commenced an action asserting that both IR 11 and IR 12 should have been set aside for it.[166] Cape Mudge responded that in fact, both reserves should have been set aside for it.[167] Both claims were based on a clerical error in land records that had been made in 1907[168] but carried forward in subsequent documents.

Counsel for both bands assured the trial judge that neither wished to expel members of the other from the reserve lands they had occupied for a century. However, based on *Guerin*, both bands wanted damages against Canada for the failure to set both reserves for their exclusive use and benefit,[169] and each plaintiff sought damages based on the highest and best use to which it could have put the other 's reserve.[170] The trial judge engaged in a long analysis of the case and ultimately dismissed both cases on their respective merits.[171] He showed slightly more sympathy for Campbell River Band, the original plaintiffs. Although he dismissed Campbell River's claims against both the Cape Mudge Band and the Crown, he did so without costs, as he did the Cape Mudge counterclaim against Campbell River. However, he clearly blamed the Cape Mudge Band for exacerbating the conflict with a claim against the

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165 *Roberts v the Queen* (1995), 99 FTR 1 (FCTD), aff'd *Wewaykum Indian Band v Wewayakai Indian Band* (1999), 171 FTR 320 (FCA), aff'd *Wewaykum Indian Band v Canada*, 2002 SCC 79.
166 *Ibid* at para 8.
167 *Ibid* at para 11.
168 *Ibid* at para 98.
169 *Ibid* at para 6.
170 *Ibid* at para 11.
171 *Ibid* at para 640-641.

Crown that had no chance of success, and he dismissed that action with costs on a solicitor-client basis. Quite apart from the merits of the case, he was convinced that both actions were statute-barred as being beyond even the most generous limitation period.[172] Both plaintiffs appealed to the Federal Court of Appeal which dismissed all of the appeals, except that the solicitor-client cost order against Cape Mudge was replaced with an order for party-party costs.[173]

In the Supreme Court of Canada, Justice Binnie spoke for a unanimous Court. Early in his analysis, Binnie referred to the "flood" of fiduciary litigation that had followed the *Guerin* decision, citing eight cases where the fiduciary claims were particularly outrageous.[174] This was not the first judicial commentary on this phenomenon. As early as 1987, Justice Southin of the Supreme Court of British Columbia complained that fiduciary claims had moved from Indigenous to non-Indigenous litigation and as a result "[T]he word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth."[175]

After reviewing recent decisions made in response to challenges that Canada had breached its fiduciary obligations in a wide variety of contexts, Binnie commented that "[T]he appellants seemed at times to invoke the 'fiduciary duty' as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark." He continued that the fiduciary duty imposed on the Crown "does not exist at large but in relation

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172 *Ibid* at para 145.

173 *Wewaykum Indian Band v Wewayakai Indian Band* (1999), 171 FTR 320 (FCA) [2000] 3 C.N.L.R. 303 (F.C.A.), aff'g *Roberts v the Queen*, (1995), 99 FTR 1 (FCTD), aff'd *Wewaykum Indian Band v Canada*, 2002 SCC 79.

174 *Wewaykum, supra* note 164 at para 82. Among the cases cited by Binnie were the claim in *Mentuck v Canada* (1986), 3 FTR 80 (TD) that the Crown's fiduciary duty extended to the obligation to pay moving expenses incurred by a member of a the Valley River Indian Band No 63A in Manitoba who moved off the Valley River Reserve No 63A on the (mistaken) belief that the Crown would compensate him for his moving expenses; the assertion in *Timiskaming Indian Band v Canada* (1997), 132 FTR 106 (FC) that the Crown had a fiduciary duty not to disclose records dealing with the management of reserve lands notwithstanding the fact that some of those records are already in the public domain in the Indian Lands Registry; and the claim in *APG v KHA* (1994), 164 AR 47 (QB) that the Crown owed a fiduciary duty to an Indigenous woman to set aside her consent to the adoption of her child, even in the absence of evidence that her consent was either uninformed or coerced.

175 *Girardet v Crease and Co.* (1987), 11 BCLR (2d) 361 at 361 (SC).

to specific Indian interests."[176] In concluding that the Crown did not owe a fiduciary obligation to either the Campbell River Band or the Cape Mudge Band, Binnie first repeated that the Crown's fiduciary duty "does not provide a general indemnity."[177] He then added that while the Crown's conduct prior to reserve creation was subject to supervision by the courts, that conduct was in the nature of public law duties.[178] Once a reserve was set aside, the Crown's fiduciary obligation increased, but not in a plenary sense as it was limited to the "protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation."[179] He concluded by expressing his agreement with the decision of the trial judge and he dismissed the appeals.[180]

Academic Commentary

Unlike *Guerin* and *Sparrow*, *Wewaykum* did not generate much academic comment. This likely related to the spurious nature of the action, a consideration that Leonard Rotman acknowledged in his commentary on the decision.[181] However, Rotman described Justice Binnie's statement that the "fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests"[182] as "unfortunate."[183] Rotman's overall complaint was that Binnie's judgment went beyond what was necessary to indicate that the Crown had not breached any fiduciary duty under the circumstances of the case and that the judgment "actively pointed towards limiting the scope of Crown fiduciary duties to Aboriginal peoples generally."[184]

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176 *Wewaykum*, *supra* note 164 at para 81.
177 *Ibid* at para 86.1.
178 *Ibid* at para 86.2.
179 *Ibid* at para 86.3.
180 *Ibid* at para 112.
181 Leonard I. Rotman, "*Wewaykum:* A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples" (2004) 37:1 UBC L Rev 219 at 256.
182 *Wewaykum, supra* note 164 at para 81.
183 Rotman, *supra* note 181 at 245.
184 *Ibid* at 256.

More generally, Rotman's initial response to *Wewaykum* was to profess that he remained sanguine about the future of the fiduciary analysis of Indigenous-Crown relations. In 2003, he contended that notwithstanding the outcome in *Wewaykum* and the comments of Justice Binnie in his judgment, "the fiduciary nature of Crown-Native relations is the fundamental element of modern Canadian Aboriginal and treaty rights jurisprudence, with implications for potentially all elements of Crown-Native interaction.[185] Two years later, he confirmed this view, using the same words, and adding that while the law surrounding Crown fiduciary obligations to Indigenous peoples was "a work in progress" he was confident that "[C]onsiderable potential and promise remain in the fiduciary concept's to Crown-Aboriginal relations in Canada."[186]

David Elliott's view of the status of fiduciary duty in Aboriginal law after *Wewaykum* was less sanguine. In a 2003 article, he expressed the view that *Wewaykum* had established that Crown fiduciary duty was "a promising but uneven bridge between aboriginal uniqueness and legal help against the Crown."[187] He interpreted *Wewaykum* as proof that the fiduciary duty's flexibility "has outrun its clarity" and that the development of fiduciary duty in Canadian law had "blurred boundaries, encouraged litigation, and generated uncertainty"[188] In Chapter III I discuss the ways in which the appearance of the Honour of the Crown was a step toward the need Elliott identified for "clearer contours" and "more coherence" regarding the use of the concept of fiduciary duty by courts.[189]

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185 Leonard I. Rotman, "Crown-Native Relations as Fiduciary: Reflections almost Twenty Years after *Guerin*" (2003) 22 Windsor YB Access Just 363 at 394-395. The one voice that has been raised in support of Rotman's view is that of Dr James Reynolds, who also dissents from the view that *Wewaykum* was a significant constraint on the reach of *Guerin.* Three years after the Supreme Court decision in *Wewaykum*, Reynolds wrote that in his view, *Guerin* and subsequent cases following it were "an outstanding example of the use of law to achieve justice for Canadians". James Reynolds, "The Impact of the *Guerin* Case on Aboriginal and Fiduciary Law" (2005) 63:3 Advocate (Vancouver) 365 at 370. Without disagreeing with the characterization of *Guerin* by Dr Reynolds, I would note that he is hardly an impartial observer, as he was one of the counsel who represented Musqueam in the action.

186 Leonard Ian Rotman, *Fiduciary Law* (Toronto: Thompson Carswell, 2005). at 580, 607, 608.

187 David E Elliott, "Much Ado about Dittos: *Wewaykum* and the Fiduciary Obligations of the Crown" (2003) 29:1 Queen's LJ 1 at 39.

188 *Ibid.*

189 *Ibid* at 39-40.

DELGAMUUKW

Decision

Although the nature of Aboriginal title and the relationship between Indigenous and Crown interests in land had been the subject of cryptic references in earlier post-*Calder* decisions, the Supreme Court did not confront Aboriginal title directly until *Delgamuukw*[190] in December 1997 (although I suggest that it was not compelled to do so). Everything about *Delgamuukw* is massive in scale. It was a claim filed by 35 Gitksan and 13 Wet'suwet'en hereditary chiefs, claiming Aboriginal title to almost 60,000 km^2 in north-west British Columbia.[191] The trial consumed 374 days over three years.[192] The trial decision, issued by Chief Justice Allan McEachern of the Supreme Court of British Columbia in March 1991 is more than 1,150 pages and begins by referring to the fact that the last great Ice Age, which lasted several thousand years and ended about 10,000 years ago, covered nearly all of what is now British Columbia.[193]

After an exhaustive review of the pre-contact and colonial history of British Columbia, which consumed more than a thousand paragraphs, McEachern turned to the authorities on which he believed he had no choice but to rely. He began with *St. Catherine's Milling*. The Chief Justice's perception that Canadian law on Aboriginal title had not changed in over a century was illustrated when he concluded, 103 years after the decision of the Judicial Committee of the Privy Council, that "*St. Catherines Milling* is a powerful authority, binding on me, that aboriginal rights, arising by operation of law, are non-proprietary rights of

190 *Delgamuukw v British Columbia,* [1997] 3 SCR 1010, rev'g [1993] 5 WWR 97 (BCCA), rev'g [1991] 3 WWR 97 (BCSC).
191 *Delgamuukw v British Columbia*, [1991] 3 WWR 97 (BCSC), aff'd [1993] 5 WWR 97 (BCCA), rev'd [1997] 3 SCR 1010.
192 *Ibid* at paras 53-55
193 *Ibid* at 1.

occupation for residence and aboriginal uses which are extinguishable at the pleasure of the Sovereign."[194]

What is even more telling is that the Chief Justice could find nothing in Canadian jurisprudence since *St. Catherine's Milling* that challenged the finding in that case. He did observe that in *Calder*, Justice Judson had commented that Lord Watson's description of Aboriginal title as a "personal and usufructuary right" was not particularly helpful, but he continued that neither *Calder* or *Guerin* had expanded the definition of Aboriginal title.[195] Other than *St. Catherine's Milling*, McEachern appears to have relied less on jurisprudence relating to claims of Aboriginal title and more on *Sparrow*, specifically the reference to the fact that Crown radical title and Crown sovereignty were not in doubt and never had been.[196] McEachern found this conclusion to be of such significance that he noted as he began his analysis of the plaintiffs' claims to ownership and jurisdiction that "powerful pronouncements of high authority" made it difficult to find much merit in the claims before him.[197] In light of this statement, it is hardly surprising that he concluded that the plaintiffs' claim to ownership and jurisdiction was not supported by the evidence presented in the case, and accordingly he dismissed the claim.[198] His decision was affirmed by a majority (three out of five) judges of the British Columbia Court of Appeal.[199]

When the case reached the Supreme Court of Canada, the actual point of law decided by the Supreme Court was a narrow one – Chief Justice McEachern had erred when he gave no independent weight whatsoever to the various forms of oral history the Gitskan and Wet'suwet'en Nations had relied on in the trial.[200] Because of this error, the factual findings at

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194 *Ibid* at 530.
195 *Ibid* at 555.
196 *Ibid* at 586.
197 *Ibid.*
198 *Ibid* at 833..
199 *Delgamuukw v British Columbia (Attorney General)*, [1993] 5 WWR 97 (BCCA), aff'g [1991] 3 WWR 97 (BCSC), rev'd [1997] 3 SCR 1010.
200 *Delgamuukw*, *supra* note 190 at 1079, Lamer CJC.

trial could not stand and the decision was set aside.[201] But the exclusion of much of the plaintiff's evidence meant it was not possible for the Supreme Court to substitute other factual findings. Chief Justice Lamer felt compelled to order a new trial, while expressing considerable regret about the ultimate outcome of the case.[202]

However, the Chief Justice did not send the parties back to trial empty-handed. In order to assist the next trial judge, and presumably the parties, Lamer elected to provide them with some observations about the content of Aboriginal title and the impact of its constitutionalization.[203] Of course, this had the effect of rendering all of this advice *obiter.*[204] It also meant that the comments made by Lamer represented legal principles that had no necessary connection to the evidentiary record in the case.[205] Lamer commented that a second trial judge who applied the principles set out by the Supreme Court to the facts of *Delgamuukw* might reach the same decision as had Chief Justice McEachern[206]

Lamer explained that his action in commenting on the content of Aboriginal title was intended to be illustrative and was in response to the incorrect characterization of Aboriginal title by both parties. The Gitskan and Wet'suwet'en had argued that Aboriginal title is tantamount to an inalienable fee simple, which confers on Indigenous peoples the rights to use those lands as they chose, and which has been constitutionalized by s. 35(1). British Columbia offered two alternative interpretations. The first was that Aboriginal title is no more than a bundle of rights to engage in activities that are themselves Aboriginal rights recognized and affirmed by s. 35(1). British Columbia argues that the *Constitution Act, 1982* merely

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201 *Ibid*

202 *Ibid* at 1027, 1079, Lamer CJC.

203 *Ibid* at 1079-1080, Lamer CJC.

204 The Honourable Mr. Justice Douglas Lambert, "*Van der Peet* and *Delgamuukw*: Ten Unresolved Issues" (1998) 32:2 UBC L Rev 249 at 255. Justice Lambert was the author of one of the two dissents in the British Columbia Court of Appeal.

205 John L. Hunter, QC, "Disappointed Expectations: Why *Delgamuukw* has Failed to Achieve Results on the Ground" in Maria Morellato, QC, ed., *Aboriginal Law since Delgamuukw* (Aurora, Ontario: Canada Law Book, 2009) at 17 at 19.

206 *Delgamuukw*, *supra* note 190 at 1079, Lamer CJC.

constitutionalized those individual rights, not the bundle itself, because the latter has no independent content. Alternatively, Aboriginal title as characterized by British Columbia encompassed the right to exclusive use and occupation of land for the sole purpose of engaging in activities that were Aboriginal rights themselves, and that s.35(1) constitutionalized only the exclusivity of these rights.[207] Lamer found the correct characterization of Aboriginal title between those proposed by the two parties. Aboriginal title transcends the use of land and amounted to a right in the land itself, including the exclusive right to use it for a variety of activities, which are not limited to the distinctive culture of Indigenous societies.[208] As such, Aboriginal title resembled fee simple title, but Lamer did not equate the two because Aboriginal title is subject to an "inherent limit."[209]

In *Guerin*, Justice Dickson had limited unique features of Aboriginal title to general inalienability and the imposition of the Crown to protect the interests of Indigenous peoples upon its surrender, and he cautioned that the addition of other characteristics could be misleading.[210] Undeterred, Lamer expressly added three additional characteristics. The first two were the fact that Aboriginal title was held communally[211] and that it arose prior to the assertion of British sovereignty and was not dependent upon a grant from the Crown.[212] The "inherent limit" represented a third new characteristic that provided that although the uses to which an Indigenous group could put land were not limited to activities that had been practiced before the date of British sovereignty, these current activities "must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's Aboriginal title."[213] In the Chief Justice's explanation of the inherent limit, it became obvious

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207 *Ibid* at 1080, Lamer CJC.
208 *Ibid* at 1080-1081, Lamer CJC.
209 *Ibid* at 1087-1088, Lamer CJC.
210 *Guerin*, *supra* note 16 at 382, Dickson J.
211 *Delgamuukw*, *supra* note 190 at 1082-1083, Lamer CJC.
212 *Ibid* at 1087, Lamer CJC.
213 *Ibid* at 1087, Lamer CJC.

that although the definition of Aboriginal title represented a greater interest in land than the mere use and enjoyment of it, the uses to which land had been put prior to British sovereignty remained a powerful consideration in identifying actions that would exceed the limit. Thus if lands had been used by Indigenous peoples for hunting purposes prior to British sovereignty, current use of the lands was not limited to hunting but was limited to activities that would not deny future members of the Indigenous collective the opportunity to continue to use the lands for hunting.[214] Further, the inalienability of Aboriginal title land to third parties was tied to the inherent limit, not because Aboriginal title was less of an interest in land than fee simple, but arguably because it was broader. Inalienability meant that land was more than a fungible commodity, and that there are important non-economic components to Aboriginal title lands. These lands possessed an inherent and unique value, which could be enjoyed by the community, but that community could not destroy the opportunity for future generations to enjoy the lands in a similar way.[215]

At the very beginning of his judgment, Lamer had noted that *Delgamuukw* provided the Supreme Court of Canada with its first opportunity to discuss the constitutionalization of Aboriginal title.[216] When he undertook an analysis of this issue, he began with the confirmation that as a type of Aboriginal right,[217] Aboriginal title "is protected in its full form by section 35."[218] However, Aboriginal title, like other Aboriginal rights, is not absolute, and both the federal and provincial Crowns may infringe it provided such infringement can be "justified".[219] In discussing justified infringement, Lamer indicated that legitimate Crown objectives that could justify the infringement of Aboriginal title included

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214 *Ibid* at 1089, Lamer CJC. The Chief Justice gave strip mining as an example of an activity that would exceed the inherent limit.
215 *Ibid* at 1090, Lamer CJC.
216 *Ibid* at 1026-1027, Lamer CJC.
217 *Ibid* at 1093-1094, Lamer CJC.
218 *Ibid* at 1091-1092, Lamer CJC.
219 *Ibid* at 1107, Lamer CJC.

> the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.[220]

In determining whether an infringement of Aboriginal title was justified, three factors require consideration. First, Aboriginal title does not amount merely to the right to occupy and use lands – it represents the exclusive right to do so. Second, subject to the inherent limit, Aboriginal title includes the right to choose the use to which lands can be put. Third, there is an "inescapable economic component" to Aboriginal title.[221] These factors could be satisfied by providing the holder of Aboriginal title with a priority in the use of a resource,[222] by providing Aboriginal title holders with input into resource use decisions through consultation,[223] and by appropriate compensation for the infringement of Aboriginal title.[224]

The final issue addressed by Lamer responded to British Columbia's argument that even if the Gitskan and Wet'suwet'en Nations had once possessed Aboriginal title it had been extinguished by provincial legislation before the enactment of the *Constitution Act, 1982*. The Chief Justice rejected this proposition completely, holding that the express reservation of jurisdiction over "Indians, and Lands reserved for the Indians" to the federal government in section 91(24) of the *British North America Act* encompassed within it the exclusive jurisdiction to extinguish Aboriginal rights, including Aboriginal title.[225] As part of his

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220 *Ibid* at 1111, Lamer CJC. It is important to note that the decision held that these activities "could" be used as part of the justification for infringement, not that they "would" in every case. As an example, the list included "protection of the environment and endangered species". However, Lamer did not provide more detail about how (and arguably why) specific measures would be necessary to justify them, as *Sparrow* had established that "conservation in the public interest" was insufficiently specific to justify an infringement. *Sparrow*, *supra* note 92 at 1113.

221 *Delgamuukw, supra* note 190 at 1111-1112, Lamer CJC.

222 *Ibid* at 1112, Lamer CJC.

223 *Ibid* at 1112-1113, Lamer CJC.

224 *Ibid* at 1113-1114, Lamer CJC.

225 *Ibid* at 1116, Lamer CJC.

analysis, he rejected the provincial suggestion that section 91(24) limited federal jurisdiction to Indian reserves, holding that it included the extinguishment of Aboriginal title.[226]

The Chief Justice declined to express any views on the self-government claim made in the litigation, noting that the parties had given little weight to the issue in their oral arguments.[227] Further, the claimed right of self-government had been made in very broad terms at trial, and in *Pamajewon*,[228] a previous decision Lamer had also written, the Supreme Court had held that such broad claims were not cognizable under section 35(1) of the *Constitution Act, 1982*.[229]

Academic Commentary

The academic response to *Delgamuukw* resembled that to *Guerin* and *Sparrow* in that it was mixed. For academic critics, one promising aspect of the Supreme Court's decision in *Delgamuukw* was the Chief Justice's acknowledgement that in determining the relationship between the "deep foundations of the common law" and both the reality and the implications of Aboriginal title, he relied substantially on the writings of Kent McNeil.[230] With regard to Aboriginal title, Lamer observed that "Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land."[231] In the course of his judgment, Lamer made considerable use of McNeil's writings, specifically citing *Common Law Aboriginal Title*[232] in support of his conclusions regarding the evolutionary nature of the ways in which Aboriginal title land could be used,[233] the effect of the constitutionalization of Aboriginal title,[234] the use of date of

226 *Ibid* at 1116-1117, Lamer, CJC.
227 *Ibid* at 1114, Lamer CJC.
228 *R v Pamajewon,* [1996] 2 SCR 821; aff'g (1994), 120 DLR (4th) 475 (O.A.C.).
229 *Ibid* at 834-835; *Delgamuukw, supra* note 190 at 1114, Lamer CJC.
230 Dwight Newman, "Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title" (2006-2007) 44:4 Alta L Rev 779 at 784.
231 *Delgamuukw, supra* note 190 at 1100-1101, Lamer CJC.
232 Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).
233 *Ibid* at 1087, Lamer CJC.
234 *Ibid* at 1092, Lamer CJC.

sovereignty as the operative date for determining the existence of Aboriginal title,[235] and the importance of considering the "aboriginal perspective."[236] In the specific context of considering what is necessary for the proof of Aboriginal title, Lamer held that it is essential to take into consideration the "aboriginal perspective on land," including "their systems of law."[237] The Chief Justice continued that the "aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples:"[238] One possible interpretation of this statement could be that if the pre-contact land-related laws of an Indigenous society recognized a landholder's tenure as exclusive, this would be relevant to the question of whether the occupation of those lands justified a claim for Aboriginal title.[239] Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.[240]

As noted in Chapter I, Kent McNeil had asserted in *Common Law Aboriginal Title* that Aboriginal title could be established in two ways. The first was by establishing pre-existing occupation sufficient to receive the protection of the common law, and the second was the continuation into the colonial era of "pre-existing systems of aboriginal law" that had recognized occupation prior to contact.[241] Lamer also made reference to the need to consider the "aboriginal perspective" regarding the nature of exclusive possession, including relevant First Nation attitudes toward trespass and "shared exclusive possession."[242] McNeil interprets Lamer's judgment as adopting both of the *Common Law Aboriginal Title* pre-contact scenarios

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235 *Ibid* at 1097, Lamer CJC.
236 *Ibid* at 1104-1105, Lamer CJC.
237 *Ibid* at 1099-1100, Lamer CJC.
238 *Ibid* at 1100, Lamer CJC.
239 *Ibid,* Lamer CJC.
240 *Ibid,* Lamer CJC.
241 McNeil, *supra* note 232 at 64-67.
242 *Delgamuukw, supra* note 190 at 1105-1107, Lamer CJC.

but combining them into a single source for Aboriginal title.[243] The judgment went on to list some of the examples given by McNeil as to how physical occupation could be established, "ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources"[244] although Lamer cautioned that this list was not exhaustive since he also endorsed Brian Slattery's position that the size, way of life, material resources, and technological capacities of individual First Nations had to be considered in order to ascertain the requirements to establish evidence of physical occupation.[245]

There is a lack of academic consensus regarding the extent to which the Supreme Court of Canada confirmed that Aboriginal title is related to the recognition of pre-contact Indigenous legal systems. Even before *Delgamuukw,* the decision in which Kent McNeil saw the origins of such a recognition, Richard Bartlett found a necessary linkage between Aboriginal title and the pre-contact existence of an Indigenous legal system in the *Sparrow* decision.[246] On the other hand, John Borrows questions whether Chief Justice Lamer understood the role of a pre-existing Indigenous legal system in light of Lamer's earlier recognition in *Gladstone*,[247] a 1996 decision, of an internal limit to the Aboriginal right to fish and the application of this to Aboriginal title in *Delgamuukw* as the inherent limit.[248] The Chief Justice described these innovations as necessary given the absence of any other constraint on the exercise of the right

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243 Kent McNeil, "Aboriginal Title in Canada: Site-specific or Territorial?", paper presented at the Law on the Edge Conference, organized by the Canadian Law and Society Association and the Law and Society Association of Australia and New Zealand, University of British Columbia, July 1-4, 2017, at 5.

244 *Delgamuukw, supra* note 190 at 1101, Lamer CJC.

245 The Chief Justice also cited Slattery regarding the evolution of uses to which Aboriginal title lands can be used, the constitutionalization of Aboriginal title and the preference for sovereignty rather than contact as the date for crystallization. *Ibid* at 1087, 1092, 1098-1099, Lamer CJC. In his concurring judgment, Justice La Forest cites Slattery in support of the requirement that Aboriginal title holders would be compensated for the loss of their title. *Ibid* at 1133 -1134, La Forest J

246 Richard Bartlett, "Native Title: From Pragmatism to Equality Before the Law" (1995) 20:2 Melbourne UL Rev 282 at 285.

247 *R v Gladstone*, [1996] 2 SCR 723, rev'g (1993), 80 BCLR (2nd) 133 (CA), rev'g (1991), 13 WCB (2nd) 601 (BCSC).

248 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 72.

or use of lands. Borrows describes this reason as incorrect, as the necessary limitations were provided by "the laws and traditions of Aboriginal peoples."[249] Nevertheless, Ardith Walkem echoes McNeil in asserting that "the Supreme Court of Canada in their reasoning on Aboriginal title crafted a test which was based on recognition of Indigenous laws, as part of a living legal traditions, and not merely as evidence".[250] James (Sákéj) Youngblood Henderson is less sanguine in describing *Delgamuukw* as evidence that the Supreme Court of Canada has ignored "Aboriginal jurisprudence … in favour of an external Anglo-Canadian legal analysis".[251] Indeed, Walkem's praise of *Delgamuukw* acknowledges that the response to Lamer's direction "to seriously engage with Indigenous legal traditions" was limited subsequently to "receiving Indigenous oral evidence as oral history", which she describes as "an ultimately impoverished endeavour that has failed in fully appreciating or taking hold of the transformative possibilities hinted at in the *Delgamuukw* decision."[252]

In a 2013 paper, McNeil credits the Chief Justice with making an "innovative advance" in Aboriginal law in *Delgamuukw*.[253] However, he is also critical of what he characterizes as the Supreme Court of Canada's impoverished description of Aboriginal title. With regard to *Delgamuukw*, McNeil's criticism focuses specifically on Lamer's introduction of "the inherent limit" and the breadth of the list of activities that he would recognize as "compelling and substantial" legislative priorities that could justify infringements of Aboriginal title.[254] As noted earlier, the idea of a limit to Aboriginal rights and title did not make its first appearance in *Delgamuukw*, as it had been introduced in the context of Aboriginal rights by Lamer in

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249 *Ibid*

250 Ardith Walkem, "An Unfulfilled Promise: Still Fighting to Make Space for Indigenous Law Traditions" in Maria Morellato, QC, ed., *Aboriginal Law since Delgamuukw* (Aurora, Ontario: Canada Law Book, 2009) 393 at 424-425.

251 James (Sákéj) Youngblood Henderson, "Aboriginal Jurisprudence and Rights" in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) 67 at 89.

252 Walkem, *supra* note 250 at 394.

253 McNeil, *supra* note 243 at 15.

254 *Delgamuukw, supra* note 190 at 1107, Lamer CJC.

Gladstone.[255] Like the earlier *Sparrow* decision, *Gladstone* recognized an Aboriginal right to fish, but in *Gladstone* the right recognized was that to fish commercially.[256] However, Lamer noted a significant distinction between subsistence fishing and commercial fishing. Fishing for subsistence purposes would impose an internal limit on the number of fish that would be caught, since once the food, social, and cultural needs of the Indigenous community had been satisfied, there would be no need for any more fish to be taken. In this way, the limit was internal to the fishing itself, and it meant that the Musqueam were free to exercise their right to fish for subsistence purposes prior to the remainder of the available resource being opened for use by others.[257] But in *Gladstone* the only limitations on commercial harvesting were the capacity of the Heiltsuk to catch fish and the size of the fish stock, which could result in Heiltsuk's priority becoming an exclusive right to all available fish.[258] This result led Lamer to consider the earlier analysis of the justification for regulation in *Sparrow*. In that case, the Supreme Court confirmed the Court of Appeal's conclusion that conservation in the "public interest" was too vague to be the justification for an infringement of an Aboriginal right.[259] However, *Sparrow* also contained the comment that regulation "to prevent the exercise of section 35(1) rights that would cause harm to the general populace" could be such a legitimate justification.[260] Thus, in the absence of an internal limit, Lamer was prepared to recognize the authority, even the duty, of the Crown to impose some external limit on priority of Indigenous peoples, the details of which he did not discuss.[261]

McNeil objects to Lamer's use of an "external limit" in *Gladstone*. He does not acknowledge the distinction made in *Sparrow* between valid and invalid uses of public interest

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255 *Gladstone, supra* note 247 at 769-770, Lamer CJC.
256 *Ibid* at 761-762, Lamer CJC.
257 *Ibid* at 762, Lamer CJC.
258 *Ibid* at 762-763, Lamer CJC.
259 *Sparrow, supra* note 92 at 1113.
260 *Ibid.*
261 *Gladstone, supra* note 247 at 766-768, Lamer CJC.

considerations as justification for infringement of the Aboriginal right to fish, and he indicates that the limitation on the Indigenous priority in *Gladstone* "sounds suspiciously like the public interest rationale that was rejected in *Sparrow*."[262] He also expresses the concern that limiting Aboriginal rights to prevent changes in the status quo to the detriment of other Canadians could actually perpetuate injustice if the status quo is itself the result of past injustice.[263] Turning to Aboriginal title, McNeil can find no justification in the common law relating to possessory titles to support an "inherent limit" to Aboriginal title, which he characterized as "an unnecessary impediment to economic development that would be in the interests of the indigenous peoples who hold the title."[264] McNeil characterizes the inherent limit as containing "an element of paternalism that was not acceptable in modern Canadian society."[265] Specifically, he expresses particular concern that the limit might force Indigenous peoples to choose either to eschew economic benefits arising from strip mining or clearcutting and choosing to live in the past or to adapt to modern Canadian life at the cost of foregoing their Aboriginal rights by surrendering their Aboriginal title.[266] McNeil's criticism is shared by Gordon Christie[267] and Ardith Walkem.[268]

In *Delgamuukw* Chief Justice Lamer did not repeat or refer to the comment in *Sparrow* that "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". However, he made several less definitive

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262 Kent McNeil, "The Vulnerability of Indigenous Land Rights in Australia and Canada" (2004) 42:2 Osgoode Hall LJ 271 at 290-291.

263 Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2:1 Indigenous LJ 1 at 9.

264 Kent McNeil, "The Source and Content of Indigenous Land Rights in Australia and Canada: A Cultural Comparison" in Louis Knafla and Hayo Westra, eds., *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (Vancouver: U.B.C. Press, 2010) 146 at 160.

265 Kent McNeil, "Self-Government and Inalienability of Aboriginal Title" (2002) 47:3 *McGill Law Journal* 473 at 479-480. See also Kent McNeil, "Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got It Right?", Twelfth Annual Robarts Lecture, Robarts Centre for Canadian Studies, 1998 at 13.

266 Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5:2 Tulsa J Comp & Intl L 253 at 257.

267 Christie, *supra* note 130 at 40-41.

268 Walkem, *supra* note 77 at 207.

statements that together amounted to the same thing. First, as to the relationship between Aboriginal title and Crown title, he described the former as "a burden on the Crown's underlying title."[269] Second, as to the historic point at which this relationship comes into being, it occurs at the time that the Crown "asserted sovereignty over the land in question."[270] In order to explain the reason for not exploring the sovereignty issue, the Chief Justice found and the parties did not dispute on appeal "that British sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty of 1846."[271]

Lamer's judgment provoked John Borrows into a forceful condemnation of the Supreme Court's treatment of the sovereignty/radical title issue. Borrows is not fully critical of *Delgamuukw*, praising Chief Justice Lamer's recommendation of negotiations as an alternative to litigation.[272] However, in a commentary on the decision, Borrows charged that the recognition of underlying Crown title "places aboriginal peoples in a feudal relationship with the Crown."[273] He has referred to Crown sovereignty as being inconsistent with both the perspective of Indigenous peoples and the rule of law,[274] and that subjecting Indigenous peoples to a non-consensual "alien sovereignty" is and will continue to be an obstacle to reconciliation.[275] Within a single chapter of his 2002 book *Recovering Canada: The Resurgence of Indigenous Law*, Borrows characterizes the concept of underlying Crown title as "magic crystals being sprinkled on the land", "reminiscent of sorcery", "tautology", an "unspoken hex", "deeply discriminatory and unjust", a "foundation of sand", a "blunt exercise of arbitrary power", and "wholly unsubstantiated by physical reality".[276]

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269 *Delgamuukw, supra* note 190 at 1098-1099, Lamer CJC.
270 *Ibid*
271 *Ibid* at 1099, Lamer CJC.
272 Borrows, *supra* note 147 at 234.
273 John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*", (1999) 37:3 Osgoode Hall LJ 537 at 568.
274 John Borrows, "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism" in *Speaking Truth to Power: A Treaty Forum* (Ottawa: Law Commission of Canada, 2001) at 35.
275 Borrows, *supra* note 248 at 97.
276 *Ibid* at 96-117.

One last criticism of *Delgamuukw* is worthy of note. Patrick Monahan has expressed concern over Chief Justice Lamer's decision to address the requirements to prove Aboriginal title, its content, and its constitutional protection in the absence of an Aboriginal title case being properly before the Court. In Monahan's words, "the abstract and generalized nature of the advice that was offered took the Court into dangerous waters." [277] He continued that the "highly abstract nature" of the principles makes it difficult to predict whether these principles "will provide clear benchmarks for litigants or judges in future aboriginal rights litigation."[278]

The specific fear expressed by Monahan is that by setting out principles relating to the content and constitutional status of Aboriginal title before the matter comes before the Supreme Court on a specific set of facts "the Court runs the risk of later having to revise or reformulate the principles."[279] John Hunter echoes Monahan's negative view of making *obiter dicta* pronouncements of legal principles, which creates the threat that in making these statements the Supreme Court has not anticipated their "full practical effect."[280]

CANADIAN ABORIGINAL LAW PRIOR TO *HAIDA*

The uncertainty expressed by Monahan and Hunter reflects the fact that many of the most important cases over the last quarter of the twentieth century had equivocal results. They were all defeats for the Crown and were predictable on the facts, but their implications were unclear. *Guerin* and *Blueberry River* found Crown liability in egregious fact situations, and while the formal majority judgment in *Blueberry River* suggested the nominal use of a fiduciary approach, more members of the Supreme Court expressed a preference for returning to approaching the issue by way of trust law. *Sparrow* also raised the possibility of a broad role for a fiduciary approach, but this was also the case in which the Court provided the reminder

277 Patrick Monahan, "The Supreme Court of Canada in the Twenty-First Century" (2001) 80:1 & 2 Can Bar Rev 374 at 396.
278 *Ibid*
279 *Ibid*
280 Hunter, *supra* note 205 at 19.

that however broadly this was applied it would not threaten Crown radical title or sovereignty. As an example of the uncertain state of the law, Ian Binnie, who had been one of the Crown counsel before the Federal Court of Appeal and the Supreme Court in *Guerin*, suggested that two references in *Sparrow* could imply risks for the federal Crown and one threatened some aspirations of Indigenous peoples. With regard to the former, the comment that one of the consequences of the inclusion of section 35(1) in the *Constitution Act, 1982* was a restraint on the exercise of sovereign power might impose limits on the authority of Parliament[281] and the reference to fiduciary duty in *Sparrow* could result in Canada's authority to legislate regarding "Indians and lands reserved for the Indians" being coupled with a duty to do so.[282] At the same time, Binnie predicted that Supreme Court's interpretation of s. 35(1) in *Sparrow* would preclude using it to justify self-government or commercial harvesting.[283] In addition to the uncertainty regarding fiduciary duty, the last section discussed what some analysts saw as the potential for the recognition of Indigenous Aboriginal legal orders, the possibility that federal jurisdiction might displace provincial jurisdiction on all Aboriginal title land, and the still-to-be-determined implications of the Supreme Court's conclusion that there is "an inescapably economic aspect" to Aboriginal title.

Other commentators, including journalists and opinion leaders, reacted with fear and outrage rather than optimism.[284] Gordon Gibson, a senior fellow at the Fraser Institute who had been an assistant to the Minister of Indian Affairs and to Prime Minister Trudeau at the time of the White Paper described the decision as "a breathtaking mistake" that "commenced

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281 W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning." (1990) 15:2 Queen's LJ 217 at 220.

282 *Ibid* at 221.

283 *Ibid* at 234.

284 Paul McHugh refers to this phenomenon when he describes media commentary as "hysterical and reductionist in its cartoonish civilization/barbarism-good/bad dichotomizing" Paul G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011) at 62.

to invent law with little reference to its own recent decisions and academic writings."[285] Columnist Jeffrey Simpson predicted that the anticipated Supreme Court of Canada decision dealing with legal aspects of Quebec's secession would be less significant than *Delgamuukw*, which he described as "judicial activism on a major scale."[286] In a column entitled "How myth disrupts BC law", Andrew Coyne accused the Court of basing its decision on the concepts of "posterior precedence, discontinuous continuity, and non-exclusive exclusivity".[287]

Both the optimism and the outrage about *Delgamuukw* arose out of a misreading of it and earlier cases by partisans of both positions. They reflect the failure to distinguish between what judges say and what courts do. Of the *Guerin, Sparrow,* and *Delgamuukw* decisions, only *Sparrow* had an application that went beyond the facts of the case with its introduction of the "*Sparrow* test" regarding the justification of infringements of Aboriginal rights. As this test expressly included the consideration of the "special trust relationship and the responsibility of the government vis-à-vis aboriginal people"[288] *Sparrow* extended the scenarios to which fiduciary principles applied beyond the Crown's authority to limit traditional harvesting practices. In comparison, the statement in *Guerin* that the Indigenous interest in reserve land and Aboriginal title land were identical and Chief Justice Lamer's commentary on the test for and the nature of Aboriginal title in *Delgamuukw* were unnecessary for the ultimate decision of the Supreme Court, although they were different forms of *obiter*. The statement in *Guerin* preceded the analysis that produced the *ratio* in the case, and it represented a digression in the process of determining the *ratio* in that it was unlinked to that process. The ultimate decision reflected in Justice Dickson's judgment would have been the same had he never engaged in consideration of the basis of

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285 Gordon Gibson, "The land claims ruling is a breathtaking mistake", *Globe and Mail*, December 16, 1997, at A21.

286 Jeffrey Simpson, "The secession ruling will be less important than *Delgamuukw*", *Globe and Mail*, February 17, 1998, at A18.

287 Andrew Coyne, "How myth disrupts BC law", *Vancouver Sun,* June 18, 1998, at A17.

288 *Sparrow*, *supra* note 92 at 1114.

aboriginal title and the nature of the interest in land which it represents."[289] In *Delgamuukw*, Justice Lamer labelled his own discussion of Aboriginal title as *obiter* by not engaging in this analysis until after he had announced the disposition of the case before the Court.

It is at this point that the discussion of precedent set out in Chapter I becomes crucial. The Supreme Court of Canada has rejected the proposition that every statement in a majority judgment was part of the Court's ruling whether or not it was necessary to the Court's ultimate decision.[290] Applying Justice Binnie's conclusion that "[A]ll *obiter* do not have, and are not intended to have, the same weight," Chief Justice Lamer's post-disposition commentary in *Delgamuukw* was a particular brand of *obiter*, namely "commentary, examples or exposition that are intended to be helpful."[291] But the mandate of the Supreme Court of Canada is to determine cases dealing with issues of national importance, which can necessarily require dealing with matters at a high degree of generality, even abstraction.[292] As such, Chief Justice Lamer's commentary on Aboriginal title was at least arguably an exercise of one of the Supreme Court of Canada's most important functions.

A more important caveat to place on predictions about the precedential value and long-term implications of Supreme Court of Canada decisions is that such predictions in the immediate aftermath of a decision are premature. This reflects the fact that determining the future impact of a decision is a retrospective rather than a prospective process. Subject of course to the vertical binding effect of past judgments of the Supreme Court of Canada and other appellate courts, judges determine the authority of decisions by looking backward and deciding whether to follow, reject, or distinguish past decisions. A decade before he was appointed to the United States Supreme Court, Justice Benjamin Cardozo gave a series of

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289 *Guerin, supra* note 16 at 376, Dickson J.

290 *R v Henry*, 2005 SCC 56 at para 57, [2005] 3 SCR 609, aff'g 2003 BCCA 476.

291 *Ibid.*

292 The Honourable Malcolm Rowe and Leanna Katz, "A Practical Guide to *Stare Decisis*" (2020) 41 Windsor Rev Legal Soc Issues 1 at 9.

lectures to law students at Yale, and these were subsequently published in book form as *The Nature of the Judicial Process*.[293] In it, Cardozo noted that the implications of a decision may at first be equivocal,[294] but over time courts determine "the directive force of principle,"[295] which may or may not move along the line of logical progression,[296] may interact with other precedents suggesting a different line of development,[297] or may, by a process of analogy, be carried beyond the limit of the logic of the initial decision.[298] In Chapter III I discuss the treatment of Chief Justice Lamer's analysis of the test for and the nature of Aboriginal title in *Delgamuukw* by Chief Justice McLachlin, who referred to the "*Delgamuukw* test" for Aboriginal title in *Marshall/Bernard*[299] and who referenced *Delgamuukw* again in *Tsilhqot'in*.[300] But I contend in Chapter III that Chief Justice McLachlin's decisions reflected the definitive statement on the test for and nature of Aboriginal title rather than retroactively designating *Delgamuukw* as the source of these conclusions. As Chapter III illustrates, this is not an entirely theoretical distinction, because in *Tsilhqot'in* McLachlin applied rather than restated her predecessor's judgment and may have modified Lamer's statements regarding the "inherent limit", a key element elements of Lamer's description of the nature of Aboriginal title.[301] Similarly, I contend that Chief Justice McLachlin's description of the nature of Aboriginal title in *Tsilhqot'in* is inconsistent with Justice Dickson's conclusion that the Indigenous interests in reserve land and Aboriginal title land were identical.

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293 Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).

294 *Ibid* at 48.

295 *Ibid* at 30-31.

296 *Ibid* at 30-31, 40.

297 *Ibid* at 40.

298 *Ibid* at 49.

299 Before making use of Chief Justice Lamer's enunciation of the principle of exclusive occupation in *Marshall/Bernard*, McLachlin noted that "]M]any of the details of how this principle applies to particular circumstances remain to be fully developed." *R v Marshall/Bernard*, 2005 SCC 43 at para 40, McLachlin CJC, [2005] 2 SCR 220, rev'g 2003 NBCA 55, aff'g 2002 NBQB 82, aff'g [2000] 3 CNLR 184 (NBPC) [*Bernard*], rev'g 2003 NSCA 105, 2002 NSSC 57, aff'g 2001 NSPC 2 [*Marshall*].

300 *Tsilhqot'in, supra* note 90 at paras 67, 69, 70, 71, 82,83, 87, 121, 150, and 152.

301 Dwight Newman, "The Economic Consequences of Indigenous Property Rights: A Canadian Case Study (2016) 95:2 Neb L Rev 432 at 450-454.

CHAPTER III

THE HONOUR OF THE CROWN, FIDUCIARY DUTY & ABORIGINAL TITLE, 2004-2014

The remainder of my dissertation deals with the emergence, nature, impact, and future of the concept of the Honour of the Crown, together with its interaction with Aboriginal title and fiduciary duty. While this chapter is largely devoted to tracing the growth of the Honour of the Crown until it reached its place as the dominant paradigm in Aboriginal law, it does note two occasions in particular, (*Haida* and *Tsilhqot'in*), in which the Honour of the Crown, Aboriginal title, and fiduciary duty overlapped. Chapter IV looks more deeply into the history of the Honour of the Crown, both within and outside Aboriginal law and considers some aspects of the nature of the Honour of the Crown that make it particularly appropriate for use in Aboriginal law. Chapter V discusses areas in which the Honour of the Crown has developed and been applied in several areas of Aboriginal law over the last decade. Chapter VI answers the questions about the honour of the Crown that I set out in Chapter I and discusses the role each of the three concepts play in a unified view of Aboriginal law.

EMERGENCE OF THE HONOUR OF THE CROWN IN CANADIAN LAW

In *Law's Empire,* Ronald Dworkin describes how "arguments that succeeded in changing adjudication over time" reflected "general movements in the political and social culture and so formed a part of intellectual and legal history."[1] These arguments often appear first in the (usually unsuccessful) arguments of lawyers in cases, dissenting opinions that explain why majority opinions reflecting the current orthodoxy are unsatisfactory, majority opinions that, once they are issued, are repeated in a growing number of decisions, and finally as propositions that are accepted

[1] Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1986) at 137

to the point that their applicability is no longer discussed.[2] Over the last several decades the Honour of the Crown followed this type of path,[3] emerging early in this century as the dominant Aboriginal law paradigm.

R v George; R. v. Sikyea

In the mid-1960s, two similar Indigenous hunting cases from different jurisdictions reached the Supreme Court of Canada within two years of each other. Both involved Indigenous hunters who were charged with breaches of regulations under the *Migratory Birds Convention Act*[4] for killing ducks for food at a time of year that was closed for hunting. Both incidents occurred within areas covered by treaties of sale or surrender, one an 1827 sale to the Crown of approximately 8,800 km² of land on the southeast shore of Lake Huron (Treaty 29)[5] and the other the 1921 surrender of the Mackenzie River valley in the Northwest Territories to Canada (Treaty 11).[6] The nineteenth century Treaty 29 made no reference to hunting or fishing, but it identified specific reserve lands and guaranteed that these reserves were set aside for the Chippewa of Kettle and Stony Point for "their own exclusive use and enjoyment."[7] Treaty 11, signed in 1921 contained a provision that "His Majesty the King hereby agrees with the said Indians that they shall have the

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2 *Ibid.*

3 While my analysis begins with a Supreme Court of Canada dissent from the 1960s, there are some suggestions that much earlier dissents from the end of the nineteenth century were precursors of the Honour of the Crown in Canadian aboriginal jurisprudence. I discuss this possibility in Chapter IV, but as I am sceptical of role of these earlier dissents in the development of the modern law of the Honour of the Crown.

4 *Migratory Birds Convention Act*, RSC 1952, c 179.

5 *Huron Tract Treaty [Treaty No. 29], made the tenth day of July, in the year of Our Lord one thousand eight hundred and twenty-seven, between Wawanosh, Osawip, Shashawinibisie, Puninince, Negig, Cheebican, Mukatwokijigo, Mshikinaibik, Animikince, Peetawtick, Shawanipinisse, Saganash, Anottowin, Penessiwagum, Shaioukima, Chekateyan, Mokeetchiwan and Quaikeegon, Chiefs and Principal Men of that part of the Chippewa Nation of Indians inhabiting and claiming the territory or tract of land hereinafter described, of the one part, and Our Sovereign Lord George the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, of the other part.*
online <www.rcaanc-cirnac.gc.ca/eng/1370372152585/1581293792285#ucls21>. This is the same treaty that played a role in the *Chippewas of Sarnia* case that was discussed in Chapter I.

6 *Treaty No11 (June 27, 1921) and Adhesion (July 17, 1922) with Reports, etc.* (Ottawa: Queen's Printer, 1957.

7 Treaty 29, *supra* note 5.

right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described…"[8] Michael Sikyea, a Dene Elder who had acted as an interpreter a Treaty 11, was charged after he shot a duck near Yellowknife, well within the "tract surrendered."[9] But despite these similarities, there was a significant difference between the two cases. When the cases reached the Supreme Court of Canada, Sikyea was appealing his conviction for hunting out of season while the Crown was appealing the acquittal of George.

Although Michael Sikyea had pled guilty before a Justice of the Peace and was fined $10.00, he believed that he was innocent.[10] When Judge John Sissons of the Territorial Court of the Northwest Territories learned of the conviction, he contacted Sikyea's counsel and directed her to file an appeal, and when the case came before Sissons, he ordered a trial *de novo*.[11] This expunged the guilty plea and placed the burden of proving guilt beyond a reasonable doubt on the prosecution. At trial, Sissons ruled that the Crown had failed to establish that the mallard duck shot by Sikyea met the statutory definition of "a wild duck,"[12] but this was very much a secondary basis for Sikyea's acquittal. Sissons also invoked, without specific precedent, the Honour of the Crown when he asserted that the protection provided by the Treaty to hunting and fishing would have been "delusive mockeries and deceitful in the highest degree if the *Migratory Bird Convention,* made just five years previously, had curtailed the hunting rights of the Indians."[13] The Crown's

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8 *Treaty No. 11, supra* note 6.

9 *R v. Sikyea*, [1964] SCR 642 at 643, aff'g (1964), 43 DLR (2nd) 150 (NWTCA), rev'g (1962), 40 WWR 494 (NWTTC).

10 Dorothy Harley Eber, *Images of Justice* (Montreal and Kingston: McGill-Queen's University Press, 1997) at 117.

11 *Ibid*

12 Because the *Migratory Bird Regulations* made it an offence to shoot a "wild duck", the prosecutor took it on himself to prove that the duck shot by Sikyea had in fact been wild. Without briefing his witness first, he asked the arresting Royal Canadian Mounted Police officer whether he knew of any "tame" ducks in the region, only to have the witness answer that he in fact kept two as pets. *Migratory Bird Regulations*, PC 1955-1070, SOR/ 58-108, Schedule A, Part XI, section 3(b)(1); Eber, *supra* note 10 at 118.

13 *R. v. Sikyea*, (1962), 40 WWR 494 at 504 (NWTTC), rev'd (1964), 43 DLR. (2nd) 150 (NWTCA), rev'd [1964] SCR 642.

position was strikingly similar to the justification of an *ex post facto* prohibition against hunting ducks. In the negotiation of Treaty 11, Crown officials confirmed that the Treaty would have no impact on hunting rights, but these officials did not advise the signatories that the right to hunt ducks had already been eliminated in 1916.

The Crown appealed to the Alberta Court of Appeal, which was styled the Northwest Territories Court of Appeal when it heard appeals from that jurisdiction. Justice Horace Johnson struggled with his conscience before reversing the decision made by Sissons. Johnson was open about his concern that the *Migratory Birds Convention Act,* which had only been in place for five years when Treaty 11 was negotiated, was a serious derogation of hunting rights but he concluded that as a matter of law it was a limitation on the hunting rights of Indigenous peoples at the time Treaty 11 was signed. He asked rhetorically how "this apparent breach of faith on the part of the government"[14] could be explained. He continued that the removal of the right to harvest game birds "cannot be described as a minor or significant curtailment of these treaty rights" because of the value of these birds as a "readily obtainable food", he concluded that it was most likely that the treaty rights had been overlooked."[15] After studying the text of Treaty 11 and the *Migratory Birds Convention Act*,[16] Justice Johnson felt that he had no alternative but to reverse Sissons' decision and reinstating a conviction.[17]

The Court of Appeal also overturned Sissons' ruling that it had not been established that the duck that had been shot was wild, and both of the reasons for the decision by Sissons were

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14 *R. v. Sikyea*, (1964), 43 DLR (2nd) 150 at 158 (NWTCA), rev'g (1962), 40 WWR 494 (NWTTC), aff'd [1964] SCR 642.

15 *Ibid.* Justice Johnson's soul-searching was mentioned in ALC de Mestral, "*Michael Sikyea v. Her Majesty the Queen",* Case Comment (1966) 11:2 McGill LJ 168 at 170. But Johnson's explanation that Indigenous harvesting rights were overlooked is unlikely, given that they had been negotiated away by the Crown only five years earlier.

16 *Migratory Birds Convention Act*, *supra* note 4, s 5(1).

17 *Sikyea*, *supra* note 14 at 159.

alive in Sikyea's appeal to the Supreme Court of Canada. Speaking for a unanimous Supreme Court, Justice Hall was able to dispose of the treaty issue in a single paragraph, endorsing the approach taken by the Alberta Court of Appeal.[18]

It is the *George* case that contained the first reference to the Honour of the Crown in the Supreme Court of Canada. Calvin George shot a duck on the reserve set aside for the Chippewa of Kettle and Stony Point, of which he was a resident. After being charged with an offence, he appeared before a magistrate and was acquitted. before a magistrate, who acquitted him of the charge. The Crown appealed the acquittal to the Ontario High Court, where it was affirmed by Chief Justice McRuer. According to the Chief Justice, the acquittal resulted from the operation of Treaty 29, which McRuer interpreted as confirming that on reserve land "the Indians on the Kettle Point Reserve still have all the rights enjoyed by their ancestors in that area."[19] The decision considered the impact of section 87 of the *Indian Act*, which provided that, subject to the terms of any treaty or federal legislation, provincial laws of general application were in force on reserves.[20] The Chief Justice concluded that the rights guaranteed under Treaty 29 brought the case within the treaty exception to section 87, and therefore that provision did not save the provincial legislation from being *ultra vires*.[21]

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18 *Sikyea*, *supra* note 9 at 646. This meant that the bulk of Hall's judgment dealt with the issue of the mallard duck itself. To assist in this, the duck, shot in May 1962 remained in evidence, sitting on a table in front of the Supreme Court panel. One biography of Sissons contains *the* story that Justice Abbott, an avid duck hunter, advised his colleagues that if the Supreme Court did not conclude that the duck was wild, it would be the laughing-stock of every duck hunter in the country. Eber, s*upra* note 10 at 122. Justice Hall noted that the dictionary definition of "mallard duck" began with the fact that it was a "wild duck." *Sikyea, supra* note 9 at 646. Further, Hall concluded that the circumstances of the case established that the duck was wild. Even if it had been domesticated, it was no longer in captivity, and upon its release it reverted to its wild state. *Ibid* at 645-646.

19 *R v George* (1963) 41 DLR (2nd) 31 (ON SC), aff'd *Attorney General of Canada v George* (1964), 45 DLR (2nd) 709 (ON CA), rev'd *R v George,* [1966] 2 SCR 267

20 *Indian Act,* RSA 1952, c 149, section 87.

21 *George,supra* note 19 at 36-37.

The Crown's appeal to the Ontario Court of Appeal was rejected by a majority of the panel hearing the case. Justice Roach, with whom Justice McLennan concurred, agreed with the analysis of Chief Justice McRuer[22] and added a second reason of his own for the outcome. Acknowledging that the guarantee to the Chippewa that reserve lands were for "their own exclusive use and enjoyment" did not make specific reference to hunting, Roach had recourse to the *Royal Proclamation of 1763*, which referred to the lands reserved to First Nations as the latter's "Hunting Grounds." Roach was of the view that since the lands reserved under Treaty 29 were taken out of the tract of land characterized as "Hunting Grounds" in the *Royal Proclamation*, it was axiomatic that hunting would be within the "use and enjoyment" of those reserve lands by the Chippewa.[23] Justice Gibson dissented. His interpretation of Treaty 29 was that it dealt exclusively with the ownership of land and contained no reference to hunting. Gibson concluded that in the absence of a treaty right to hunt, the exception in the first phrase of section 87 of the *Indian Act* was not engaged, and as such the *Migratory Birds Convention Act* was enforceable on the reserve lands at Kettle Point as a law of general application.[24] Shortly after the announcement of the decision of the Ontario Court of Appeal, the Supreme Court or Canada issued its decision in *R. v. Sikyea*,[25] which was contrary to the rulings of the Ontario courts that had heard *George*.

The *Sikyea* decision meant that a reversal of *George* by the Supreme Court of Canada was little more than a formality. Certainly, this was the view held by the majority of the Supreme Court, and Justice Martland's judgment reversing the decision of the Ontario Court of Appeal took less than two pages.[26] While acknowledging that *George* was not as straightforward as *Sikyea*, Justice

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22 *Attorney General of Canada v George* (1964), 45 DLR (2nd) 709 at 713, Roach JA, (ON CA), aff'g *R v George* (1963) 41 DLR (2nd) 31 (ON SC), rev'd *R v George*, [1966] 2 SCR 267.

23 *Ibid* at 712-713, Roach JA.

24 *Ibid* at 716-717, Gibson J.A., dissenting

25 *Sikyea, supra* note 9.

26 Not all Court members saw the matter that way. Justice Cartwright, who dissented, had been a member of the Supreme Court panel that elected unanimously to convict Sikyea. *Ibid* at 642.

Martland concluded that the two cases could not be distinguished.[27] Justice Cartwright dissented. After reviewing the facts and the decisions below, he accepted Roach's interpretation of Treaty 29 rather than Gibson's. In considering the intentions of the parties in 1827, Cartwright found it "impossible" to believe that any of the parties to the Treaty "would have understood that what was reserved to the Indians and their posterity was the right merely to occupy the reserved lands and not the right to hunt and fish thereon which they had enjoyed from time immemorial."[28]

George's legal team had retained Bert James McKinnon as additional counsel for the appeal to the Supreme Court. McKinnon argued that *George* could be distinguished from *Sikyea*, focusing most of his attention on the argument that neither Sissons nor the Alberta Court of Appeal had addressed the effect of section 87 of the *Indian Act* on the case.[29] Justice Cartwright noted this omission, 87,[30] and he concluded that the absence of such a discussion, particularly in the Court of Appeal, was an omission that could have been decisive in determination of the case.[31] He continued that the "honour of the Sovereign" required that the reference in section 87 to the exception of rights protected by treaties from the operation of laws of general application be given a generous interpretation, which was the approach taken to the provision by the Ontario Court of Appeal in *George.*[32]

George and *Sikyea* illustrate the first stage in the process of changing adjudication over time identified by Ronald Dworkin. *George* presents an example of the appearance of proposition that would develop into the present concept of the Honour of the Crown in both the unsuccessful argument by counsel and the dissent by Justice Cartwright. While not identical, the reversed trial

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27 *R v George,* [1966] 2 SCR 267 at 280-281, Martland J, rev'g *Attorney General of Canada v George* (1964), 45 DLR (2nd) 709, (ON CA), rev'g *R v George* (1963) 41 DLR (2nd) 31 (ON SC)
28 *Ibid* at 272, Cartwright J., dissenting.
29 *Ibid* at 274-275, Cartwright J., dissenting.
30 *Ibid* at 276, 277, Cartwright J., dissenting.
31 *Ibid* at 278, Cartwright J., dissenting.
32 *Ibid* at 279, Cartwright J., dissenting.

decision in *Sikyea* was a similar development. It would take 15 years before the Honour of the Crown took the next step summarized by Dworkin.

R v Taylor and Williams

The 1981 Ontario Court of Appeal decision, *R. v. Taylor and Williams,*[33] is tied inextricably to *George*. Not only was the decision as close to a *de facto* refusal to follow a Supreme Court of Canada's *George* decision as a ruling of an inferior court can be, the author of the Court of Appeal decision in *Taylor and Williams,* Assistant Chief Justice McKinnon, was the same Bert James McKinnon who had argued *George* before the Supreme Court of Canada. The *Taylor and Williams* decision in the Ontario Court of Appeal reflected the argument McKinnon had advanced on behalf of Calvin George, which had been accepted by Justice Cartwright but rejected by his colleagues.[34]

This case began when two members of the Mississauga of Curve Lake First Nation were charged with being in possession of 65 bullfrogs taken from a lake near Peterborough three weeks before the opening of the harvesting season for bullfrogs in Ontario.[35] Taylor and Williams were convicted at trial[36] of violating a provision of the Ontario *Game and Fish Act* establishing open and closed seasons for taking bullfrogs and prohibiting harvesting during the latter.[37] When an appeal of the conviction commenced, counsel for the Crown asked the Divisional Court to take judicial notice of the Williams Treaty of 1923, to which reference had been made at trial but which had not been considered by the trial judge because counsel for both parties were agreed that it was

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33 *R. v. Taylor and Williams* (1981), 62 CCC (2nd) 227 (ON CA), aff'g (1979), 55 CCC (2nd) 172 (ON SCDC), leave to appeal to S.C.C. refused December 21, 1981.

34 Jamie D. Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal law in Canada* (Saskatoon: Purich Publishing, 2015) at 25.

35 *R. v. Taylor and Williams* (1979), 55 CCC (2nd)) 172 at 173 (ON SCDC), aff'd (1981), 62 CCC (2nd) 227 (ON CA), leave to appeal to S.C.C. refused, December 21, 1981.

36 *Ibid at* 173.

37 *Game and Fish Act,* RSO1970, c 186, section 74 prohibited the taking of bullfrogs during a closed season, and by regulation the closed season for each year extended from January 1 to June 30 inclusive and from October 16 to December 31 inclusive. RRO 1970, Reg 359, s 2.

not applicable to the case.[38] The reason for the Crown's change of position on this question was that while the Williams Treaty did not deal with the Crown's acquisition of the land in which the harvesting of bullfrogs occurred (which had been the subject of an earlier treaty in 1818), the Williams Treaty (to which the Mississauga of Curve Lake was a party) purported to extinguish Indigenous fishing, hunting, and trapping rights not only within its boundaries but throughout Ontario.[39] The Divisional Court agreed to admit into evidence not only the 1923 Treaty, but also the 1818 Treaty and the minutes of the negotiations that resulted in the execution of the earlier document.[40]

In ascertaining the meaning of the 1818 document, the Divisional Court held that it was obliged to interpret it "as favourably as possible to the Indians," adopting the following principles as considerations:

> (1) The words used should be given their widest meaning in favour of the Indians.
>
> (2) Any ambiguity is to be construed in favour of the Indians.
>
> (3) Treaties should be construed and interpreted so as to avoid bringing dishonour to the Government and Crown.
>
> (4) The right to hunt and fish is aboriginal in nature and was confirmed by the *Royal Proclamation of 1763*: the intention of the Sovereign to extinguish Indian title or any aspect of it must be by clear language, and the onus of establishing extinguishment is upon the Crown.
>
> (5) The right of Indians to hunt and fish for food on unoccupied Crown land has always been recognized in Canada - in the early days as an incident of

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38 *Taylor and Williams, supra* note 35 at 173.

39 *Ibid.*

40 *Ibid* at 173, 175. The treaty was *ARTICLES OF PROVISIONAL AGREEMENT entered into on Thursday, the fifth day of November, 1818, between the Honorable William Claus, Deputy Superintendent General of Indian Affairs on behalf of His Majesty, of the one part, and Buckquaquet, Chief of the Eagle Tribe; Pishikinse, Chief of the Rein Deer Tribe; Pahtosh, Chief of the Crane Tribe; Cahgogewin of the Snake Tribe; Cahgahkishinse, Chief of the Pike Tribe; Cahgagewin, of the Snake Tribe; and Pininse, of the White Oak Tribe, Principal Men of the Chippewa Nation of Indians inhabiting the back parts of the New Castle District, of the other part [Rice Lake Treaty No 20].*

> their ownership of the land, and later by the treaties by which the Indians gave up their ownership right in these lands.[41]

The first three of these considerations were set out as not requiring any previous authority. Justice Hall's dissenting judgment in the *Calder* case was cited as authority for the fourth[42] and fifth points[43]

In applying these considerations to the terms of the 1818 Treaty, the Divisional Court concluded that the document specifically reserved to its beneficiaries the rights to fish and hunt on unoccupied Crown lands covered by the Treaty.[44] In the absence of other considerations, this determination would have justified the replacement of the convictions at trial with acquittals. However, given that the situation was complicated by the suggestion that Williams Treaty purported to extinguish First Nation harvesting rights throughout Ontario, the convictions were merely set aside and a new trial was ordered to consider the effect of the later Treaty.[45] Rather than proceed with another trial, the Crown appealed the Divisional Court decision to the Ontario Court of Appeal, taking the position that it no longer relied on the 1923 Williams Treaty and advising the Court of Appeal that the appeal was limited to challenging the Divisional Court's conclusion regarding the effect of the 1818 Treaty on harvesting rights.[46]

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41 *Taylor and Williams, supra* note 35 at 174.

42 *Ibid* at 176. Consideration 4 contained three separate propositions. The first ended with the colon in the second line, while the second and third were separated by the comma in the penultimate line. These are never combined in a single proposition in the Hall J.'s opinion in *Calder*, but there is a passage in the opinion that is a reasonable paraphrase of the second and third parts of the proposition. *Calder et al v. British Columbia et al*, [1973] SCR 313 at 150, Hall J, dissenting, aff'g (1970) 74 WWR (NS) 481 (BCCA), aff'g (1969) 71 WWR (NS) 81 (BCSC). It must also be noted that the suggestion that the right to hunt and fish was confirmed in the *Royal Proclamation* was a questionable assertion. To the extent that this statement implies that the *Royal Proclamation* is the source of rights, it was wrong, and *Calder* was the first occasion on which the Supreme Court of Canada clarified this matter. *Ibid* at 322, Judson J.

43 *Taylor and Williams, supra* note 35 at 177. Proposition 5 was in fact drawn from the Alberta Court of Appeal judgment of Justice Johnson in *R. v. Sikyea*, which Hall quoted in his *Calder* dissent. *Calder, supra* note 42 at 397, Hall J., dissenting.

44 *Taylor and Williams, supra* note 35 at 178-179. Somewhat unfortunately in light of the questionable accuracy of the fourth consideration used to interpret the 1818 Treaty, the Divisional Court also found that as a secondary ground for acquittal, the *Royal Proclamation* guaranteed the rights of hunting and fishing and these rights are not subject to the operation of section 88 (which had been section 87 when *George* was decided. *Ibid* at 179.

45 *Ibid at* 181.

46 *Taylor and Williams, supra* note 33 at 229

The only reference to *George* in the judgment written by Assistant Chief Justice McKinnon was to the dissent by Justice Cartwright.[47] What had been a solitary dissent in 1966 had become the authority on which the *Taylor and Williams* decision relied. McKinnon set out what the unanimous Court of Appeal viewed as the role the Honour of the Crown played in treaty interpretation. These principles, which in McKinnon's words "have been much canvassed over the years", stressed that "the Honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned.[48] Applying these principles to the 1818 negotiations, McKinnon concluded that although the right to hunt and fish was not mentioned in the written treaty, the transcript of oral requests by the Chippewa and the responses on behalf of the Crown (which preceded the signing of the Treaty) established that the right to hunt and fish had been confirmed by the Crown.[49] Certainly, there was some ambiguity about the exchange,[50] but McKinnon held that the Honour of the Crown required that the interpretation most favourable to the Chippewa be the one to be used. Further, there was contextual information cited by McKinnon that is only consistent with the continued hunting and fishing by the Chippewa. The 1818 Treaty did not set aside any reserve any lands for the Chippewa, but it was clearly the intention of the parties that they would remain in the region since there is reference to in the oral exchanges to "Whites that are to come among us."[51] The judgement asked rhetorically that if the 1818 Treaty did not provide for reserve land, how did the Crown think the Chippewa would support themselves if they were

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47 *Ibid* at 235.

48 *Ibid.*

49 *Ibid* at 234-235.

50 The request was in the form of an expression of hope that "we shall not be prevented from the right of Fishing, the use of the Waters, & Hunting where we can find game ...". The response on behalf of the Crown was "[I] have no doubt but that he [the King] will accede to your wish. The Rivers are open to all & you have an equal right to fish and hunt on them." Crown counsel argued that the second sentence in the response meant that the Chippewa would have no special right to fish and hunt beyond that of others living in or travelling through the area. Assistant Chief Justice McKinnon did not accept this position, concluding instead that the Chippewa would have interpreted the first sentence of the response as a fulfilment of their request. *Ibid* at 232-236

51 *Ibid* at 232.

not able to hunt and fish as before?[52] The abandonment of the Crown's argument based on the 1923 Treaty meant that acquittals could be entered on the charges, and somewhat surprisingly in a prosecution, Taylor and Williams were awarded costs on a solicitor-client basis.[53] The Supreme Court of Canada dismissed the Crown's application for leave to appeal the Court of Appeal decision.[54]

Mitchell v Peguis Indian Band

After *George* in 1966, the Supreme Court next referred to the Honour of the Crown in two decisions decided only weeks apart in 1990. The first was *Sparrow*, which I discuss in Chapter II. The references in *Sparrow* were limited to the relationship between the Honour of the Crown and fiduciary duty, and as such I will return to *Sparrow* when discussing that relationship. The second reference was in the judgment by Justice La Forest in *Mitchell v. Peguis Indian Band*.[55] This illustrated the potential application of the Honour of the Crown to a wide range of cases, since Justice La Forest invoked it in a case to which the Crown was not even a party. In 1983 Manitoba and the Peguis First Nation agreed to settle the latter's claim that beginning in 1964, Manitoba Hydro had improperly taxed Peguis First Nation for the delivery of power to the Peguis Reserve, and under the agreement Manitoba refunded approximately $950,000 dollars to Peguis. Litigation arose when a former accountant for Peguis sued for work he alleged he had done as part of the negotiation of the settlement, for which he claimed to be entitled to a fee of approximately $190,000 dollars based on a contingency fee agreement. Peguis denied the existence of a contingency fee agreement and disputed whether the accountant had provided any assistance in

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52 *Ibid* at 235.
53 *Ibid* at 237-238.
54 *Ibid* at 227.
55 *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, aff'g (1986), 39 Man R (2d) 180 (CA), aff'g (1983), 22 Man R. (2d) 286 (QB).

negotiations with Manitoba. The accountant had also sought and obtained a pre-judgment order of garnishment of the full amount claimed by him.[56] The garnishment order was quashed by the Manitoba Court of Queen's Bench in a decision[57] that was affirmed by the Manitoba Court of Appeal.[58]

The case turned on the interpretation of the provisions in the *Indian Act* that exempted, in appropriate circumstances, the property of Indians from seizure. Section 89(1) of the *Indian Act* exempted on-reserve real and personal property from seizure,[59] and section 90(1)(b) deemed personal property received by an Indian pursuant to a treaty or agreement with Her Majesty to be situate on-reserve.[60] Both the motions judge and the Manitoba Court of Appeal had justified their respective decisions to quash the garnishment order on the grounds that the word "Her Majesty" in section 90(1)(b) could be interpreted as including both federal and provincial governments.[61] Although all seven members of the Supreme Court of Canada who heard the appeal agreed that the appeal should be dismissed, only Chief Justice Dickson was prepared to accept the interpretation of the courts below.[62] Justice Wilson wrote on behalf of herself and Justices Lamer and L'Heureux-Dubé that rather than treating the issue as one of statutory interpretation, the case was an appropriate one to apply the longstanding Crown exemption from garnishment.[63] However, Justice La Forest, writing for himself and Justices Sopinka and Gonthier, grounded his judgment in the Honour of the Crown.

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56 *Ibid* at 93-96, Dickson CJC.
57 *Ibid* at 96-97, Dickson CJC.
58 *Ibid* at 97-98, Dickson CJC.
59 *Indian Act,* RSC 1970, c I-6, s 89(1).
60 *Ibid* at s 90(1)(b).
61 *Mitchell, supra* note 55 at 96-98, Dickson CJC.
62 *Ibid* at 110., Dickson CJC.
63 *Ibid* at 122, Wilson J.

La Forest's analysis began with the observation that Indigenous parties to treaties would have taken it for granted that the possession of any property they or their members received under a treaty would be protected against loss. Therefore, it was unrealistic to suggest that they ever expected that their receipt of the full benefit of a treaty would be compromised because of the ability of non-Indians to "impose liens on it every time it was necessary to remove the property from the reserves." He asserted that it would be inconsistent with the Honour of the Crown to enter into a treaty notionally fulfilling an honourable obligation while at the same time allowing some of the benefits to become subject to seizure or taxation if they were notionally situated off-reserve.[64] The circumstances of the case convinced La Forest that allowing the garnishment order to stand would lead to results that would be particularly egregious.[65] The debt owed by Manitoba to Peguis resulted from the imposition of an *ultra vires* tax. La Forest concluded that it would be completely unfair if the replacement of money that was taken illegally would leave the replacement funds liable to seizure. In the final analysis, La Forest quashed the garnishment order not on what he viewed as the artificial reasons set out by the Chief Justice or Justice Wilson, but rather because its enforcement would have been a breach of the larger social goals justifying tax exemption.[66] While referring explicitly to the Honour of the Crown only once, there is little doubt that the concept was at the heart of his analysis.

THE HONOUR OF THE CROWN AND TREATY INTERPRETATION

R v Badger; R v Simon; R v Sundown

The Supreme Court's 1996 decision in *R v Badger*[67] occupies a prominent place in the genealogy of the Honour of the Crown. Eight years later, in her *Haida* judgment, Chief Justice

64 *Ibid* at 134-135, La Forest J.
65 *Ibid* at 136, La Forest J.
66 *Ibid* at 147-148, La Forest J.
67 *R v Badger,* [1996] 1 SCR 771, var'g (1993), 135 AR 286 (CA).

McLachlin identified *Badger* as the authority for the proposition that "[T]he Honour of the Crown is always at stake in its dealings with Indigenous peoples."[68] The specific contribution of Justice Cory's judgment to the understanding of the Honour of the Crown was Cory's illustration of how the interpretation of the terms of Treaty 8 "in the sense that they would naturally have been understood by the Indians at the time of the signing"[69] contributed to the development of the "visible and incompatible land use" test to determine occupied and unoccupied lands for hunting purposes.[70] *Badger* also identified principles for the interpretation of treaties and legislation that were required by the Honour of the Crown. These had been identified in *Taylor and Williams* by the Ontario Court of Appeal, but *Badger* gave them the *imprimatur* of the Supreme Court of Canada.[71]

In *Badger*, the Supreme Court applied the principles of interpretation required by the Honour of the Crown not only to Treaty 8, but also to the interpretation of the phrase "lands to which the said Indians may have a right of access" found in paragraph 12 of the Alberta *Natural Resources Transfer Agreement.*[72] A similar issue arose in 1999 in *R v Sundown*,[73] except the relevant treaty was Treaty 6 and the relevant constitutional provision was paragraph 12 of the Saskatchewan *Natural Resources Transfer Agreement*, which was identical to the Alberta provision considered in *Badger.* But the focus in *Sundown* differed from that in *Badger*. Whereas the earlier case focused on the interpretation of the *Natural Resources Transfer Agreement* required by the Honour of the Crown, *Sundown* was primarily concerned with the application of the same principles to the harvesting provision of Treaty 6.

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68 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16 [2004] 3 SCR 522, rev'g 2002 BCCA 462, var' g 2002 BCCA 147, rev'g 2000 BCSC 1280.

69 *Badger, supra* note 67 at 799, Cory J.

70 *Ibid* at 800, Cory J.

71 *Ibid* at 793-794, Cory J.

72 *Natural Resources Transfer Agreement, 1930* (*Constitution Act, 1930*, Schedule 3, (Saskatchewan), para 12.

73 *R. v. Sundown*, [1999] SCR 393, aff'g [1997] 4 CNLR 241 (SK CA), aff'g [1995] 3 CNLR 152 (SK QB), rev'g [1994] 2 CNLR 174, (SK PC).

Sundown was the confluence of the Honour of the Crown as it had developed through *Badger* and treaty interpretation as illustrated in the Supreme Court's 1985 decision in *Simon v the Queen.*[74] *Simon* involved the prosecution of a Mi'kmaq member of the Shubenacadie Indian Brook Band, who was charged with hunting with a rifle that was prohibited during a closed season.[75] The accused, James Matthew Simon, asserted his right to hunt under the Treaty of 1752, which provided that the Mi'kmaq retained the "Free Liberty of Hunting & Fishing as usual".[76] He was convicted at trial and the conviction was sustained by the Nova Scotia Court of Appeal on the various grounds of extinguishment by settlement, the conclusion that the Treaty of 1752 was not a source of a right to hunt, subsequent termination of the Treaty of 1752, Simon's failure to establish that he was a beneficiary of the Treaty of 1752 if it had survived, and the authority of Nova Scotia to regulate hunting by way of laws of general application.[77] The Supreme Court of Canada overturned the conviction in a unanimous decision, and the judgment by Chief Justice Dickson systematically rejected all of the reasons given by the Nova Scotia Court of Appeal.[78] The most significant reason given for the conviction by the lower courts was that even if Simon was successful in establishing that the Treaty of 1752 was a valid treaty when signed and the Treaty had not been terminated, the words "as usual" in the hunting guarantee would preclude hunting with a modern rifle. The Chief Justice rejected this argument on the basis that the words "as usual" did not refer to methods of hunting, and concluded that to be effective, the right to hunt "must embody those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds."[79]

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74 *Simon v the Queen,* [1985] 2 SCR 387, rev'g *R v Simon* (1982), 49 NSR (2d) 596 (CA).
75 *Ibid* at 390-391.
76 *Ibid* at 393-394.
77 *Ibid* at 395-397.
78 *Ibid* at 398-414.
79 *Ibid* at 403.

John Sundown, a member of the Joseph Bighead First Nation, made the same "reasonably incidental" argument in *R v Sundown.* In *Sundown* the action that was characterized as "reasonably incidental" to hunting was the construction of a 1,200 square foot cabin in Meadow Lake Provincial Park, which was contrary to Saskatchewan regulations governing provincial parks.[80] At trial in Provincial Court Sundown's argument was rejected, with the judge hearing the case concluding that "[T]here is a world of difference in the activity of *Simon,* namely possession of a gun and ammunition en route to hunt, and in the activity of constructing the log cabin by Mr. Sundown."[81] The Court of Queen's Bench overturned the conviction, but this decision did not cite reasons specific to Aboriginal law and dealt with evidentiary issues, noting the absence of evidence to justify the conclusions reached by the trial judge.[82] This situation changed upon the Crown's appeal to the Saskatchewan Court of Appeal. Justice Vancise wrote the majority judgment, and he began his analysis with a listing of the principles for the interpretation of treaties and statutes relating to Indigenous peoples. Among these was the principle that "the Honour of the Crown is at stake and it must always be assumed the Crown intends to fulfil its promises."[83] In *Sundown,* the Crown acknowledged that the accused had a right of access to the Meadow Lake Provincial Park for hunting purposes but that the construction of the hunting cabin and the felling of trees related to it were not "reasonably incidental."[84] Vancise followed *Simon* and concluded that the construction of the cabin was "reasonably incidental" to the traditional harvesting practices of Sundown and his fellow members of the Joseph Bighead First Nation.[85] In reaching this decision,

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80 *R v Sundown*, [1994] 2 CNLR 174 at para 8 (SK PC), rev'd [1995] 3 CNLR 152 (SK QB), rev'd [1997] 4 CNLR 241 (SK CA), rev'd [1999] SCR 393.

81 *Ibid* at para 35.

82 *R. v Sundown*, [1995] 3 CNLR 152 (SK QB), rev'g [1994] 2 CNLR 174 (SK PC), aff'd [1997] 4 C.N.R.L. 241 (SK CA), aff'd [1999] SCR 393.

83 *R v Sundown,* [1997] 4 CNLR 241 at para 7, Vancise JA (SK CA), aff'g [1995] 3 CNLR 152 (SK QB), rev'g [1994] 2 CNLR 174 (SK PC), aff'd [1999] SCR 393.

84 *Ibid* at para 10.

85 *Ibid* at para 49.

he cited the "uncontroverted" evidence that the "hub and spoke" method of hunting that was the preferred means of hunting traditionally employed by the Joseph Bighead First Nation. This method of hunting required the use of a "base camp," which the hunting cabin constructed by Sundown provided.[86] When Saskatchewan appealed to the Supreme Court of Canada, Justice Cory's judgment on behalf of a unanimous panel agreed with the Saskatchewan Court of Appeal. While concluding that there were situations in which the prohibition of a hunting cabin could be justified, there were none in *Sundown* since the Honour of the Crown required that justification involve more than the bare assertion that the prohibition was necessary for conservation.[87]

By the end of the twentieth century, the concept of the Honour of the Crown had followed the path described by Ronald Dworkin. It began in the mid-1960s as a lawyer's theory presented to the Supreme Court of Canada in *George*, where it was taken up by a single dissenting voice. A decade later it began working through the lower court system, moving from Provincial Court trials through summary conviction appeals, forming the basis of the 1981 Ontario Court of Appeal decision in *Taylor and Williams*. *Sundown* marked its return to the Supreme Court of Canada with the concept of "reasonably incidental", where the successive decisions of three appellate courts in Saskatchewan were affirmed unanimously.

R v Marshall

The outcome in *Sundown* was predictive of the decision of the majority of the Supreme Court in *Marshall*, in that once the Honour of the Crown allows (or requires) that "reasonably incidental" additions can be read into a provision of the guarantee of harvesting rights in a written agreement, it is only a small step to the opportunity (or the requirement) to read such a guarantee into an agreement. However, unlike the situation in *Sundown*, in *Marshall* the court did not

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86 *Ibid* at para 46.

87 *Sundown, supra* note 73 at paras 38-46.

unanimously agree as to what the Honour of the Crown requires. In *Marshall*, the majority judgment written by Justice Binnie held that the requirement in a 1760 Treaty that Mi'kmaq fishermen trade only at British "truckhouses" was not, as the literal wording of the Treaty suggested, merely a limitation on trade other than with the British. Rather, the requirement was part of an overall agreement between the parties to the Treaty regarding trade and harvesting, the effect of which was to guarantee a limited right of harvesting animals and fish for trade.[88] In part, this was simply a matter of treaty interpretation, since Binnie noted that the apparent restrictiveness of the Treaty provision was inconsistent with the more balanced exchange between the parties in the negotiations preceding the signing of the Treaty.[89] However, Binnie's conclusion transcended the interpretation of the words of the 1760 Treaty and required the effective insertion of an additional term. The Honour of the Crown provided a rationale for this action. Binnie noted that the law "has long recognized that parties make assumptions when they enter into agreements about certain things that give their arrangements efficacy."[90] Among the tools that Courts use is that of implying a contractual term consistent with the presumed intentions of the parties. He added that the interpretation of Indigenous-Crown treaties was an area in which the inclusion of implied terms could be particularly useful: "If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations."[91]

Binnie referred to *Sundown*, characterizing the earlier decision as one in which the *sui generis* nature of the Indigenous-Crown relationship justified the application of the concept of

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88 *R v Marshall,* [1999] 3 S.C.R 456 at 500-501, Binnie J., rev'g [1997] 3 CNLR 209 (NSCA).
89 *Ibid* at 484-487, Binnie J.
90 *Ibid* at 492-493, Binnie J.
91 *Ibid*, Binnie J.

implicit rights to support the meaningful exercise of explicit treaty rights notwithstanding the fact that no such implication would be justified in a non-Aboriginal law context. Binnie wrote that although in "ordinary commercial situations" the right to trade does not necessarily imply any right of access to things to trade, "I think the Honour of the Crown requires nothing less in attempting to make sense of the result" of the treaty negotiations in 1760.[92] He added that not to so interpret the discussion regarding trade and the associated harvesting would be an approach that "turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant" that "is inconsistent with the honour and integrity of the Crown."[93] Specifically, the Honour of the Crown would preclude an interpretation under which the Crown, seeking in good faith to address the trade demands of the Mi'kmaq, accepted the Mi'kmaq suggestion of a trading facility while denying any treaty protection to Mi'kmaq to obtain the things that were to be traded. Binnie stressed that the document he was interpreting was not a commercial contract, and "must be interpreted in a manner which gives meaning and substance to the promises made by the Crown."[94]

Marshall revealed that there were differences within the Supreme Court of Canada regarding the application of the Honour of the Crown in an Aboriginal context. Like *George, Marshall* contained a dissent. In the case of *Marshall*, the dissent was written by Justice McLachlin, who began with a list of the nine principles of treaty interpretation.[95] Only one of these principles, that in searching for the common intention of the parties, the integrity and Honour of the Crown is presumed,[96] expressly related to the Honour of the Crown, but that doctrine was also present as the baseline justification for six other principles, specifically that:

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92 *Ibid* at 493-494, Binnie J.
93 *Ibid* at 498-499, Binnie J.
94 *Ibid.*
95 *Marshall, supra* note 88 at 511-513, McLachlin J, dissenting.
96 *Ibid.*

- as a unique type of agreement, Aboriginal treaties require special principles of interpretation;
- treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories;
- the goal of treaty interpretation is to choose the interpretations of common intention that best reconciles the interests of both parties at the time the treaty was signed;
- in ascertaining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties;
- a technical or contractual interpretation of treaty wording should be avoided; and
- treaty rights must not be interpreted in a static or rigid way, but must be updated to provide for their modern exercise.[97]

On the specific facts of *Marshall*, Justice McLachlin disagreed with Binnie's analysis and preferred the conclusion reached by the trial judge after 40 days of evidence that there had been no misunderstanding between the British and the Mi'kmaq regarding trading in accordance with the Treaty.[98]

I suggest that Justice McLachlan's dissent should not be interpreted as an absence of consensus within the Court regarding the Honour of the Crown. There was no disagreement as to the significance of the concept, as it was at the heart of both judgments. Subsequent decisions of the Court consistently cite Justice McLachlin's list of interpretative principles when they illustrate the applicability of the Honour of the Crown in treaty cases. Leonard Rotman's suggestion that

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97 *Ibid.*

98 *Ibid.* at 515, McLachlin J, dissenting.

there is a legal difference between the two judgments and that Justice Binnie was more reflective of the fiduciary nature of the Indigenous-Crown relationship[99] overstates the difference between the two. The disagreement between Binnie and Marshall was limited to the question of whether the facts justified the former's non-literal interpretation of the truckhouse clause in that particular case.

HONOUR OF THE CROWN, FIDUCIARY DUTY, & ABORIGINAL TITLE

Honour of the Crown and Fiduciary Duty pre-*Haida*

As early as 1990, the Supreme Court's *Sparrow* decision[100] contained several references to the Honour of the Crown and fiduciary duty in a manner that suggested that for the Supreme Court the terms have related meanings. As an illustration of this approach, *Sparrow* cited *Guerin* and *Taylor and Williams* jointly as the source of the "guiding interpretive principle" that determines whether an infringement of an Aboriginal right can be justified,[101] although *Guerin* refers to fiduciary duty but not Honour of the Crown and *Taylor and Williams* refers to the Honour of the Crown and not fiduciary duty. But there are obvious differences between fiduciary duty and the Honour of the Crown. No matter how the Honour of the Crown is characterized, there is no doubt that it is a public law duty, while the *Guerin* decision states unequivocally fiduciary obligation is not.[102] While *Sparrow* left the precise relationship between the Honour of the Crown and fiduciary obligation uncertain, there is no doubt that the Honour of the Crown was initially introduced as not only being related to fiduciary obligation, but also secondary to and dependent

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99 Leonard I Rotman, "'My Hovercraft is Full of Eels': Smoking Out the Message in *R v Marshall*" (2000) 63:2 Sask L Rev 617 at 624-625.

100 *R v. Sparrow,* [1990] 1 SCR 1075 at 1108, aff'g [1987] 5 WWR 577 (BCCA).

101 *Ibid* at 1114.

102 *Guerin v R*, [1984] 2 SCR 335 at 385, Dickson J., rev'g [1983] 2 FC 656 (FCA), aff'g on other grounds [1982] 2 FC 285 (FCTD).

on it, since the Honour of the Crown was limited to being a standard to assess conduct within a relationship once that relationship has been characterized as a fiduciary one.[103]

Supreme Court of Canada decisions between *Sparrow* and *Marshall* did little to enhance the significance of the Honour of the Crown in the eyes of the Court. In his decision on behalf of the majority in *Van der Peet,*[104] Chief Justice Lamer referred to the Honour of the Crown as being an "implication" of the fiduciary relationship between the Crown and Indigenous peoples.[105] He added that it is this fiduciary relationship that requires the application of generous and liberal interpretation principles not only to treaties, but also to the entire Indigenous-Crown relationship and to the purposive analysis of s. 35(1) and its definition and scope.[106] In *R v Lewis*,[107] Justice Iacobucci was even more dismissive of the Honour of the Crown. His references to it were limited to quotations from the argument of the appellants that the Crown was honour bound to act in accordance with its fiduciary obligations to them.[108] Since Iacobucci determined that if the Crown had such a fiduciary obligation, it had fulfilled it,[109] the condition precedent for him to discuss the Honour of the Crown never arose.

Since *Marshall*'s only mention of fiduciary duty was in a quote from *Adams*,[110] the first decision that delinked the Honour of the Crown from its subsidiary relationship with fiduciary duty was *Wewaykum Indian Band v Canada*,[111] decided by the Supreme Court of Canada in

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103 *Sparrow*, *supra* note 100 at 1114.

104 *R. v Van der Peet*, [1996] 2 SCR 507, aff'g [1993] 4 CNLR 221 (BCCA), rev'g [1991] 3 CNLR 161 (BC SC), aff'g [1991] 3 CNLR 155 (BC PC).

105 *Ibid* at para 24, Lamer CJ.C.

106 *Ibid*, Lamer CJC.

107 *R v Lewis*, [1996] 1 SCR 921, aff'g (1993) 80 BCR (2d) 224 (CA), rev'g [1989] 4. CNLR 133 (County CT)

108 *Ibid* at para 49.

109 *Ibid* at para 52.

110 *R v Adams,* [1996] 3 SCR 101 at 132, Lamer CJC, rev'g [1993] 3 CNLR 98 (QC CA), rev'g [1985] 4 CNLR 39 (QC SC), rev'g [1985] 4 CNLR 123 (QC PC). The reference in *Marshall* is at *supra*, note 88 at 556, Binnie J.

111 *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245, aff'g [2000] 3. CNLR 303 (FCA), aff'g 1995), 99 FTR 1, (FCTD).

December 2002 and discussed in detail in Chapter II. The assertion that the *Wewaykum* decision was significant in the history of the Supreme Court's use of the Honour of the Crown seems at first to be counter-intuitive: Justice Binnie made a single reference to the Honour of the Crown in his decision, noting that the need to uphold the Honour of the Crown was somewhat related to the "ethical standards required of a fiduciary in the context of the Crown and Indigenous peoples."[112] However, his statement was made in the midst of a decision in which the Court held that the Crown did not have a fiduciary duty. In fact, the *Wewaykum* decision marked a retreat in the Supreme Court of Canada's use of a fiduciary approach to the Indigenous-Crown relationship. Binnie noted that Crown fiduciary obligations had not been held to apply in cases unrelated to the management of reserve land, although he did not close the door to doing so in appropriate circumstances.[113] Accordingly, Binnie was stating that the Honour of the Crown might apply in cases where the factual conditions to establish a fiduciary obligation were not present.

***Haida* & *Taku River* – The Three Paradigms**

Haida and *Taku River* reflected the confluence of two streams running through Canadian Aboriginal law, the role of fiduciary duty and the Honour of the Crown in the "*Sparrow* test" and Aboriginal title claims. The first of these cases involved an attempt by the Haida Nation to set aside the transfer of a tree farm licence by the British Columbia Ministry of Forests to forestry giant Weyerhauser.[114] The Haida Nation added a breach of the Crown's fiduciary duty as a secondary allegation[115] to the primary claim that as a matter of law its unaddressed Aboriginal title claim was a legal encumbrance that precluded the transfer of the licence.[116]

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112 *Ibid* at para 80.

113 *Ibid* at para 81.

114 *Haida Nation v British Columbia (Minister of Forests)* 2000 BCSC 1280, [2001] 2 CNLR 83 (BCSC), rev'd 2002 BCCA 147, rev'd 2004 SCC 73.

115 *Ibid, at* para 10(a).

116 There were actually two alternative claims, both of them raised as separate grounds. The first was that the asserted claim to Aboriginal title was an equitable interest that "imposed a fiduciary duty on the provincial

The judge hearing the application was satisfied that Canada and the Haida Nation were parties to a fiduciary relationship and he concluded that British Columbia and the Haida shared a similar relationship.[117] He nevertheless felt compelled to dismiss the application since he interpreted *Sparrow* as requiring the Haida Nation to establish its Aboriginal title case and the Crown's infringement of that title in order to impose on the Crown the duty to justify that infringement, through consultation or some other action.[118] The Haida Nation had not done so in the case before him, although it had established "a reasonable probability" that its Aboriginal title claim would succeed and a "substantial probability" that the Haida would be successful in asserting that the tree farm licence would infringe their Aboriginal right to harvest timber.[119]The judge concluded that British Columbia had a moral, rather than a legal duty to consult with the Haida and that the Honour of the Crown would be called into question if it failed to do so.[120]

This decision was overturned by a unanimous British Columbia Court of Appeal. The judgment, written by Justice Lambert, agreed with the motions judge that the Crown's fiduciary obligation to Indigenous peoples extended to British Columbia as well as Canada.[121] The application of this obligation in a constitutional context meant it would be contrary to section 35 to force the Haida to prove their rights in a trial before it was entitled to the relief it sought in the action.[122] Further, British Columbia's fiduciary obligation to consult was free-standing and not

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Crown to treat the timber on Block 6 as being legally encumbered by the Haida title, unless and until the Crown established that it was not so encumbered." *Ibid* at para 10(b). Alternatively, British Columbia had breached a fiduciary duty not to transfer the tree farm licence "without first consulting with the Haida Nation in good faith, and with the intention of substantially addressing their concerns with respect to their asserted Aboriginal title. *Ibid* at para 10(c).

117 *Ibid* at para 23.

118 *Ibid* at paras 27-29.

119 *Ibid* at para 47.

120 *Ibid* at para 64.

121 *Haida Nation v British Columbia (Minister of Forests)* 2002 BCCA 147 at para 34, rev'g 2000 BCSC 1280, var'd 2004 SCC 73.

122 *Ibid* at para 37.

limited to "justification."[123] Finally, two out of the three justices on the panel held that Weyerhauser also had a fiduciary duty to consult with the Haida before the replacement tree farm licence could issue.[124]

Both British Columbia and Weyerhauser appealed to the Supreme Court of Canada, and in a unanimous decision, British Columbia's appeal was dismissed and Weyerhauser's was allowed. Chief Justice McLachlin held that the interest being asserted by the Haida Nation did not give rise to a fiduciary obligation on the part of British Columbia.[125] With regard to Weyerhauser, she expressed doubt whether it was even possible legally for the recipient of a Crown disposition to share in the Crown's obligations to Indigenous peoples.[126]

McLachlin grounded the Crown's obligation to consult with the Haida Nation in the Honour of the Crown.[127] She held that the Honour of the Crown began with the initial Indigenous-European contact and its goal was the reconciliation of the pre-contact world of unchallenged Indigenous sovereignty and unquestioned Crown sovereignty throughout modern Canada.[128] She also made a significant change in earlier comments by the Supreme Court on the relationship between fiduciary obligation and the Honour of the Crown. While *Sparrow* and *Van der Peet* characterized the Honour of the Crown as little more than a contingent consequence of fiduciary obligation, the Chief Justice held that the Honour of the Crown was the more constant doctrine

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123 *Ibid* at para, 55.

124 *Ibid* at para 48. The initial decision that Weyerhauser shared the Crown's fiduciary duty was unanimous. After the initial Court of Appeal decision was announced, a second hearing was held after it was noted that the Haida Nation had not alleged in its pleadings that Weyerhauser shared in the Crown's fiduciary obligation. In the judgment following the second hearing, Justice Low resiled from his earlier concurrence and dissented from the decision that Weyerhauser owed a fiduciary duty to the Haida Nation. Justice Lambert and Chief Justice Finch repeated their initial conclusion, although the latter did so partially, and as such, the majority endorsed Finch's one ground for the conclusion rather than the two cited by Lambert. *Haida Nation v British Columbia (Minister of Forests)*, 2002 BCCA 462, aff'g 2002 BCCA 147, rev'g 2000 BCSC 1280, rev'd 2004 SCC 73.

125 *Haida, supra* note 68 at para 18.

126 *Ibid* at para 54.

127 *Ibid* at para 13.

128 *Ibid* at 16.

and fiduciary obligation was a subset of the Honour of the Crown when certain additional conditions were met.[129]

As described by McLachlin, the Honour of the Crown is as old as the earliest contact between Europeans and Indigenous peoples. In fact, its source is found in that very contact, and its nature is such that while there was a point at which it began, there is no point at which it will end. She stressed that "[I]n all its dealings with Indigenous peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably."[130] McLachlin continued that the Crown conduct required by the Honour of the Crown varied depending upon the circumstances. If the Crown had assumed discretionary control over specific assets of a first nation, the Honour of the Crown expressed itself as a fiduciary obligation.[131] The process of negotiating treaties was "infused" with the Honour of the Crown, as was their implementation.[132] Most importantly for the purpose of the Supreme Court of Canada in the *Haida* case, the Crown was obliged to deal honourably with Indigenous peoples who were neither parties to treaties nor in active negotiations regarding them, with the ultimate aim of engaging in "negotiations leading to a just settlement of aboriginal claims."[133] Included in this was the obligation to consult with Indigenous peoples prior to undertaking any activity or making any decisions that might have an impact on their Aboriginal rights.[134]

Finally, McLachlin clarified the relationship between the Honour of the Crown and the *Sparrow* test when applied to situations in which Aboriginal title has been asserted but not proven

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129 *Ibid* at para 18.
130 *Ibid* at para 17.
131 *Ibid* at para 18.
132 *Ibid* at para 19.
133 *Ibid* at para 20.
134 *Ibid.*

In contrast to the conclusions by the chambers judge that he could not impose a duty to consult in the absence of satisfying the first part of the *Sparrow* test that infringement of an Aboriginal right had been proven, the Chief Justice held that the limitation of a remedy to situations in which an infringement of Aboriginal rights or title had been established was itself inconsistent with the Honour of the Crown, particularly in Aboriginal title cases.[135] To allow resources to be depleted or development to proceed during the time required to prove Aboriginal title would be inconsistent with the Crown's obligation to treat Indigenous peoples fairly and honourably by protecting them from exploitation.[136] Accordingly, the Chief Justice interpreted the process of justification process outlined in *Sparrow* as applicable to the time "before the right" was proven [emphasis in original].[137] The result of the decision was the introduction of "the *Haida* test," which requires the Crown to engage in justificatory activities aimed at reconciliation whenever it "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[138]

In one sense, *Haida* represented the completion of the adjudication change posited by Ronald Dworkin. Although the Honour of the Crown made several appearances in Supreme Court of Canada jurisprudence in the 1990s, *Sparrow* left the significance of the respective roles of the Honour of the Crown and fiduciary duty uncertain. *Haida* marked the complete transition of the Honour of the Crown from its humble origins to become the dominant paradigm in Aboriginal law.

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135 *Haida, supra* note 68 at paras 28-31.
136 *Ibid* at paras 26-27.
137 *Ibid* at para 34.
138 *Ibid* at para 35.

Haida was heard by the Supreme Court together with another British Columbia case, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*,[139] and the decisions in the cases were announced together. While less ground-breaking than *Haida*, the *Taku* decision made two important contributions to an understanding of the Honour of the Crown. The first was an even more forceful rejection of the Crown's argument that *Sparrow* required proof of the existence of a right and an infringement before consultation was required. McLachlin described this position as reflecting "an impoverished vision of the Honour of the Crown and all that it implies."[140] Second, notwithstanding the Supreme Court's displeasure with the Crown's argument regarding the circumstances that gave rise to the duty to consult, the Court concluded that on the facts of *Taku River*, that obligation had been fulfilled. The case arose out of a judicial review application by the Taku River First Nation to set aside a Project Approval Certificate regarding a proposal to re-open a mine.[141] Taku River was included in the regulatory process required before the mine could be re-opened, which included membership on the committee that set the specifications for a report that the project proponent,[142] participation in the review of that report, which required the proponent to address deficiencies in the initial report,[143] completion of traditional land use studies, working with a consultant chosen by Taku River to address issues identified by it, and the authority to require an addendum to the report prepared by the consultant to address Taku River's concerns.[144] Only after the completion of this addendum did the staff of the Environmental Assessment Office prepare a Recommendations Report that explicitly identified Taku River's concerns and points of disagreement as well as suggested mitigation

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139 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 S.C.C. 74, rev'g 2002 BCCA. 59, rev'g 200 BCSC 1001.
140 *Ibid* at para 24.
141 *Ibid* at para 19.
142 *Ibid* at paras 9-10.
143 *Ibid* at para 11.
144 *Ibid* at para 13.

measures.[145] Taku River filed an application for judicial review, which was successful in the British Columbia Supreme Court and the Court of Appeal dismissed British Columbia's appeal with one dissent.[146]

Like the decision in *Haida*, the Supreme Court of Canada decision in *Taku River* was unanimous and was written by the Chief Justice. She indicated that the threshold established to require consultation had been met, and British Columbia was obliged to consult and if necessary accommodate Taku.[147] In summarizing the history of the consultation process, McLachlin commented that the process had taken almost four years,[148] that Taku River had received financial assistance to participate in the process,[149] and that opportunities to consult remained throughout the life of the project.[150] Under the circumstances, the Supreme Court concluded that the process followed by British Columbia was consistent with the Honour of the Crown.[151]

Haida and *Taku River* marked the point at which the Honour of the Crown, which had hitherto been limited to treaty interpretation,[152] emerged as what Jamie Dickson has called the "predominant, it not the exclusive" test of Crown conduct in its relations with Indigenous peoples.[153] It has maintained this significance in the field of consultation and accommodation since that time. While the Honour of the Crown owes its description to *Haida*, it was *Taku River* that applied the test to establish that the Honour of the Crown was not an impossible goal, but one that could be met with diligent effort on the part of the Crown. It was likely this balance that led to a

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145 *Ibid* at para 15.
146 *Ibid* at paras 19-20.
147 *Ibid* at paras 25, 28.
148 *Ibid* at para 33.
149 *Ibid* at para 37.
150 *Ibid* at para 45.
151 *Ibid* at para 32.
152 Timothy McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Persons* (Markham, Ontario: LexisNexis Canada Inc, 2005) at 2.
153 Jamie D. Dickson, "The Honour of the Crown: Making Sense of Crown Liability in Crown/Aboriginal law in Canada" (LLM. Thesis, University of Saskatchewan, Faculty of Law, 2014) at 10.

more ambivalent media response rather than the anger and near-hysteria that accompanied *Delgamuukw.* Jeffrey Simpson, one of the most outspoken commentators in the earlier controversy, referred in his *Globe and Mail* column to "McLachlin's reality court," in which his description of the practical consequences of maintaining the Honour of the Crown was purely factual and not accompanied by criticism. Simpson identified that if claims are weak or an infringement is minor, the situation might require little more than notice. If a case is stronger, the requirements increase, with what is required being determined by the "Honour of the Crown."[154]

Honour of the Crown and Fiduciary Duty in a Treaty Context

In her judgment in *Haida,* Chief Justice McLachlin indicated that the Honour of the Crown arose with the European assertion of sovereignty and infused the relationship thereafter. However, while the Court said that the conduct of the Crown in the negotiation of treaties was subject to evaluation in accordance with the Honour of the Crown, what the Court actually did in *Haida* was establish that the Honour of the Crown required consultation with Indigenous peoples in a pre-treaty relationship with the Crown upon certain circumstances.

The question of what the Honour of the Crown required once Indigenous peoples had, in the words of Chief Justice McLachlin, "reconciled their claims with the sovereignty of the Crown through negotiated treaties,"[155] arose in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*,[156] considered by the Supreme Court the year after *Haida* and *Taku River*. This case dealt with the "taking up of lands" by the Crown pursuant to Treaty 8, which would have the right of removing these lands from the category of "unoccupied Crown lands" on which

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154 Jeffrey Simpson, "Judging McLachlin's reality court" *Globe and Mail* (November 24, 2004) A25.

155 *Haida, supra* note 68 at para 25.

156 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388, rev'g 2004 FCA 66, aff'g 2001 FCT 1426.

Indigenous peoples could exercise wildlife harvesting rights.[157] The Mikisew Cree First Nation asserted that the Crown was required to consult with it prior to approving the construction of a winter road that would have been immediately adjacent to a Mikisew Cree Reserve and would have traversed the traplines of 14 Mikisew Cree families and the hunting grounds of about 100 Mikisew Cree members.[158]

In speaking for a unanimous Court, Justice Binnie dealt expeditiously with any the claim by Mikisew Cree that the case gave rise to a fiduciary duty of the case by indicating at the start of his analysis that "it is not necessary for present purposes to invoke fiduciary duties."[159] One of the arguments raised by the Crown was that the Honour of the Crown had been satisfied when the Crown consulted with Mikisew Cree and the other Treaty 8 First Nations in the process that led to the signing of Treaty 8 in 1899. Justice Binnie quoted federal counsel's assertion,

> The treaty itself constitutes the accommodation of the aboriginal interest; taking up lands … leaves intact the essential ability of the Indians to continue to hunt, fish and trap. As long as that promise is honoured, the treaty is not breached and no separate duty to accommodate arises [emphasis in original]."[160]

Justice Binnie rejected this argument completely. In addition to repeating the conclusion from *Haida* that "the Honour of the Crown infuses every treaty and the performance of every treaty obligation,"[161] he added that the Honour of the Crown was not fulfilled with the signing of treaties, which were "the first step in a long journey that is unlikely to end any time soon."[162] Binnie's

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157 The "taking up" of lands is covered by the provisions of the various treaties more commonly referred to as the "harvesting clause". In Treaty 8 this provided that Indigenous peoples "shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered… saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." *Treaty No 8 Made June 21, 1899 and Adhesions, Reports, Etc* (Ottawa: Queen's Printer and Controller of Stationery, 1966).

158 *Mikisew Cree, supra* note 156 at para 3.

159 *Ibid* at para 51.

160 *Ibid* at para 53.

161 *Ibid* at para 57.

162 *Ibid* at para 56.

decision also clarified that the Honour of the Crown governs the interpretation of the Indigenous-Crown relationship whether or not the facts give rise to a fiduciary duty.[163]

The Supreme Court returned to the question of "taking up land" in its 2014 decision in *Grassy Narrows First Nation v Ontario (Natural Resources)*,[164] which dealt with a unique form of the harvesting clause in Treaty 3, signed in 1873. Treaties 4 through 8 inclusive contained harvesting clauses in the form set out in the discussion of Treaty 8 above.[165] However, for reasons that are not relevant to my dissertation, the harvesting clause of Treaty 3 stated

> shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered… saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada[166]

In *Grassy Narrows,* the plaintiffs asserted that given the wording of the harvesting clause of Treaty 3, Ontario could not take up land for "settlement, mining, lumbering or other purposes" without the involvement of the federal government in the process.[167] After reviewing the background, negotiation, and implementation of Treaty 3, the trial judge agreed, ruling that it would violate the Honour of the Crown if Ontario were to continue to violate the process set up in Treaty 3 providing a role for the federal government in taking up land.[168]

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163 *Ibid* at para 51.

164 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 50, [2014] 2 SCR 447, aff'g *Keewatin v Ontario (Minister of Natural Resources),* 2013 ONCA 158, rev'g *Keewatin v Minister of Natural Resources,* 2011 ONSC 4801.

165 *Supra* note 157.

166 Indian Affairs and Northern Development, *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions* (Ottawa: Queen's Printer, 1978).

167 *Keewatin v Minister of Natural Resources,* 2011 ONSC 4801 at paras 12-16, rev'd *Keewatin v Ontario (Minister of Natural Resources),* 2013 ONCA 158, rev'd *Grassy Narrows First Nation (Natural Resources)*, 2014 SCC 48.

168 *Ibid* at para 1625.

The trial judgment describes the one point in the trial when the question of fiduciary duty arose. Ontario sought confirmation that any federal obligations assumed by Ontario would not be fiduciary in nature.[169] The judge did not give Ontario that assurance and instead employed a double negative, indicating that he could not assure Ontario that the relevant obligations were not fiduciary,[170] although nothing in his decision suggested that they were. The Ontario Court of Appeal judgment reversing the trial decision made no reference to fiduciary considerations and held that Ontario's capacity to take up lands was limited only by its obligation to act consistently with the Honour of the Crown.[171]

Chief Justice McLachlin's judgment on behalf of a unanimous Supreme Court of Canada affirmed the Ontario Court of Appeal decision, holding that while "Ontario and only Ontario" has the right to take up lands under Treaty 3, this authority must be exercised "in conformity with the honour of the Crown."[172] However, she added that Ontario is also "subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests", citing *Mikisew Cree v Minister of Canadian Heritage* in support of that proposition.[173] The Court had determined in that decision that taking up land did not give rise to a fiduciary duty.[174] Therefore, *Grassy Narrows* stated that in taking up land Ontario is obliged to fulfil the fiduciary duty to consult in accordance with the

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169 *Ibid* at para 1463.

170 *Ibid* at para 1470. This exchange was not the only sign of tension in the interaction between the trial judge and counsel for Ontario. In his judgment, the trial judge complained that "[F]rom the beginning of opening arguments until the end of the case, counsel for Ontario chanted the phrase 'Honour of the Crown' almost like a mantra, as if the reassuring cadence of its repetition would salve any concerns this Court might otherwise have about its failure to honour Treaty Rights in the past." *Ibid* at para 1598.

171 *Keewatin v Ontario (Minister of Natural Resources),* 2013 ONCA 158 at para 89, rev'g *Keewatin v Minister of Natural Resources,* 2011 ONSC 4801, aff'd *Grassy Narrows First Nation v Ontario (Natural Resources),* 2014 SCC 48.

172 *Grassy Narrow, supra* note 164 at para 50.

173 *Ibid*.

174 *Mikisew Cree, supra* note 156 at para 51.

principles set in an earlier case in which the duty to consult regarding taking up land was described as non-fiduciary.

The Future of Fiduciary Duty?

As early as 1995, Justice Gonthier indicated in *Blueberry River* that given the opportunity, his preference would have been to deal with reserve surrenders as trusts, rather than instances of fiduciary duty. But it was not until 2010 that a member of the Supreme Court of Canada openly questioned the use of a fiduciary approach to Aboriginal law matters *per se*. In a concurring judgment in *Beckman v. Little Salmon/Carmacks First Nation*[175] a consultation case that arose in the Yukon Territory, Justice Deschamps, joined by Justice LeBel, expressed two concerns about fiduciary duty - first that it was limited to certain types of Indigenous-Crown interactions, and second that fiduciary duty had paternalistic overtones. She noted with approval the recent tendency of the Supreme Court of Canada to substitute the Honour of the Crown for fiduciary duty, and at least implicitly suggested that the Honour of the Crown should displace fiduciary duty as the paradigm in all Indigenous-Crown relations.[176]

It did not take Chief Justice McLachlin long to respond to the Justice Deschamps' criticism of a fiduciary approach to Aboriginal law. In a decision released only six months after *Beckman*, the Chief Justice confirmed in her judgment in *Alberta v. Elder Advocates of Alberta Society* that under the appropriate circumstances the Crown will owe a fiduciary duty to Indigenous peoples.[177] Among the issues in *Elder Advocates* was whether allegations of a breach of fiduciary duty by Alberta relating to the treatment of 12,500 residents of Alberta's long-term care facilities should

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175 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103, aff'g *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*, 2008 YKCA 13, rev'g 2007 YKSC 28.

176 *Ibid* at para 105, Deschamps J, concurring.

177 *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261, var'g *Elder Advocates of Alberta Society v. Alberta* 2009 ABCA 403, aff'g 2008 ABQB 490.

be struck from the pleadings in the action. The judge hearing a certification application determined that the action was properly characterized as a class action but struck the parts of the Statement of Claim alleging breaches of fiduciary duty based on the conclusion that the allegations had no chance to succeed at trial.[178] Both findings were appealed, and the Alberta Court of Appeal affirmed the certification decision and reversed the striking of the fiduciary allegations, restoring them to the pleadings.[179]

In the Supreme Court, the decision of the certification judge, including the striking of the fiduciary allegations, was restored.[180] The actual outcome of *Elder Advocates* is immaterial for the purposes of Aboriginal law. What was significant was how Chief Justice McLachlin explained the difference between the application of a fiduciary analysis in an Aboriginal law context and in cases involving non-Indigenous persons. She confirmed that the comment in *Sparrow* that the Crown has a responsibility to act in a fiduciary capacity with respect to Aboriginal peoples remained the position of the Supreme Court.[181] She added that this arose out of the "unique and historic nature of Crown-Aboriginal relations," and it was not intended to act as a "template" for a duty of the Crown to other citizens who were not party to this historic relationship.[182] Accordingly, the clear commitments made by the Crown to Indigenous peoples that resembled those "where a fiduciary duty has been recognized on private actors"[183] were not present in *Elder Advocates*.[184]

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178 *Elder Advocates of Alberta Society v. Alberta,* 2008 ABQB 490 at paras 377, (1908), 94 Alta. L.R. (4th) 10 (QB). var'd 2009 ABCA 403, aff'd *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24.

179 *Elder Advocates of Alberta Society v. Alberta,* 2009 ABCA 403 at paras 68,80,83, & 98, (2009), 16 Alta LR (5th) 1, (var'g 2008 ABQB 403, var'd *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24.

180 *Elder Advocates, supra* note 177.

181 Chief Justice McLachlin confirmed that *Sparrow* held that the Crown owed a fiduciary duty to revved Indigenous peoples "with regard to their lands". *Ibid* at para 39.

182 *Ibid* at para 40.

183 *Ibid* at para 48.

184 *Ibid* at para 63.

Crown Promises of a Constitutional Nature

While Chief Justice McLachlin's comments in *Elder Advocates* could be interpreted as an endorsement of the use of fiduciary analysis in an Aboriginal law context, she did not feel the need to make such use of fiduciary duty in an appeal of the decision of the Manitoba Court of Appeal in *Manitoba Métis Federation Inc. v Canada (Attorney General)*[185].

In that case, the trial judge in *Manitoba Métis* put a curious interpretation on the relationship Justice Dickson had described in *Guerin* between Aboriginal title and fiduciary obligation. Justice MacInnes concluded that Métis did not possess Aboriginal title,[186] and since his interpretation of *Guerin* was that the Crown's fiduciary obligation arose out of Aboriginal title, Métis could not claim to be the beneficiaries of a fiduciary duty.[187] On appeal, a unanimous Manitoba Court of Appeal concluded in 2010 that the trial judge had erred in his analysis of fiduciary matters.[188] While it is not entirely certain how the Court of Appeal reached this decision, the judgment appeared to hold that the very existence of Aboriginal title within the law of Canada means that any Indigenous group that has a cognizable interest in lands is owed a fiduciary obligation by the Crown whether or not it has Aboriginal title to those particular lands.[189] However, this analysis availed the Métis plaintiffs nothing, since the Court of Appeal concluded that even though the trial judge believed that no fiduciary obligation was owed to the Métis in the historic events that gave rise to the litigation, he had nonetheless investigated the matter and concluded that any duty had been fulfilled in any event. Turning to the Honour of the Crown, the Manitoba Court of Appeal held that the promises in the *Manitoba Act* that related only to the Métis of

185 *Manitoba Métis Federation Inc. v Canada (Attorney General)* 2007 MBQB 293, (1907), 223 Man R (2d) 42 (QB), aff'd 2010 MBCA 71, rev'd 2013 SCC 14.
186 *Ibid* at para 593.
187 *Ibid* at para 631.
188 *Manitoba Métis Federation Inc. v Canada (Attorney General)* 2010 MBCA 71 at para 432, aff'g 2007 MBQB 293, rev'd 2013 SCC 14.
189 *Ibid* at paras 479-502.

Manitoba[190] did engage the Honour of the Crown,[191] but it also concluded that Honour of the Crown did not give rise to freestanding Crown responsibility and that the Honour of the Crown "has not been recognized by the Supreme Court of Canada as an independent cause of action"[192] outside of cases dealing with the duty to consult.[193] The Court of Appeal found no palpable and overriding error in trial judge's decision and dismissed the appeal.[194]

In the Supreme Court of Canada, Chief Justice McLachlin and Justice Karakatsanis were the co-authors of the judgment of the six judges forming the majority. The first matter addressed in their judgment was whether undertakings made to the Métis of Manitoba in sections 31 and 32 of the *Manitoba Act, 1870*[195] imposed a fiduciary duty on the federal Crown. They began with confirmation that in general the relationship between Métis and the Crown is fiduciary in nature, but was subject to the caveat that not all dealings between parties to a fiduciary relationship are governed by fiduciary obligations.[196] For this obligation to arise, it is necessary to establish that the Crown administers the Indigenous interest in lands or property, which requires the identification of a specific or cognizable Indigenous interest in lands or property and a Crown undertaking of discretionary control over that interest.[197] McLachlin and Karakatsanis concluded that neither of these conditions were present. They agreed with the trial judge that the Manitoba Métis lacked the necessary communal Aboriginal title to land to give rise to a Crown fiduciary

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190 The litigation concerned two sections of the *Manitoba Act*. Section 31 called for the distribution of 1,400,000 acres of land to the children of Métis families. Section 32 undertook to protect various interests of land that had been recognized in a *de facto* manner by the Hudson's Bay Company but which had not been registered as legal interests. While the majority of the settlers who would have benefitted from section 32 were Métis, there were non-Indigenous members of this class as well. *Manitoba Act, 1870,* SC 1870, c 3, ss 31, 32, reprinted in RSC 1985, Appendix II, Schedule, Item 8.

191 *Manitoba Métis Federation Inc*, *supra* note 188 at para 423.

192 *Ibid* at para 422.

193 *Ibid* at para 428.

194 *Ibid* at para 737(g).

195 *Manitoba Act, supra* note 190.

196 *Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14 at para 48, McLachlin CJC and Karakatsanis J, [2013] 1 SCR 623, rev'g 2010 MBCA 71, rev'g 2007 MBQB 293.

197 *Ibid* at para 51, McLachlin CJC and Karakatsanis J.

duty.[198] With regard to the Crown's discretionary control, the majority noted that to elevate the exercise of this power to the level of fiduciary obligation, it "must be coupled with an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty."[199] They could find no such undertaking in sections 31 and 32,[200] and they concluded that in implementing the programs outlined in those provisions the Crown did not owe a fiduciary obligation to the Métis of Manitoba.[201]

However, the Chief Justice and Justice Karakatsanis indicated early in their judgment that the Honour of the Crown would play a substantial role in their analysis. They began with the conclusion that section 31 of the *Manitoba Act* "constitutes a constitutional obligation to the Métis people of Manitoba … specifically to provide the Métis children with allotments of land.[202] This promise had both immediate and longer-term goals. The immediate one was to give the Métis children a "head start over the expected influx of settlers from the east". The longer-term purpose was to reconcile the Métis' interests in the Manitoba with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. The judgment held that the obligation set out in section 31 of the *Manitoba Act* did not impose a fiduciary or trust duty on the government, although as a solemn constitutional obligation to the Métis people of Manitoba it engaged the Honour of the Crown. This required the government to act with diligence in pursuit of the fulfillment of the promise, and on the findings of the trial judge, the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled. The judgment concluded that under the circumstances, the Honour of the Crown was not barred by the law of limitations or the

198 *Ibid* at para 59, McLachlin CJC and Karakatsanis J.
199 *Ibid* at para 61, McLachlin CJC and Karakatsanis J.
200 *Ibid* at para 62-63, McLachlin CJC and Karakatsanis J.
201 *Ibid* at para 64, McLachlin CJC and Karakatsanis J.
202 *Ibid* at para 9, McLachlin CJC and Karakatsanis J.

equitable doctrine of laches, and as a result the majority concluded that the Métis claimants "are entitled to a declaration that Canada failed to implement section 31 as required by the Honour of the Crown."[203] Noting that past decisions of the Supreme Court had found that the Honour of the Crown was engaged by section 35(1) of the *Constitution Act, 1982*[204] and treaty promises,[205] the decision analogized that the Honour of the Crown was engaged by an explicit obligation to Indigenous peoples that has been enshrined in the Constitution,[206] as was the case with section 31 of the *Manitoba Act*.

The judgment agreed with the Manitoba Court of Appeal that the Honour of the Crown is not a cause of action in itself, but rather a means of evaluating how obligations engaging it are fulfilled.[207] The Honour of the Crown requires that in implementing a constitutional obligation to Indigenous peoples, the Crown must satisfy two conditions. The first is to take a broad purposive approach to the interpretation of the promise.[208] The second is to "act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests."[209] In applying these tests to the implementation of section 31 of the *Manitoba Act*, Chief Justice McLachlin and Justice Karakatsanis concluded that the reconciliation of interests of the Manitoba Métis community with the sovereignty of the Crown and the creation of the province of Manitoba required that the anticipated transfer of lands to Métis children proceed promptly. Only by providing the Métis with a "head start" in the acquisition of land while such an advantage was possible could reconciliation be achieved.[210] The decision concluded that the facts of the case

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203 *Ibid.*
204 *Ibid* at para 69, McLachlin CJC and Karakatsanis J.
205 *Ibid* at para 71, McLachlin CJC and Karakatsanis J.
206 *Ibid* at paras 70, 91, 94, McLachlin CJC and Karakatsanis J.
207 *Ibid* at para 73, McLachlin CJC and Karakatsanis J.
208 *Ibid* at paras 75, 76, McLachlin CJC and Karakatsanis J.
209 *Ibid* at paras 75, 78, McLachlin CJC and Karakatsanis J.
210 *Ibid* at paras 98, 99, McLachlin CJC and Karakatsanis J.

demonstrated a consistent pattern of inattention, for which there was no adequate explanation, which had the effect of frustrating rather than fulfilling the Crown's constitutional obligation.[211]

Noting that the Supreme Court had established that statutory limitation periods could not prevent the courts, as guardians of the constitution, from issuing declarations regarding the constitutionality of legislation, McLachlin and Karakatsanis held that by extension, limitation periods could not prevent them from issuing a declaration regarding the constitutionality of Crown conduct.[212] The Court was confronted with a constitutional grievance that had been outstanding for almost a century and a half. If the operation of limitation periods had the effect of preventing a declaration by the Court, the goal of reconciliation would not be achieved and the reconciliation of Métis with Crown sovereignty would remain "unfinished business".[213] Accordingly, McLachlin and Karakatsanis concluded that the Manitoba Métis Federation and the individual plaintiffs were entitled to a declaration that the manner in which the distribution of land to Métis children under section 31 of the *Manitoba Act* amounted to a breach of the Honour of the Crown, and the appeal was allowed to that extent only.[214]

Justice Rothstein was joined by Justice Moldaver in an dissent that accused the majority of no longer requiring Indigenous peoples to prove a fiduciary obligation by the Crown before a court can find the Crown liable for the non-fulfilment of a promise.[215] He dismissed the majority's finding that the Crown could be made liable for an unfulfilled promise by the Honour of the Crown as the introduction of a new "fiduciary-duty-light" liability.[216] There was an air of disingenuity surrounding Rothstein's failure to recognize the abandonment of fiduciary obligation-based

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211 *Ibid* at paras 107-110, 117, 123, McLachlin CJC and Karakatsanis J.
212 *Ibid* para 135, McLachlin CJC and Karakatsanis J.
213 *Ibid* at para 140, McLachlin CJC and Karakatsanis J.
214 *Ibid* at para 154, McLachlin CJC and Karakatsanis J.
215 *Ibid* at para 208, Rothstein J, dissenting.
216 *Ibid*.

liability in favour of Honour of the Crown-based liability since the *Haida* decision in 2004. Jamie Dickson has blamed the Chief Justice's judgment in *Haida* for Rothstein's opportunity to take the position he did, arguing that McLachlin should have been clearer in *Haida* that the Supreme Court was choosing to replace fiduciary obligation with the Honour of the Crown as the guiding principle in all cases other than reserve surrenders.[217] This would not have been impossible, as McLachlin could have done the same thing to fiduciary obligation in *Haida* that she did to interjurisdictional immunity in *Tsilhqot'in* – leave the doctrine intact while putting a fence around Aboriginal law to prevent its application there. However, McLachlin had confirmed in *Elders Advocates* and would repeat later in *Tsilhqot'in* that she had no intention of moving in that direction.

As to the merits of the case Justice Rothstein contended that delays in the implementation of Section 31 could be explained given the circumstances of the 1870s.[218] Rothstein also objected to what he characterized as the majority's development of a new duty, the duty to fulfill solemn obligations, grounded in the Honour of the Crown.[219] The dissent seemed to object not only to the views of the majority in the present case, but also to the Supreme Court's reasoning in a line of cases reaching back to *Haida* that concluded that a breach of the Honour of the Crown would entitle Indigenous claimants to relief even in the absence of evidence of a specific interest necessary to ground a fiduciary claim.[220] His description of the Honour of the Crown as "fiduciary duty-light" reflected the view that the majority's actions represented "a significant expansion of Crown liability."[221]

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217 Dickson, *supra* note 34 at 51-52.
218 *Manitoba Métis Federation, supra* note 196 at paras 165-202, Rothstein J, dissenting.
219 *Ibid* at para 203, Rothstein J, dissenting.
220 *Haida, supra* note 68 at para 18.
221 *Manitoba Métis Federation, supra* note 196 at para 208, Rothstein J, dissenting.

Rothstein saved his strongest criticism for the majority's conclusion that no statute of limitations prevented the Court from issuing the declaration that it did. He characterized the actions of his colleagues as creating "a general exception from limitations legislation for constitutionally derived claims" that was not consistent with the practice of the Supreme Court.[222] He denied that the majority's characterization of the case was correct, and in his view, the case involved a factual dispute about events that occurred more than 130 years earlier.[223] The dissent answered the majority's conclusion that reconciliation required an exception to statutory limitation periods by noting that the application of limitation periods was not discretionary[224] and that the position taken by the majority substituted the Court's views on policy for the legislature's and amounted to legislating social policy.[225]

Rothstein registered three additional objections to the majority's conclusion that the Aboriginal law context of the case required reconciliation to be the Court's overarching consideration. First, in doing so, the majority called into question the Court's decision in *Canada (*Attorney *General) v Lameman*[226] that limitation periods applied to Aboriginal law cases in the same way they did to other litigation.[227] Second, he denied that the case was based on an Aboriginal right and therefore involved ongoing legal entitlements. Rather, in his view it dealt with a constitutional obligation that had been fulfilled more than a century ago.[228] Further, the dissent rejected the majority's assertion that if the claim were barred by limitations statutes it would

222 *Ibid* at para 224, Rothstein J, dissenting.
223 *Ibid* at para 227, Rothstein J, dissenting.
224 *Ibid* at para 229, Rothstein J, dissenting.
225 *Ibid* at para 230, Rothstein., dissenting.
226 *Canada (Attorney General) v. Lameman*, 2008 SCC 14, rev'g 2006 ABCA 392, aff'g 2004 ABQB 655. In Chapters V and VI, I discuss whether Justice Rothstein was correct in suggesting that *Manitoba Métis Federation* overruled *Lameman* or an exception to *Lameman*, the effect of which is unknown.
227 *Manitoba Métis Federation, supra* note 196 at para 254, Rothstein J., dissenting.
228 *Ibid* at para 255, Rothstein J, dissenting.

perpetuate "an ongoing rift in the national fabric."[229] Rothstein argued that the issue of what amounts to a rift in the national fabric was not legally cognizable and was instead a political or sociological question.[230]

***Tsilhqot'in* – Aboriginal Title and the Return of Fiduciary Duty**

After the decision in *Manitoba Métis Federation* in March 2013, it appeared that some clarity had been achieved in Canadian Aboriginal law. Notwithstanding Chief Justice McLachlin's insistence that Crown fiduciary duty remained a part of Aboriginal law, the Supreme Court had in *Haida, Taku River, Mikisew Cree,* and *Manitoba Métis Federation* declined to treat the Indigenous interest at issue as sufficient to give rise to a fiduciary claim. After the flurry of media concern after *Delgamuukw*, the only Aboriginal title case to reach the Supreme Court of Canada since that decision was *R v Marshall/R v Bernard*, in which Chief Justice McLachlin had applied the test for Aboriginal title set out by Chief Justice Lamer and determined that the Mi'kmaq of New Brunswick and Nova Scotia had not established Aboriginal title claims to areas in both provinces.[231]

All of this changed in June 2014 with the release of the Supreme Court of Canada decision in *Tsilhqot'in v British Columbia*.[232] Not only did the decision represent the first successful Aboriginal title claim in Canada, it brought with it a potential revival of Crown fiduciary duty as a significant concept in Canadian Aboriginal law. Prior to the release of the Supreme Court of Canada decision in *Tsilhqot'in Nation v British Columbia* in June 2014, Indigenous peoples would have been forgiven for feeling sceptical that Canadian courts would ever confirm that a claim of

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229 *Ibid* at para 140, McLachlin CJC and Karakatsanis J.

230 *Ibid* at para 263, Rothstein J., dissenting.

231 *R v Marshall/Bernard*, 2005 SCC 43, [2005] 2 SCR 220, rev'g 2003 NBCA 55, aff'g 2002 NBQB 82, aff'g [2000] 3 CNLR 184 (NBPC) [*Bernard*], rev'g 2003 NSCA 105, 2002 NSSC 57, aff'g 2001 NSPC 2 [*Marshall*].

232 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, reversing 2012 BCCA 285, varying 2007 BCSC 1700.

Aboriginal title had been established. In *Calder* in 1973, the decision of the Supreme Court of Canada was that the claim failed because of the absence of a fiat from the Attorney General of British Columbia before filing the claim.[233] Almost a quarter century later in *Delgamuukw***,** the Gitksan and Wet'suwet'en heard, after a trial that had lasted more than three years, a decision by a unanimous Supreme Court that a procedural mistake by counsel was one of the factors preventing the Supreme Court from rendering a decision.[234] The trial in *Tsilhqot'in* took longer to hear than *Delgamuukw*, and although the Tsilhqot'in Nation had provided evidence that justified a decision that Aboriginal title had been established, once again a defect in pleadings convinced the trial judge that he was precluded from making a declaration confirming Aboriginal title.[235] The British Columbia Court of Appeal held that the trial judge had reached the correct outcome by making two offsetting errors. Contrary to the trial judge's conclusion, he was not precluded from finding that the Tsilhqot'in had proven a claim to Aboriginal title.[236] However, his opinion that such a

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233 *Calder, supra* note 42 at 426-427, Pigeon J. Although the formal reason for the rejection of the appeal in *Calder* was the failure to obtain a fiat, there is little doubt that had he taken a position on the merits of the case, it would have been to support Justice Judson's judgment.

234 *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at 1063, Lamer CJC, (1997), 153 DLR (4th) 153, rev'g [1997] 5 WWR 97, (BCCA), rev'g [1991] 3 WWR 97 (BC SC).

235 *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 120, 129, and 962, [2008] 1 CNLR 112 (BCSC), aff'd 2012 BCCA 285, var'd 2014 SCC 44. Although *Tsilhqot'in* required fewer days of hearings than *Delgamuukw* (339 days compared to 374), the *Tsilhqot'in* trial took place over a period of 53 months beginning November 2002 as compared to 37 months for *Delgamuukw*. While appeals of the trial decision were before the British Columbia Court of Appeal, Kent McNeil asked whether judges would "always shy away from declarations of title because the adversarial nature of the Canadian legal system and the limitation of the law make it impossible for them to achieve the desired goal of reconciliation?" Kent McNeil, "Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v British Columbia"* (2010) 8:1 Indigenous LJ 7 at 13-14.

236 *Tsilhqot'in Nation v British Columbia*, 2012 BCCA 285 at para 117, (2012), 33 BCLR (5th) 260 (CA), aff'g 2007 BCSC 1700, rev'd 2014 SCC 44. In fact, David Rosenberg, QC, lead counsel for the Tsilhqot'in told a conference three months after the Supreme Court's decision that in his opinion, one of the factors that contributed to the success of the Tsilhqot'in appeal was the immense pressure on the Court to stop evading the issue of the existence of Aboriginal title and to decide the matter once and for all. David Rosenberg, QC, verbal comments at Affinity Institute, *The SCC Tsilhqot'in decision: Significance, Implications and Practical Impact*", Vancouver, British Columbia, September 26, 2014. British Columbia facilitated the consideration of the merits of the case when it advised the Supreme Court of Canada that it abandoned its contention that the defect in the pleadings precluded a finding of Aboriginal title. *Tsilqot'in*, *supra* note 232 at para19.

claim had been proven was, in the eyes of the Court of Appeal, also incorrect, as the evidence was insufficient to justify that conclusion.

The Tsilhqot'in Nation is comprised of six individual bands with a combined population of about 3,000 residing in an isolated part of central British Columbia. The area claimed in the litigation was about five per cent of the Tsilhqot'in traditional territory, in which about 200 Tsilhqot'in members lived.[237] The pre-contact Tsilhqot'in lived in villages, but most of their activity involved trapping and foraging for roots, and the Supreme Court found they could best be described as semi-nomadic.[238] Chief Justice McLachlin indicated very early in her judgment that the semi-nomadic nature of the Tsilqhot'in did not preclude a finding of Aboriginal title.[239] The Chief Justice confirmed that it was necessary for an Aboriginal title claimant to establish an intention to hold or possess land in a manner comparable to what would be required to establish title at common law.[240] However, she rejected the suggestion by the British Columbia Court of Appeal that this requirement limited Aboriginal title to specific village sites or farms, and confirmed that hunting, fishing, trapping, and foraging could meet the test of common law equivalency.[241] In her discussion of continuity and exclusivity, she was entirely consistent with Chief Justice Lamer's explanation of the tests in *Delgamuukw*,[242] adding that the absence of pre-sovereignty conflict or controversy could be interpreted as acquiescence by other Indigenous peoples in their exclusion from certain lands.[243] On the specific facts of the case before her, McLachlin held that the trial judge had been correct in reaching his determination regarding

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237 *Tsilhqot'in, supra* note 232 at paras 3, 5, 6. The action was brought by Roger William, Chief of Xeni Gwet'in, one of the six Nations that make up the Tsilhqot'in, as a representative action on behalf of all Tsilhqot'in members.

238 *Ibid* at para 3.

239 *Ibid* at para 2.

240 *Ibid* at para 41.

241 *Ibid* at para 42.

242 *Ibid* at paras 45-47.

243 *Ibid* at para 48.

Aboriginal title based on "regular" use of lands by the Tsilhqot'in[244] and that both the decision of the British Columbia Court of Appeal[245] and British Columbia's argument before the Supreme Court of Canada were incorrect in proposing that "intensive" use was necessary for such a finding.[246] Finally, McLachlin concluded that the trial judge had been correct to determine that the appropriate test to establish Aboriginal title was whether the claimant was a general occupant at common law.[247]

The Chief Justice then turned to the relationship between Aboriginal title and the Crown's radical title. She indicated that both interests were determined by the incidents of Aboriginal title, since the Crown interest is residual, being that portion of complete ownership that is left after Aboriginal title has been removed. In terms of these respective rights, Aboriginal title represents a beneficial interest in land, which includes the right to use and enjoy it and to profit from its economic development, thereby depriving the Crown of a beneficial interest.[248] Once a claim to

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244 *Ibid* at para 51.

245 *Ibid* at para 56.

246 *Ibid* at para 60.

247 *Ibid* at para 39. Alex M. Cameron, who had been senior counsel for Nova Scotia in all three appeals of the *Marshall* half of *Marshall/Bernard*, was critical of the Chief Justice's reference to general occupation at common law as part of the test for Aboriginal title. In her reference to general occupation, the Chief Justice had adopted the reasoning of Justice Cromwell in his majority judgment on behalf of the Nova Scotia Court of Appeal in *Marshall*, in which Cameron participated as Nova Scotia counsel. Cameron noted that Justice Cromwell had referred to *Common Law Aboriginal title,* in which Kent McNeil had described the common law role of the general occupant in a particular form of a life interest known as an "estate *pur autre vie*. This arose when a landowner (L) granted a tenant (A) an interest for the term of the life of a third party (B). If A died before B, no one had an interest in the lands. The law did not allow A's heirs to inherit, L could not claim the land because he had disposed of a life interest that did not expire until the death of B, and B had never had any interest in the land. The result, a vacant interest, was the one situation that the common law was designed to avoid. The land reverted to a lawless state of nature, and the first person to seize the land became a general occupant, whose occupancy was recognized for the remainder of B's life. To say that the common law was uncomfortable with general occupancy would be an understatement. In the seventeenth century both law and equity tried to terminate it. The Court of Chancery began to intervene in general occupancy cases and in 1677 the *Statute of Frauds* provided that a life interest *pur autre vie* could be devised to the heirs of a life tenant (in our example A) as personal property. Cameron concluded that the suggestion that the suggestion that a common law aberration that had been terminated almost a century before the assertion of British sovereignty could be relevant in defining Aboriginal title was "patently absurd". Alex M. Cameron, "The Absurdity of Aboriginal title after *Tsilhqot'in*" (2015) 44:1 Adv Q 28 at 29-32. See also *Marshall*, *supra* note 40 at paras 134-138, Cromwell JA, and *Statute of Frauds*, 1677 (Eng.), 29 Charles II, c 3, s 3.

248 *Tsilhqot'in, supra* note 232 at para 70.

Aboriginal title has been proven, McLachlin includes a fiduciary duty owed by the Crown regarding the management of Aboriginal title lands as one of the two elements of Crown radical title,[249] with the Crown's right to encroach on Aboriginal title lands when it can be justified being the second.[250] This appears to be a restatement of the *Sparrow* provision that regulation of Indigenous rights must be done in a manner consistent with the Crown's fiduciary obligations to Indigenous peoples, a conclusion that is buttressed when the *Sparrow* language was repeated in *Tsilhqot'in.*[251] McLachlin then proceeds with an infringement/justification analysis along the lines of the original *Sparrow* test, that resembles the Supreme Court's past discussion of consultation and accommodation following *Haida*, but instead of invoking the Honour of the Crown to measure the appropriateness of the Crown's justification measures, she makes reference to fiduciary duty on several occasions.[252] This terminology reflects the fact that once Aboriginal title is established, the honourable treatment of asserted but unproven claims is no longer sufficient as Aboriginal title confirms an interest in land that cannot be questioned.[253]

However, there is little in *Tsilhqot'in* that addresses the practical implications of the principles set out by the Chief Justice. What is said in the decision about Aboriginal title and fiduciary duty suggests that the resource development and regulatory world will not change dramatically.[254] The only hint given is that neither the authority of the Crown nor the right of a holder of Aboriginal title is absolute.[255] The decision does not indicate how a situation in which the Crown's consultation and accommodation obligations are judged by the need to satisfy a

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249 *Ibid* at para 77.
250 *Ibid* at para 71.
251 *Ibid* at para 77.
252 *Ibid* at paras 84-90.
253 *Ibid* at para 92.
254 Kenneth Coates and Dwight Newman, *The End is Not Nigh: Reason over alarmism in analysing the Tsilhqot'in decision*, Aboriginal Canada and the Natural Resources Economy Series, Number 5 (Ottawa: Macdonald-Laurier Institute, 2014) at 16.
255 *Tsilhqot'in, supra* note 232 at para 76.

fiduciary duty differs in a practical sense from a situation in which the requirement is to fulfil the Honour of the Crown. The Chief Justice paraphrased *Sparrow* in advising that Crown "intrusions" on Aboriginal title lands "must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the aboriginal group." However stringent these requirements were, they did not include the need for consent by the Aboriginal title holder.[256] Subject to justification, allowable government actions include the enforcement of provincial laws and regulations of general application.[257] *Tsilhqot'in* found the British Columbia *Forest Act*[258] inapplicable on Aboriginal title lands, but that was a matter of statutory interpretation rather than constitutional law because Aboriginal title lands are no longer Crown lands as that term is defined in the legislation.[259] However, the Supreme Court added that British Columbia has the authority to amend the legislation to cure this deficiency.[260]

Chief Justice McLachlin's judgment, like that of Chief Justice Lamer in *Delgamuukw*, referred to a limit on the use to which Aboriginal title lands can be put. However, McLachlin did not give any indication whether she described resembled, modified, or replaced the limit described by Lamer.[261] The inherent limit set out in *Delgamuukw* prevented Aboriginal title lands from being used "in a manner that is irreconcilable with the nature of the claimants' attachment to those lands."[262] *Tsilhqot'in* described a limitation that would preclude the use of Aboriginal title lands "in a way that would substantially deprive future generations of the benefit of the land."[263] There

256 *Ibid* at para 88.
257 *Ibid* at para 106.
258 *Forest Act,* RSBC 1996, s 157.
259 *Ibid* at s.1.
260 *Tsilhqot'in, supra* note 232 at para 116.
261 Dwight Newman, "The Economic Consequences of Indigenous Property Rights: A Canadian Case Study (2016) 95:2 Neb L Rev 432 at 453.
262 *Delgamuukw*, *supra* note 234 at 1088, Lamer CJC.
263 *Tsilhqpt'in, supra* note 232 at para 74.

is no necessary contradiction between the two definitions. Using lands in a manner inconsistent with the nature of an Indigenous people's attachment to lands would likely run the risk of depriving future generations of the benefit of the land. In the trial judgement in *Tsilhqot'in*, Justice Vickers cited the description of the inherent limit in *Delgamuukw* in support of his finding that Aboriginal title lands cannot be put to uses "that would destroy the ability of the land to sustain future generations of Aboriginal peoples."[264] But there is no doubt that the two limits focus on different considerations.[265] In *Delgamuukw*, the inherent limit looked backward in time and focused on cultural continuity and preservation,[266] while the limit in *Tsilhqot'in* was forward-looking and tied to sustainability and the value of land to future generations.[267] Whether the two limits on Aboriginal title are consistent or inconsistent, it is clear that the version that represents the position of the Supreme Court is the test as enunciated in *Tsilhqot'in*. Leaving aside the question of whether Chief Justice Lamer's inherent limit was ever part of Canadian law, it is subsumed in the limit set out in *Tsilhqot'in* if the two limits are consistent and replaced by the latter if the two are inconsistent.

One other consequence of *Tsilhqot'in* must be addressed briefly. Although Chief Justice McLachlin made no reference to Justice Dickson's comments in the identical nature of the Indigenous interest in reserve land and Aboriginal title land, her description of the nature of provincial jurisdiction over Aboriginal title lands can only be interpreted as a rejection of Dickson's statement. While provincial land-related law has no application on reserve land,

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264 *Tsilhqot'in, supra* note 235 at para 539.

265 Newman, *supra* note 261 at 453.

266 Kent McNeil, "Aboriginal Title and Indigenous Governance: Identifying the Holders of Rights and Authority" (2020) 57 Osgoode Hall L J 129 at 137; David W-L Wu, "*Tsilhqot'in Nation* as a Gateway to Sustainability: Applying the Inherent Limit to Crown Land" (2015) 11:2 McGill Int'l J Sust Dev L & Pol'y 329 at 342.

267 McNeil, *supra* note 266 at 137; Wu, *supra* note 266 at 342.

provincial laws apply on Aboriginal title lands subject to a limited number of constitutionals constrains.[268]

ACADEMIC COMMENTARY

The Rise of the Honour of the Crown and the Overlap with Fiduciary Duty

Academic commentary on the Honour of the Crown is much less voluminous than analysis of Aboriginal title or fiduciary duty, and commentary on the Honour of the Crown can best be described as ambivalent. Timothy McCabe, the author of the first book-length study of the Honour of the Crown, commented that after *Taylor and Williams* referred to the Honour of the Crown in 1981, the concept "seemed an unpromising candidate for foundation of liability or other regulation of legal relations between the Crown and Indigenous peoples in any broad sphere.[269] Over two decades later, McCabe expressed concern that beyond the "infrequent" references to the Honour of the Crown in relation to treaty interpretation, the concept might result in little more than the creation of an Indigenous-Crown relationship resembling an unenforceable "political trust". [270] After both the majority judgment and the dissent in *Marshall*, also a treaty interpretation case, evoked the Honour of the Crown, Leonard Rotman concluded in a review of the case that the precise role of the Honour of the Crown in Canadian law was uncertain. Rotman's view was that while both judgments agreed the Honour of the Crown was a guiding principle, the majority characterized it as "a fundamental component of the entire process of treaty interpretation", while the dissent did not.[271] When *Wewaykum* made a single reference to the Honour of the Crown with regard to reserve creation in a non-treaty context,[272] David Elliott interpreted it as Justice Binnie's

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268 101-106, 150-151
269 McCabe, *supra* note 152 at 2.
270 *Ibid.*
271 Leonard Rotman, "Developments in Aboriginal law: The 1999-2000 Term" (2001), 13 SCLR 1 at 18.
272 *Wewaykum, supra* note 111 at para 80.

conclusion that "pre-reserve interests should be considered in conjunction with the Crown's public responsibilities".[273] James Reynolds dismissed the significance of the reference, since in his opinion the attempt to distinguish between the Honour of the Crown and fiduciary duty was "a distinction without a difference, like the difference between trust and fiduciary in *Guerin*".[274] Leonard Rotman proposed a different interpretation, arguing that the Supreme Court did not introduce the Honour of the Crown is an alternative to fiduciary `duty but rather added the former to the existing doctrine of fiduciary obligation, although he conceded that the result created confusion as to the relationship between the two doctrines.[275] The suggestion that the Honour of the Crown is an emanation of fiduciary duty has been made as recently as 2017 in an Australian article making reference to "the historically vague quasi-fiduciary 'Honour of the Crown'."[276] The general academic consensus is that the Honour of the Crown is a broader but shallower concept than fiduciary obligation[277] and the Honour of the Crown "is not a full surrogate for fiduciary obligation, as it lies on a spectrum substantially lower."[278]

The concept of the Honour of the Crown has been used by the Supreme Court of Canada in cases related to treaty interpretation, the Crown's obligation to consult regarding resource development, and Crown promises of a constitutional nature. After the 2005 *Mikisew* decision, Peter Hutchins expressed hope that the decision was a promising start in applying the Honour of

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273 David W. Elliott, "Much Ado About Dittos: *Wewaykum* and the Fiduciary Obligations of the Crown" (2003) 29:1 Queen's LJ 1 at 33.

274 James I. Reynolds, "The Spectre of Spectra: The Evolution of the Crown's Fiduciary Obligation to Indigenous peoples Since *Delgamuukw*" in Maria Morellato, Q.C., ed., *Aboriginal law Since Delgamuukw* (Aurora, Ontario: Canada Law Books, 2009) 107 at 142-143.

275 Leonard I. Rotman, "Crown-Native Relations as Fiduciary: Reflections Almost Twenty Years after *Guerin*" (2003) 22 Windsor YB Access Just 363 at 369.

276 Guy C Charleton and Xiang Gao, "Constitutional Obligation and the Development of Canadian Aboriginal law" (2017) 19 U Notre Dame Austl L Rev 1 at 17.

277 Peter W. Hogg and Laura Dougin, "The Honour of the Crown: Reshaping Canada's Constitutional Law" (2016) 72 SCLR (2nd) 291 at 308.

278 Gordon Christie, "A Colonial Reading of the Recent Jurisprudence: *Sparrow, Delgamuukw,* and *Haida Nation* (2005) 23 Windsor YB Access Just 17 at 43.

the Crown to historic treaties.[279] He was heartened by the willingness of Justice Binnie to "read down apparently clear language" in the name of the Honour of the Crown despite the fact that "Treaty 8 could not have been clearer in its language about taking up."[280] Michael Coyle has argued for such a robust interpretation of treaties in all cases to recognize the right of Indigenous parties to treaties to share in the benefits of treaty, which in his opinion "flows not merely from even-handed, after the fact stewardship by federal and provincial governments, but from the institutional nature of the treaties themselves.[281] More recently, Peter Hogg and Laura Dougan have expressed the view that the principle of "diligent implementation" introduced by the Court in *Manitoba Métis Federation* would apply to obligations assumed by the Crown in a treaty.[282]

Aside from *Manitoba Metis Federation*, most Honour of the Crown cases have been filed in support of treaty rights.[283] By definition, cases relating to the interpretation of treaties are limited to Indigenous parties to treaties. Similarly, the duty to consult has largely been enforced by courts and recognized by the Crown as it relates to treaty beneficiaries and parties asserting Aboriginal title claims.[284] But even before the decision in *Manitoba Métis Federation*, the Supreme Court of Canada had discussed the Honour of the Crown as governing the Crown's interaction with all "aboriginal peoples of Canada" as that term is defined in s 35(2) of the *Constitution Act, 1982.*[285]

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279 Peter W. Hutchins, "Cede, Release and Surrender: Treaty Making, the Aboriginal Perspective and the Great Juridical Oxymoron: Or Let's Face It – It Didn't Happen" in Maria Morellato, QC, ed, *Aboriginal law Since Delgamuukw* (Aurora, Ontario: Canada Law Books, 2009) 431.

280 *Ibid* at 453.

281 Michael Coyle, "From Consultation to Consent: Squaring the Circle" (2016) 67 UNBLJ 235 at 264.

282 Hogg and Dougin, *supra* note 277 at 316.

283 The most significant exception to this generalization is *Labrador Metis Nation v Newfoundland and Labrador*, 2006 NLTD 119, aff'd *Newfoundland and Labrador v Labrador Metis Nation,* 2007 NLCA 75, application for leave to appeal to the Supreme Court of Canada dismissed, Ma 29, 2008, 2008 CANLII 42711 (SCC). The case held that Newfoundland and Labrador must consult with the Labrador Metis Nation regarding the construction of Phase III of the Trans-Labrador Highway.

284 Mariana Valverde, "'The Honour of the Crown is at Stake": Aboriginal Land Claims Litigation and the Epistemology of Sovereignty" (2011) 1:3 UC Irvine L Rev 955 at 966.

285 "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada" *Constitution Act, 1982,* being Schedule B of the *Canada Act, 1982* (UK), c 11.

Manitoba Métis Federation not only extended the Honour of the Crown to the implementation of Crown constitutional promises, but it also confirmed expressly that the Honour of the Crown protects and promotes the interests of all "aboriginal peoples of Canada." This expansion has not exempted the decision from academic criticism. Jeffrey Hewitt has charged that the Supreme Court failed to apply the Honour of the Crown in *Manitoba Métis Federation* "because it scolds the Crown on its ethics while still not providing the Métis with a long-promised land base."[286] Andrea Bowker has added that justification for potential impacts on rights, which was mandated by the Honour of the Crown, was "incompatible with fiduciary principles".[287]

More optimistic reactions note that the Honour of the Crown was engaged in the same quest for legitimacy as the requirements of fiduciary duty, and that the Honour of the Crown is much broader than fiduciary duty.[288] Justice Paul Finn, an international authority on fiduciary law predicted in 2016 that fiduciary law principles will likely prove unsuited to the Crown-first nation relationship, but the need for the Crown to show good faith and fair dealing toward first nations will be required by "the evolving concept of the Honour of the Crown."[289] In a case comment on *Manitoba Métis Federation*, Sacha Paul posited that the enduring significance of the decision may be the recognition of the "duty of diligence" as part of the Honour of the Crown. He continued "the duty of diligence requires that when the Crown promises to confer a benefit to Aboriginal people it must take reasonable steps to ensure that its obligations are fulfilled."[290] This source of this duty is the principle that when the Crown makes a promise, it intends, both at that point and

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286 Jeffrey G Hewitt, "Reconsidering Reconciliation: The Long Game" (2014) 67 SCLR (2nd) 259 at 277.
287 Andrea Bowker, "*Sparrow's* Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995) 53:1 UT Fac L Rev 1 at 13.
288 Hogg and Dougan, *supra* note 277 at 308.
289 Paul Finn, "Public Trust, Public Fiduciaries" (2016) 38:3 Fed L Rev 335 at 354.
290 Sacha R Paul, "A Comment on *Manitoba Métis Federation Inc. v Canada*" (2013) 37:1 Man L J 323 at 325.

in the future, to fulfil it.[291] Bad faith is not necessary to show a breach of a duty of diligence,[292] and one example of evidence of a breach of the Honour of the Crown is conduct that cannot reasonably be expected to fulfil a promise.[293]

The overall academic response to the Supreme Court's repeated references to the Honour of the Crown has been characterized by positive commentary regarding the concept but scepticism as to the likelihood of courts actually requiring the Crown to act in accordance with the Honour of the Crown. James [Sa'ke'j] Youngblood Henderson has been effusive, even perhaps a little overgenerous in his description of the concept: "The purpose of this doctrine is a constitutional therapy for the ill of colonization on Indigenous peoples."[294] However, he has also indicated that any government action short of establishing "a distinct branch of government for Aboriginal people based on their constitutional rights to perform this role" would represent the continuation of "dishonourable action."[295] Jeffrey Hewitt finds acceptable the characterization of the Honour of the Crown as an "enforceable obligation"[296] rather than "using good manners to extinguish Aboriginal rights with a legislated 'please' and 'thank you'."[297] But he denies that the decisions in *Haida Nation* and *Taku River* are consistent with the Honour of the Crown because both decisions concluded that the plaintiffs were not treated as having a veto regarding Crown decisions. In Hewitt's view this creates a relationship that "is not a relationship of equals but one that perpetuates Crown sovereign authority."[298] Mark Walters agrees, adding that decisions and Crown responses to date have failed to redeem the existing "dishonourable" foundations of Crown sovereignty by

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291 *Ibid* at 329.
292 *Ibid* at 325.
293 *Ibid* at 329.
294 James [Sa'ke'j] Youngblood Henderson, "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72:1 Sask L Rev 29 at 51.
295 *Ibid* at 56.
296 Hewitt, *supra* note 286 at 278.
297 *Ibid* at 274.
298 *Ibid* at 261, footnote 16.

failing to establish "a reciprocal relationship between the Canadian state and Indigenous peoples."[299]

These expressions of ambivalence are based on the shared concern that the potential of the Honour of the Crown will not be achieved because of both the refusal of the Crown to make the structural and policy changes necessary to fulfil the Honour of the Crown and the failure of courts to impose the legal requirement to do so. However, Mariana Valverde's ambivalence results in a different position. While critical of the Supreme Court's interpretation of the Honour of the Crown, she considers what the current state of the law would be in the absence of the *Haida* decision. In this scenario, virtually all Indigenous litigants, including those with credible but unproven claims to Aboriginal title, would be left with the *Sparrow* requirement that the infringement of Aboriginal rights, including Aboriginal title be proven before an obligation to consult arises. The result is her unenthusiastic endorsement that the Honour of the Crown "may be the lesser of two evils."[300]

***Tsilqhot'in* – Aboriginal Title, Its Limits, and Provincial Jurisdiction**

Chapter II summarized the widespread academic criticism of Chief Justice Lamer's introduction of the inherent limit, and the limit on Aboriginal title described in *Delgamuukw* has met with no more positive reaction.[301] Felix Hoehn acknowledges that the limit may be well-intentioned, but it is inconsistent with an Indigenous-Crown relationship based on equality and the recognition of Indigenous land-related law.[302] Other criticism includes the charge that the limit introduced in *Tsilhqot'in* exacerbated the paternalism represented by the inherent limit.[303]

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299 Mark D. Walters, "The Morality of Aboriginal Law" (2005-2006) 31 Queen's LJ 470 at 473, 513.

300 Valverde, *supra* note 284 at 971.

301 Amid the criticism, one commentator praised the Justice McLachlin's limit to Aboriginal title in the name of environmental sustainability and suggested that the same limit apply to all Crown land. Wu, *supra* note 266 at 347.

302 Felix Hoehn, "Back to the Future: Reconciliation and Indigenous Sovereignty" (2016) 67 UNBLJ 109 at 125.

303 Wu, *supra* note 266 at 345.

The concern that *Tsilhqot'in* may preclude the use of lands in the way that is most productive economically leads Kenneth Coates and Dwight Newman to suggest that in some cases it could force Indigenous peoples to cede Aboriginal title lands to Canada and receive back a title that resembles fee simple ownership.[304] Such an outcome would, in the view of Mark Stevenson require Indigenous peoples to "break with their history and their culture."[305] Further, Coates and Newman suggest that a scenario may arise where an Indigenous group's decision to cede Aboriginal title lands as part of an economic development plan could be frustrated by "outside environmental groups" invoking the limit as described by Chief Justice McLachlin to override the decision by the Aboriginal title holder.[306] Just as the impossibility of creating fee simple interests on reserve land reduce the value of leasehold lands on the Musqueam Reserve to half the value of comparable off-reserve lands,[307] limits on the use to which Aboriginal title lands can be put "diminishes the value of Aboriginal title lands for Indigenous communities by casting a pall of uncertainty over the ways in which communities may use their own lands.[308]

The aspect of the *Tsilqhot'n* decision that has provoked the most response is the section dealing with jurisdictional issues, and much of that commentary has been negative. Kent McNeil disagrees with the Chief Justice's conclusions that lands could be Crown lands and Aboriginal title lands at the same time and that interjurisdictional immunity was inapplicable to them,[309] because in McNeil's view that doctrine was essential to preserve the principle that that Aboriginal title lies

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304 Coates and Newman, *supra* note 254 at 16.

305 Stevenson, *supra* note 64 at 115.

306 Coates and Newman, *supra* note 254 at 15.

307 *Musqueam Indian Band v Glass*, 2000 SCC 52 at para 53, Gonthier J, [2000] 2 SCR 633; rev'g [1999] 2 FC 138 (FCA), aff'g (1997), 137 FTR 1 (FC).

308 Dwight Newman, "Judicial Power, Living Tree-ism and the Alteration of Private Rights by Unconstrained Public Law Reasoning" (2017) 36:2 UQLJ 247 at 251.

309 Kent McNeil, "The Test for Aboriginal title in 2014: Defining the Legal Requirements", paper presented at Affinity Institute, *The SCC Tsilhqot'in Decision: Significance, Implications and Practical Impact*", Vancouver, British Columbia, September 26, 2014, at 10.

"within the core of federal jurisdiction."[310] At the heart of McNeil's constitutional theory is the belief that "[T]here is a compelling argument against any provincial jurisdiction to infringe Aboriginal title, even indirectly."[311] His view has not been swayed by the Supreme Court of Canada's conclusion in *Tsilhqot'in* that subject to important constitutional limits, provincial laws of general application, including laws aimed at the regulation of land use, apply throughout Aboriginal title lands.[312] McNeil has characterized the proposition that provincial laws of general application could be operative on Aboriginal title land as a position "based on a fundamental mistake of law."[313] He added that the Supreme Court's direction does not answer the question he proposed in the wake of *Delgamuukw* - if provinces cannot extinguish Aboriginal title, how could they manage Aboriginal title lands and create interests that might infringe on that title and associated rights?[314]

McNeil is not alone in his concern about the negative impact of provincial power on Aboriginal rights and title. David Rosenberg and Jack Woodward argue that the continued operation of provincial laws of general application to lands subject to an unproven claim of Aboriginal title means that any delay in filing and pushing litigation puts claimants in ongoing jeopardy.[315] The abandonment of the doctrine of interjurisdictional immunity has also been

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310 Kent McNeil, "The Vulnerability of Indigenous Land Rights in Australia and Canada" (2004) 42:2 Osgoode Hall LJ 271 at 292.

311 Kent McNeil, "Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult" (2005) 29 SCLR 447 at 453.

312 *Tsilhqot'in, supra* note 232 at paras 101-102.

313 Kent McNeil, "Aboriginal title and the Provinces after Tsilhqot'in Nation. *"The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71 at 74 (2015). http://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/4.

314 Kent McNeil, "Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v. British Columbia"* (2010) 8:1 Indigenous LJ 7 at 14-15. To be completely accurate, Dr McNeil raised the question after the decision of the British Columbia Court of Appeal and before the Supreme Court of Canada decision, but McNeil's comments at a post-*Tsilqot'in* conference in Vancouver in September 2014 confirm that his concerns remained after the decision by the Supreme Court.

315 David M. Rosenberg QC and Jack Woodward QC, "Case Comment: The *Tsilhqot'in* Case: The Recognition Affirmation of Aboriginal title in Canada" (2015) 48:3 UBC L Rev 943 at 960..

characterized as a substantial departure from established case law that removed a constitutional protection previously guaranteed to claimants and provided provinces with an expanded opportunity to make decisions that have an impact of Aboriginal and treaty rights.[316]

These views are not unanimous. Ken Coates and Dwight Newman point out five messages that Indigenous peoples, governments, and industry draw should draw from the decision. First, Indigenous communities with outstanding Aboriginal title claims have stronger claims after the decision than they had before.[317] Second, although the Court did not make Indigenous consent a legal necessity, it did indicate forcefully its desirability, which is consistent with its other recent statements that it prefers to see negotiations rather than be faced with litigation.[318] The Court's third point is actually a corollary of its second one. While governments retain the authority to override a refusal to provide consent, this step should only be taken in the case of "a compelling public interest" and government must fulfil its procedural consultation requirements and pass a "proportionality test".[319] Fourth, provinces should seize the opportunity provided by the Supreme Court to operate within their spheres of constitutional jurisdiction, but must do so positively, with an eye to improving relations with Indigenous communities.[320] Fifth, it is not entirely clear why the role to fiduciary duty was inserted in the decision, and until the Court provides clarity regarding the matter, it is best to proceed on the expectation that the requirements of fiduciary duty and the Honour of the Crown will not turn out to be fundamentally different.[321]

Tsilhqot'in also provided the Supreme Court the opportunity to restate its views on Crown radical title and Crown sovereignty in case the recognition of *Tsilhqot'in* Aboriginal title lands

316 Bruce McIvor and Kate Gunn, "Stepping into Canada's Shoes: *Tsilhqot'in*, *Grassy Narrows*, and the Division of Powers" (2016) 67 UNBLJ 146 at 146.
317 Coates and Newman, *supra* note 254 at 17.
318 *Ibid.*
319 *Ibid* at 18.
320 *Ibid* at 20-21.
321 *Ibid* at 17-18.

might be taken as a retreat from Court's past pronouncements on the matter. On four separate occasions the Chief Justice referred to Crown radical title. She interpreted Justice Dickson's judgment in *Guerin* as stating that upon the Crown's assertion of sovereignty, it acquired "radical or underlying title" to all land,[322] and she confirmed that Dickson's conclusion has been adopted by the Supreme Court and become the law of the land,[323] began her analysis with the observation that Aboriginal title was a burden on radical Crown title, and held that even on Aboriginal title land, the Crown retained the authority "to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*."[324] Chief Justice McLachlin reassured claimants of the possible implications of her discussion of the legal characterization of Aboriginal title, Chief when she commented that "[T]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada".[325]

This statement provoked a strong response from John Borrows. He began a review of the decision by characterizing it as "an exceedingly strong decision" that demonstrated "the intelligence, wisdom, honesty, humility and humanity of an extraordinary group of jurists."[326] But Borrows could not ignore what he saw as blatant hypocrisy. In response to the Chief Justice's comment regarding *terra nullius*, Borrows indicated that while it would be welcome if this were true, "Canadian law still has *terra nullius* written all over it" because *Tsilhqot'in* also confirmed the existence of radical or underlying title, which was merely burdened by the pre-existing legal rights of aboriginal peoples."[327] Borrows' final comment in his review article on *Tsilhqot'in* is

322 *Tsilhqot'in, supra* note 232 at para 12.
323 *Ibid* at para 69.
324 *Ibid* at para 71.
325 *Ibid* at para 69.
326 John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia* (2015) 48:3 UBC L Rev 701 at 703.
327 *Ibid* at 702.

expressed in a tone that is difficult to align with his initial praise as he concluded that the Court's comments on radical Crown title "represent an empty incantation that is devoid of self-reflection concerning the discriminatory denigration of Indigenous people's social organization that it implies."[328]

THE HONOUR OF THE CROWN AFTER *TSILHQOT'IN*

The most significant development in Canadian Aboriginal law in the early twenty first century was the reversal of the relative importance of the Honour of the Crown and fiduciary duty. After describing the Honour of the Crown as an "implication" of fiduciary obligation as late as 1996,[329] by 2014 Supreme Court of Canada established jurisprudence had appeared to establish that the Honour of the Crown is a consideration in all Aboriginal law cases, while fiduciary considerations arise in a relatively small subset of these cases. As such, fiduciary duty would govern if certain conditions (generally related to the nature of the Indigenous interest at stake) were satisfied. When, as in most cases, these conditions were not met, the governing consideration would be the Honour of the Crown.[330]

One of the situations that does give rise to Crown fiduciary duty is the management of Crown lands that are also held by Aboriginal title. However, the nature of the Indigenous interest in these lands is such that it imposes less onerous duties on the Crown than are the case where the Crown is responsible for the handling of surrendered reserve land, where the Crown, to use Justice Wilson's words, has the duties of a "full blown trustee."[331] In contrast, the fiduciary nature of

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328 *Ibid* at 723-724.

329 *Van der Peet, supra* note 104 at 536-537, Lamer CJC.

330 One other general observation is that by 2014 the Honour of the Crown seemed more capable of handling the conflict between the fiduciary duty of absolute loyalty, which requires that fiduciaries act for the sole benefit of beneficiaries and the obligations the Crown owes to all citizens. Tamar Frankel, Fiduciary Law (Oxford: Oxford University Press, 2011**)** at 108; Senwung Luk, "Not So Many Hats: The Crown's Fiduciary Obligations to Aboriginal Communities Since *Guerin*" (2013) 76:1 Sask L Rev 1 at 3-4.

331 *Guerin, supra* note 102 at 355, Wilson J.

Crown duties regarding Aboriginal title lands likely leads to obligations resembling those arising out of the nebulous "trust-like, rather than adversarial" Indigenous-Crown relationship cited in *Sparrow* in the context of Indigenous harvesting rights.[332]

One aspect of the Honour of the Crown differs dramatically from Aboriginal title and fiduciary duty. While the latter two doctrines have well-defined pedigrees (one for at least 250 years in Canada and the other reaching back to the Roman Empire), the apparent youth of the Honour of the Crown and the lack of detail about its origins in Chief Justice McLachlan's judgment in *Haida* require more information about both its sources and its nature before its full impact and potential can be assessed. In Chapter IV I set out to seek the source and consider the nature of the Honour of the Crown before moving on to assessing its significance and potential future use in Chapters V and VI.

[332] *Sparrow, supra* note 100 at 1108.

CHAPTER IV

SOURCE AND NATURE OF THE HONOUR OF THE CROWN

SOURCE OF THE HONOUR OF THE CROWN

Genealogy of the Honour of the Crown

If the origins of the Honour of the Crown could be found only in the authorities cited in *Haida*[1] it would appear that it is a doctrine that its first appearance in common law jurisdiction with the Supreme Court of Canada in its decisions in the decade before *Haida.* In that decision, the only precedents cited by Chief Justice McLachlin were *Badger*[2] and *Marshall*,.[3] Decided in 1996 and 1999 respectively. *Badger* in turn only traced the Honour of the Crown to *Sparrow*[4] and *Taylor and Williams,*[5] the latter of which was decided in 1981, although not by the Supreme Court of Canada.

It is *Marshall* that holds the key to identifying the source of the Honour of the Crown in Canadian law. Justice Binnie relied on the dissent in *George*, particularly Justice Cartwright's reference to maintaining the "honour of the Sovereign."[6] In turn, Cartwright had cited two earlier Supreme Court of Canada dissents by Justice John Wellington Gwynne[7] in cases decided in 1895[8] and 1901[9] respectively, as well as the decision in *The Case of the*

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1 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, rev'g 2002 BCCA 462, var'g 2002 BCCA 147, rev'g 2000 BCSC 1280.
2 *Ibid* at paras 16, 19, 20.
3 *Ibid* at paras 16, 19.
4 *R v Badger*, [1996] 1 SCR 771 at 794, 813, 821, Cory J, var'g (1993) 135 AR 286 (CA).
5 *Ibid* at 794, 821
6 *R v Marshall,* [1999] 3 S.C.R 456 at 498-499, Binnie J., rev'g [1997] 3 CNLR 209 (NSCA).
7 *R v George*, [1966] SCR 267 at 271, 276, 279, Cartwright J, dissenting, rev'g [1964] 2 OR 429 (CA), reversing [1964] 1 OR 24 (HC).
8 *Province of Ontario v. Dominion of Canada and Province of Quebec. In re Land Claims* (1895), 25 SCR 434, aff'd [1897] AC 199 (JCPC).
9 *Ontario Mining Company v. Seybold* (1901), 32 SCR 1, aff'g (1900), 32 OR 301 (Ont Div Ct), aff'g (1899), 31 OR 386 (Ch.), aff'd [1903] AC 73.

Churchwardens of St. Saviour in Southwark, written by Chief Justice Edward Coke in the Court of King's Bench in 1613.[10] To these precedents, Binnie added *Roger Earl of Rutland's Case*,[11] a second decision by Sir Edward Coke when he was Chief Justice of the Court of Common Pleas in 1608.[12] Binnie also relied on *Taylor and Williams*.[13]

Potential Domestic Source of the Honour of the Crown

I question the view shared by Justice Binnie and Justice Cartwright that the judicial writings of Justice Gwynne at the end of the nineteenth century are legitimate precursors for the Supreme Court's modern view of the Honour of the Crown. An analysis of the central issues in Canadian constitutional law in the late nineteenth century and Justice Gwynne's role in the judicial history of that time suggests a context in which his comments bear little resemblance to the views of the modern Supreme Court on the Honour of the Crown.

In the decades after Confederation the dominant, in fact almost the only, Canadian constitutional controversy was the battle over the division of governmental authority between the Dominion of Canada and the various provinces. The division within the *British North American Act* between matters within the "exclusive legislative authority of the Parliament of Canada" listed in s 91[14] and the matters in respect of which a "[provincial] Legislature may exclusively make laws" enumerated in s 92[15] did not cleave the potential matters that might engage government cleanly enough to avoid overlaps with regard to a wide range of subjects. For example, section 91(2) places "the regulation of trade and commerce" under exclusive federal jurisdiction[16] while section 92(9) empowers provinces to license businesses for "the

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10 *The Case of the Churchwardens of St. Saviour in Southwark* (1613), 10 Co Rep 66b, 77 ER 1025 (KB).
11 *Marshall, supra* note 6 at 492-493, Binnie J.
12 *Roger the Earl of Rutland's Case* (1608), 8 Co Rep 55a, 77 ER 555 (CP).
13 *Marshall, supra* note 6 at 492-493, Binnie J.
14 *British North America Act, 1867*, 30-31 Vict (1867), c 3, s 91.
15 *Ibid,* s 92.
16 *Ibid*, s 91(2).

raising of a revenue for provincial, local, or municipal purposes"[17] and section 92(13) places "property and civil rights" within provincial jurisdiction.[18] The overlap led to decisions that federally-incorporated insurance companies selling insurance policies in Quebec were engaged in trade and commerce[19] while insurance policies in Ontario were contracts of indemnity rather than commercial transactions and were governed by local law.[20]

While the Quebec and Ontario cases had significant factual differences, these did not diminish the fact that in one province the highest court reached its decision on the basis that insurance companies were engaged in trade and commerce and beyond provincial jurisdiction while the other concluded that insurance companies were not engaged in trade and commerce and subject to provincial regulation regarding property and civil rights. These were not the only examples of conflicting decisions in separate jurisdictions. Dealing with the question of whether federal authority over trade and commerce shielded liquor distributors from provincial attempts to regulate or prohibit their products, the Supreme Court of New Brunswick held that the province could not prohibit liquor products.[21] Four years later, the same court suggested a void in the distribution of powers by finding that the Dominion of Canada also lacked the power to prohibit the sale of liquor.[22] The Quebec Superior Court agreed with New Brunswick regarding the provincial prohibition, but the decision was reversed by the Quebec Supreme Court, which held that the prohibition of liquor was an example of purely local regulation that had been exercised throughout Canadian history.[23] In concurrent decisions the Ontario Court

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17 *Ibid* at s 92(9).
18 *Ibid* at s 92(13).
19 *Angers v Queen Insurance Company* (1877), 22 LCJ 77 (Sup Ct), aff'd (1877), 22 LCJ 307 (QB).
20. *Parsons v the Queen Fire and Insurance Company* (1879), 4 OAR 103 at 107 (CA), aff'g 43 UCQB 271, aff'd (1880), 4 SCR 215, aff'd [1881] UKPC 49.
21 *R v Justices of the Peace of the County of Kings* (1875), 15 NBR 535 (SC).
22 *R v Fredericton* (1879), 19 NBR 139 (SC), rev'd (1880), 3 SCR 505
23 John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2012) at 27

of Queen's Bench found that a province could not license a brewer already licensed by the Dominion[24] but a municipality still exercised its traditional power to prohibit liquor as a matter of local authority.[25]

Section 101 of the *British North American Act* empowered Parliament to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada."[26] Although Prime Minister Macdonald claimed that the creation of such a court was a priority for him, he abandoned two rather feeble attempts at introducing legislation to that effect as Prime Minister between 1867 and November 1873.[27] Alexander Mackenzie, who succeeded Macdonald in late 1873 and won a large majority in an election in January1874 was convinced of the risks inherent in inconsistent decisions among provincial courts and was anxious to move forward on a national court as soon as possible during his tenure.[28] For this initiative, Mackenzie had hoped to rely heavily on Edward Blake, one of Canada's most respected lawyers and the former Premier of Ontario. However, Blake advised that his health limited his contribution to the preparation of legislation to establish a Supreme Court for introduction in Parliament.[29] As a Canadian nationalist, Blake's goal was the creation of the Supreme Court and the termination Canadian appeals to the Judicial Committee of the Privy Council, but he saw this as a natural result of the new court and elected not to abolish appeals to the Judicial

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24. *R v Taylor* (1875), 36 UCQB 183.
25. *In Re Slavin and the Corporation of the Village of Orillia* (1875), 36 UCQB 159.
26. *British North America Act, supra* note 14 at s 101.
27. Richard Gwyn, *Nationmaker - Sir John A Macdonald: His Life, Our Times,* Volume Two (Toronto: Random House, 2011) at 265. In his biography of Macdonald, Donald Creighton claims that Macdonald's Supreme Court initiative of 1868 failed in part because of the distractions created by the Fenian invasion. Donald Creighton, *John A Macdonald: The Old Chieftain* (Toronto: University of Toronto Press, 1998) at 19.
28 William Buckingham and George W. Ross, *Honourable Alex Mackenzie: His Life and Times* (Toronto: Rose Publishing, 1892) at 384.
29 Ben Forster and Jonathan Swainger, "BLAKE, EDWARD," in *Dictionary of Canadian Biography*, vol. 14. University of Toronto/Université Laval, 2003–, accessed August 20, 2020, http://www.biographi.ca/en/bio/blake_edward_14E.html.

Committee expressly in the legislation.[30] Blake retired from Cabinet before the bill was introduced, and the responsibility for managing Parliament fell to Télesphore Fournier, the Minister of Justice.[31]

During debate, a Liberal backbencher introduced an amendment to state explicitly that decisions of the Supreme Court would not be subject to appeal to the Judicial Committee. Fournier, who had previously expressed a desire that such a provision be included,[32] agreed to accept the amendment on behalf of the government. The *Supreme and Exchequer Courts Act* as passed by Parliament included the amendment as section 47.[33]

In May 1875, Edward Blake returned to government and replaced Fournier as Minister of Justice.[34] Blake then departed for England to meet with the Colonial Office regarding the review of the legislation. While Blake's optimum outcome was that the legislation be accepted as written, his more realistic hope was that he could convince the Colonial Office not to disallow the legislation in its entirety because of the presence of section 47.[35] He was opposed by Henry Reeve, who had been registrar of the Judicial Committee for 18 years and clerk of appeals for an additional 20 years. Reeve took the position that an autonomous Supreme Court of Canada was nothing less than a threat to the Empire.[36] In the final analysis, Blake was able to save the legislation from disallowance, although Canada was forced to concede that section 47 was inoperative.[37] As such, the Judicial Committee of the Privy Council remained the court of final appeal on Canadian constitutional matters until 1949.[38]

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30 Saywell, *supra* note 23 at 57.
31. Creighton, *supra* note 27 at 193-194; Gwyn, *supra* note 27 at 374.
32. Saywell, *supra* note 23 at 57.
33. *The Supreme and Exchequer Courts Act,* SC 1875, c 11.
34. Shortly after Blake's return, Fournier was appointed as one of the original members of the Supreme Court of Canada. Forster and Swainger, *supra* note 29.
35. Joseph Schull, *Edward Blake: The Man of the Other Way,* vol 1 (Toronto: Macmillan, 1975) at 151.
36 Saywell, *supra* note 23 at 59.
37 Schull, *supra* note 35 at 164.
38 *An Act to Amend the Supreme Court Act,* SC 1949, c 37, s 3.

The developments just discussed – the dominance of the issue of the division of jurisdiction, authority, and power between the Dominion and the provinces, the creation of the Supreme Court of Canada, and the fact that Supreme Court of Canada decisions were subject to appeal by the Judicial Committee of the Privy Council combined to set the context for considering Justice Gwynne's comments on the relationship between Indigenous peoples and the Crown. Although never parties to early constitutional law cases, the interest of Indigenous peoples in Aboriginal title lands were essential issues in the decades of litigation between the Dominion of Canada and Ontario regarding the ownership of and jurisdiction over public lands within Ontario. In Chapter I, I described the first of these cases, *St Catherine's Milling and Lumber Company v the Queen,*[39] which limited the interest in Aboriginal title lands prior to the signing of Treaty 3 to a non-proprietary burden upon Ontario's otherwise complete title that disappeared, perfecting Ontario's title, upon the execution of Treaty 3.[40]

The primary combatants to this struggle were Sir John A Macdonald, who was Prime Minister of Canada from 1867 to 1873 and from 1878 until his death in 1891,[41] and Sir Oliver Mowat, who was Premier of Ontario from 1872 to 1896[42] In this struggle, Justice John Wellington Gwynne was a partisan warrior for the Dominion of Canada's cause. He had met

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39. *St. Catherines Milling and Lumber Company v. the Queen* aff'g (1887), 13 SCR 577, aff'g (1886) 13 Ont App R 148 (CA), aff'g (1885), 10 OR 196 (Ch), aff'd [1888] UKPC 70.

40 *Ibid.*

41 Although two of the three Aboriginal law cases reached the Supreme Court several after Macdonald's death in 1891, both had their roots in events from the 1870s. One determined which government was responsible to fund an 1874 increase in annuities and the other arose out of a federal disposition following an 1886 surrender of reserve land.

42 Mowat and Macdonald had a much longer history than their overlap in office between 1878 and 1891. Mowat had begun articling in Macdonald's Kingston law office in 1836, six months before his sixteenth birthday. Paul Romney, "MOWAT, Sir OLIVER," in *Dictionary of Canadian Biography*, vol. 13, University of Toronto/Université Laval, 2003–, accessed August 18, 2019, http://www.biographi.ca/en/bio/mowat_oliver_13E.html.

Sir John A. Macdonald when they were both articling in Kingston, [43] although Gwynne moved to Toronto to finish his articles. He and Macdonald remained lifelong friends, and one of the first actions the latter took after he was returned to office in 1878 was to appoint Gwynne to the Supreme Court of Canada.[44] During his tenure on the Court, Gwynne consistently outlined his views on Canada's constitutional nature, which reduced provinces to little more than municipal governments[45] and described Canada as being a unitary state resembling Great Britain.[46] A biographical sketch of Gwynne published shortly after his death praised his writing style,[47] which exhibited technical precision but also showed over time a growing tendency toward the apocalyptic in tone.[48]

Shortly after Gwynne's appointment, the trend of Supreme Court of Canada division of power decisions began to favour the provincial position. In terms of causation, it is impossible to say with certainty whether this trend coincided with or was influenced by a similar tendency displayed by the Judicial Committee of the Privy Council. The Judicial Committee interpreted the *British North America Act* through a decentralizing prism that likely would have surprised the authors of the document.[49]

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43. Paul Romney, "From Railway Construction to Constitutional Construction: John Wellington Gwynne's National Dream" (1991) 20:1 Man LJ 91 at 92.

44. Partisanship aside, contemporaries of Gwynne praised his tenure on the Court of Common Pleas, particularly his experience in the field of equity. Saywell, *supra* note 23 at 34.

45 *City of Fredericton v the Queen* (1880) 3 SCR 505 at 564, Gwynne J, rev'g (1879), 19 NBR 139 (SC).

46 *Ibid* at 561, 563, Gwynne J.

47 The article described Gwynne's written judgments as "masterpieces of written English". George Martin Rae, "Some Constitutional Opinions of the Late Justice Gwynne" (1904), 24 Can Law Times 1 at 1-2.

48. In a private letter written when he was 75, he expressed the view to a friend that "Old as I am, I fully expect that both you and I shall be present as mourners at the funeral of Confederation cruelly murdered in the house of its friends." Paul Romney, GWYNNE, JOHN WELLINGTON," in *Dictionary of Canadian Biography*, vol 13, University of Toronto /Universite Laval, 2013-, accessed August 18, 2019. http://www.biographi.ca/en/bio/gwynne_john_Wellington _13E.html; Romney, *supra* note 43 at 105.

49 I recognize that this view is far from unanimous. In *Lawmakers,* John Saywell summarizes the contending views regarding the Judicial Committee's interpretation of the *British North America Act.* The defenders of the Judicial Committee mentioned by Saywell include Paul Romney, William Lederman, and Peter Russel. The opposing view is represented by Paul Weiler, Bora Laskin as academic and judge, and Saywell himself. Saywell, *supra* note 23 at xvi-xx.

Justice Gwynne was a member of the Supreme Court when the conflicting decisions of provincial courts began to reach the Supreme Court. His description of provinces as little more than municipal corporations was expressed in his judgment as part of a majority upholding the validity of the *Canada Temperance Act.*[50] But Gwynne was in the minority when the Supreme Court affirmed the Ontario Court of Appeal decisions in *Parsons* that the insurance policies were subject to provincial regulation as matters affecting property and civil rights.[51] Throughout his tenure, Gwynne maintained his correspondence with the Prime Minister, providing advice on how to respond to what he saw as incorrect Supreme Court decisions. After the *Parsons* decision, Gwynne encouraged a vigourous appeal to the Judicial Committee, characterizing the position put forward successfully by Ontario in that case as nothing less than a claim of "Provincial Sovereignty."[52]

After *St Catherines Milling,* the next Aboriginal law case faced by the Supreme Court of Canada was *Ontario v Dominion of Canada*[53] in which the Supreme Court was required in its decision to address the implementation of two treaties negotiated by Commissioner William Benjamin Robinson on behalf of the Crown with the First Nations of the Lake Superior and Lake Huron watersheds in 1850.[54] In these treaties, the Crown was the Province of Canada created by the *Act of Union, 1840.*[55] While both Ontario and Quebec were successors in title

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50. *City of Fredericton, supra* note 45.
51. *Citizens' and the Queen Insurance Companies v Parsons* (1880), 4 SCR 215, aff'g (1879), 4 OAR 96 at 100, aff'g (1878) UCQB 261 [*Citzens*], aff'g (1879), 4 OAR 103, aff'g (1878), 43 UCQB 271 [*the Queen*], aff'd [1881] UKPC 49.
52. Saywell, *supra* note 23 at 104.Macdonald's biographer Richard Gwynn states that Macdonald ignored Citizens Gwynne's advice. Gwyn, *supra* note 27 at 379.
53. *Ontario v Canada*, *supra* note 8.
54. *Robinson Treaty Made in the Year 1850 with the Ojibwa Indians of Lake Superior and Lake Huron* (Ottawa: Queen's Printer, 1964).
55 *Act of Union, 1840* (UK), 3-4 Vict (1840), c 35.

to the Province of Canada under the *British North America Act,*[56] all of the lands covered by the Robinson Treaties were in Ontario.

The facts in *Ontario v Canada* were hopelessly complex, but the issue before the Court was relatively straightforward. The two Robinson Treaties included terms providing for the payment by the Crown of perpetual annuities and set a test for determining whether the annuities would be increased.[57] Under the *British North America Act, 1867*, the new Dominion of Canada became responsible for the payment of the annuities subject to reimbursement by Ontario as a successor of the Province of Canada. In 1874, the Dominion conceded that the conditions precedent for increasing the treaty annuities had been satisfied. There were two ways to calculate how much Ontario owed the Dominion as a result of this increase, and which method to use was determined by how the promise of increased annuities was characterized. If the promise represented a "debt or liability" of Ontario, the reimbursement would be calculated by using a complex formula set out in sections 111 and 112 of the *British North America Act*. If this method was appropriate, Ontario might have no obligation of reimbursement, and any liability would be shared with Quebec.[58] But if the treaty promise regarding increases in annuities created a "trust" within the meaning of section 109 of the *Constitution Act*, *1867*,[59] Ontario alone would be obliged to reimburse Canada for the full amount of the payments. As set out in section 142 of the *British North America Act, 1867*, Canada, Ontario, and Quebec each selected an arbitrator to consider the question.[60] By a margin of two to one, these arbitrators concluded that the territory ceded by the Robinson Treaties became part of Ontario

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56 *British North America Act, supra* note 14 at s 6, s 109.

57 *Robinson Treaties, supra* note 54. The annuities paid under the Treaties were funded by the proceeds of the sales of lands surrendered by the Treaties. If it was determined "at any future time" that the annuities could be increased "without incurring loss," such an increase would take place. It was determined in 1874 that the condition precedent for an increase to the annuities had been met as early as 1851.

58 *British North America Act, supra* note 14, ss 111-112.

59 *Ibid,* s 109.

60 *Ibid.* at s 142.

subject to a trust to pay the increased annuities should the conditions for such payment be met. As a consequence, Ontario was solely liable to reimburse Canada for the increased payments.[61] Ontario appealed the decision of the arbitrators to the Supreme Court of Canada.

To succeed before the Supreme Court of Canada, Ontario was required to prove that the reference in the Robinson Treaties to a direct and contingent relationship between revenues from the disposition of surrendered lands and the calculation of treaty annuities constituted neither a charge on the surrendered lands nor a charge on the funds obtained through their disposition of these lands. Counsel for Ontario set out to do so through three similar arguments, all related to the reasons for entering into the Treaties in 1850. Essentially, the three arguments were variations on the assertion that the negotiation of the Robinson Treaties could not possibly have resulted in the creation of a trust, because that would have rendered impossible the primary goal of the Crown in entering into the treaties, which was "that the lands were to be placed in the possession of [the Province of] Canada, so that they might deal absolutely with them."[62] In response, counsel for the federal government presented an argument usually associated with Aboriginal law a century later by denying that the Indigenous interest in the surrendered lands either before or after the Robinson Treaties could be defined by analogy to any known common law or statutory interest and was *sui generis*. However, the argument then continued that whatever the interest was, it had the characteristics of a trust on the surrendered lands.[63] At the heart of the federal argument was the goal of distinguishing the case from *St. Catherines Milling*, which held that there was no cognizable Indigenous interest in land either before or after the signing of Treaty 3.[64] Canada characterized Treaty 3, which was at issue in

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61 *Ontario v Canada, supra* note 8 at 497-498, Strong CJC.
62 *Ibid* at 468-473.
63 *Ibid* at 476-477.
64 *St. Catherines Milling and Lumber Company v. the Queen* [1888] UKPC 70, aff'g (1887), 13 SCR 577, aff'g (1887), 13 SCR 577, aff'g (1886) 13 OAR 148 (CA), aff'g (1885), 10 OR 196 (Ch).

St Catherines Milling, as a transaction completed upon signing, with lands being surrendered in return for reserves, perpetual but fixed annuities, and other defined benefits. In contrast, the Robinson Treaties were a work in progress, as annuities would from time to time be adjusted to reflect the revenue from sales of the ceded lands. The ongoing contingent relationship between the two meant that the promise of annuities was a trust that burdened the ceded lands.[65]

By a majority of three to two, the Supreme Court agreed with the arguments made by Ontario and reversed the conclusion of the arbitrators. For the majority, Chief Justice Strong began his analysis by accepting Ontario's argument that there was nothing in the Robinson Treaties that either expressly or implicitly established a trust or any other relationship between the surrendered lands and the promised annuities.[66] The Chief Justice expressed the view that the Indigenous signatories to the Treaties had received the same security for the enhanced annuities as "an ordinary vendor of real property" and that this was the highest security possible, namely the "assurance and covenant of the Imperial Government."[67] He also agreed with Ontario's underlying argument that no trust could have been intended when the treaties were negotiated, since the Province of Ontario would not have agreed to do so under any circumstances.[68] Justice Taschereau concurred with the Chief Justice.[69] Justice Sedgewick concurred in the result, but he added the contention that since the decision would have no impact on the Indigenous signatories to the Robinson Treaties, those documents had no relevance and the issue in the litigation was a matter of the division of powers under the *British North America Act, 1867.*[70] Justice King used the same analysis as Sedgewick, but he dissented because he applied the principle that when two interpretations of an agreement are possible,

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65 *Ontario v Canada, supra* note 8 at 498.
66 *Ibid* at 503, Strong CJC.
67 *Ibid.*
68 *Ibid*. at 503, Strong CJC.
69 *Ibid* at 508, Taschereau J.
70 *Ibid* at 535, Sedgewick J.

the law should be interpreted to provide the "more effectual security" to an unpaid vendor.[71] As such, the undertaking to pay (and potentially increase) annuities should be characterized as a trust rather than a debt.[72]

Justice Gwynne began his dissent by commenting on the essential nature of treaty promises, which "had always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which the faith and Honour of the Crown is pledged."[73] He added that this trust "has always been most faithfully fulfilled as a treaty obligation of the Crown."[74] This trust was in no way a burden on the surrendered lands, but rather on the fund into which the proceeds of land sales were paid.[75] Gwynne went on to insist that nothing in his opinion should be interpreted as suggesting that the trust that was created could be enforced by any court of law or equity.[76] Rather, the trust was entirely the result of an *ex gratia* undertaking by the Crown and not as consideration for the cession of any Indigenous interest in the surrendered lands. Any other approach could lead to the incorrect suggestion that "Her Majesty's title to the lands was not perfect, independently of the treaties, or that Her Majesty derived title to the lands in virtue of the surrender by the Indians mentioned in the treaties."[77] Rather, it had been the policy of the Crown throughout Canada's colonial history to apply the "rule or practice of entering into agreements with the Indian nations or tribes" to obtain the cession or surrender of "what such sovereigns have been pleased to designate the Indian title, by instruments similar

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71 *Ibid.* at 546-548, King J, dissenting.
72 *Ibid.* at 550, King J, dissenting.
73 *Ibid.* at 511-512, Gwynne J, dissenting.
74 *Ibid.* at 512, Gwynne J, dissenting.
75 *Ibid.* at 524-525, Gwynne J, dissenting.
76 *Ibid.* at 524, Gwynne J, dissenting.
77 *Ibid.* at 511-512, Gwynne J., dissenting.

to these now under consideration"[78] It was for those reasons that Justice Gwynne would have affirmed the decision of the arbitrators.[79]

The federal government and Quebec appealed to the Judicial Committee of the Privy Council. The decision of the Judicial Committee was delivered by Lord Watson, who had played the same role in *St. Catherine's Milling*. He adopted the same analysis as Justices Sedgewick and King (notwithstanding the fact that they had reached opposite conclusions), quoting the latter but agreeing with the result reached by the former. Lord Watson could see no reason to interpret the Robinson Treaties as creating an equitable interest on behalf of the Indigenous signatories when this would be of no practical value to them, particularly when the Province of Canada would have not agreed to the same when the Treaties were signed. Accordingly, the Judicial Committee affirmed the decision of the Supreme Court.[80]

Ontario Mining Company v. Seybold[81] dealt with the same issue as *St. Catherine's Milling*, although it concerned minerals rather than lands. After the signing of Treaty 3, Sultana Island in the Lake of the Woods was set aside as a reserve for the Rat Portage Band. This reserve land was surrendered for sale by the Band in 1886 on the condition that the Dominion of Canada would include in the disposition of the minerals in the reserve a royalty in favour of Rat Portage.[82] Canada and Ontario disposed of the minerals to different parties, and litigation arose out of an action by the purchasers from the federal Crown against the purchasers from Ontario.[83]

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78 *Ibid.* at 511, Gwynne J, dissenting.
79 *Ibid.* at 527, Gwynne J, dissenting.
80 *Attorney General of the Dominion of Canada v. the Attorney General for the Province of Ontario*, [1897], AC 199 at 213, Lord Watson, (JCPC), aff'g *Province of Ontario v. Dominion of Canada and Province of Quebec. In re Land Claims* (1895), 25 SCR 434.
81 *Seybold, supra* note 9.
82 *Ibid.* at 17, Gwynne J. dissenting.
83 *Ibid.* at 19, Gwynne J. dissenting.

The trial decision, delivered by Chancellor John Alexander Boyd, the same judge who had heard *St. Catherine's Milling*, held that the earlier case had established that the Indigenous interest in lands was limited to a usufructuary right relating to the surface and did not extend to mines and minerals, and as such Ontario had held the minerals since 1867.[84] This decision was upheld in a short decision by the Ontario Divisional Court.[85] In the Supreme Court of Canada, four of the five judges who heard the case agreed with a one sentence judgment by Chief Justice Strong that any appeal must fail because the Court was bound by *St. Catherine's Milling*.[86]

In contrast to Chief Justice Strong's one sentence decision, Justice Gwynne wrote a 20-page dissent. He asserted that to uphold the lower court decisions in favour of Ontario would mean that the *Royal Proclamation* was a dead letter; that the practice of engaging in "solemn proceedings" resulting in treaties was a "delusive mockery;" and that s. 91(24) of the *British North America Act, 1867* was "devoid of all significance."[87] Gwynne closed his dissent with the conclusion that the case before him was easily distinguishable from *St. Catherine's Milling*.[88] The apocalyptic tone of Justice Gwynne's dissent could have reflected the fact that, a few days away from his 87th birthday and within a year of his death, he continued to brood over what he saw as the injustice of *St. Catherine's Milling*, decided almost 15 years earlier.

The Judicial Committee dismissed the appeal from the Supreme Court of Canada decision. Lord Watson had died in 1899,[89] and Lord Davey delivered the decision. The Judicial

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84 *Ontario Mining Company v. Seybold* (1899), 31 OR 386 (Ch), aff'd (1900) 32 OR 301 (Div Ct), aff'd (1901) 32 SCR 1, aff'd [1903] AC 73.

85 *Ontario Mining Company v. Seybold* (1900), 32 OR 301 (Div. Ct.), aff'g *Ontario Mining Company v Seybold* (1899), 31 OR 386 (Ch.), aff'd (1901) 32 SCR 1, aff'd [1903] AC 73.

86 *Seybold, supra* note 9 at 2, Strong CJC.

87 *Ibid.* at 19-20, Gwynne J. dissenting.

88 *Ibid*. at 22-23, Gwynne J. dissenting.

89 RB Haldane, "Lord Watson" (1899) 11:3 Jurid Rev 278 at 278. Viscount Haldane was Watson's successor on the Judicial Committee as well as his intellectual heir. He acknowledged that the law created by Lord Watson was "his own", but that it had been necessary to do so. Haldane's conclusion was that

Committee agreed that the case before it was a "corollary" to *St. Catherine's Milling*. Since in 1867 Ontario took the lands that were later the subject of Treaty 3 free and clear of all burdens, there was no need for the Judicial Committee to consider the 1886 surrender, which was irrelevant.[90] The Committee also registered a not particularly subtle criticism of Justice Gwynne, describing his dissent as an attack on the Judicial Committee's decision in *St. Catherine's Milling*.[91]

Of Gwynne's two dissents, the one in *Ontario v Canada* was the more substantive. Justice Binnie quoted and highlighted Gwynne's contention in that case that the Crown had pledged its faith and honour to the fulfilment of a trust that it had "graciously assumed" in the Robinson Treaties.[92] These words can be interpreted as going beyond fulfilling the Honour of the Crown and in fact imposed a fiduciary obligation on the Crown.[93] As noted earlier, the issue in the case was whether the promise to pay enhanced annuities created a trust. But no Indigenous interest was at issue in the case. The enhanced annuities had been paid since 1874 and the case was limited to whether or not the Dominion was entitled to reimbursement by Ontario for these payments. A characterization of the enhanced annuities as a trust would have benefited the Dominion rather than the Robinson Treaty annuitants. Had the interest of annuity recipients been at issue, the unenforceable trust as described by Justice Gwynne is less impressive. He acknowledged that he was describing a relationship that could be deemed to be

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Watson was the author of "a series of judgments" through which he "expounded and established the real constitution of Canada."

90 *Ontario Mining Company v. Seybold,* [1903] AC 73 at 81, aff'g (1901), 32 SCR 1, aff'g (1900), 32 OR 301 (Div Ct), aff'g (1899), 31 OR 386 (Ch.).

91 *Ibid.* at 78. By the time the Judicial Committee announced its decision, Gwynne had been dead for almost a year. Romney, *supra* note 48.

92 In *Marshall, supra* note 6 at 497, Justice Binnie quotes Gwynne's words from *Ontario v Canada, supra* note 8 at 512, Gwynne J, dissenting.

93 A 2015 decision of the Specific Claims Tribunal, which is discussed at length in Chapter V, held that the collective annuities of a band's members were "an asset" of a band and the wrongful withholding of these annuities constituted a breach of fiduciary duty. *Beardy's and Okemasis First Nation v the Queen,* 2015 SCTC 3.

a trust for the purpose of section 109 of the *British North America Act*, not a trust that represented a charge on the lands surrendered in the treaty, a trust recognizable by a court of law or equity, or a trust that imposed a legal obligation on the Crown that could be enforced by Indigenous parties to the treaty.[94]

For future generations, the motivation of a judge for reaching a particular conclusion matters far less than the conclusion itself, and Justice Binnie was entitled to interpret Gwynne's words in *Ontario v Canada* and for Justice Cartwright to refer to Gwynne's words in *Seybold*[95] as being consistent with a generous interpretation of the Honour of the Crown. However, Justice Gwynne's motivation for writing his judgment is significant in determining the credit he should receive for the modern concept of the Honour of the Crown. As noted above, other excerpts from the dissent in *Ontario v Canada* describe the "trust" he referenced less generously.

An 1852 Upper Canada Court of Appeal decision in a non-Aboriginal law case earlier in the nineteenth century had suggested a way to interpret royal grants. The decision relied on two decisions reported (but not decided) by Coke[96] that support the proposition that if a royal grant is given for value, "the effect of the patent shall always, for the honor [sic] of the Crown, be allowed in favour of the grantee." [97] Another early nineteenth century Upper Canada decision held that a gratuitous grant is to be construed most favourably for the King.[98] Gwynne's judgment leaves no doubt that it was his view that the Crown's title to the lands covered by the Robinson Treaties was "perfect" prior to the execution of the treaties and that

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94 *Ontario v Canada, supra* note 8 at 511-514.

95 *George, supra* note 7 at 276, Cartwright J, dissenting. In fact, Cartwright quotes Territorial Court Judge Sissons' citation of *Seybold.*

96 *Baldwin's Case (Baldwin v Marton)* (1589) 2 Co Rep 23 at 24a (CP), 76 ER 436; *Davenport's Case* (1610), 8 Co Rep 144b at 145a (KB), 77 ER 693.

97 *Doe d Henderson v Westover* (1852), 1 E&A 465 at 468, Robinson CJ (UCCA).

98 *R v Allan, Jarvis, and McGill* (1830-1831), 2 UCKB (OS) 90. This point was also conceded in *Doe D Henderson, supra* note 97.

the undertakings made in the treaties were gratuitous and entirely the result of the grace of the Crown.[99]

I also find it relevant that in *Ontario v Canada* and *Seybold* (as well as in *St Catherines Milling*), the position of the Dominion was served by a generous characterization of the Indigenous interest in land, and that the outrage expressed by Gwynne related to the victory of Ontario over the Dominion in the litigation rather than to any impact on the Indigenous parties to the relevant treaty. It is doubtful that Gwynne's views would have been as generous had Indigenous peoples and the Dominion of Canada been adverse in interest, but Gwynne's judicial writings justify considerable scepticism.

Nor is it possible to find the Honour of the Crown playing much of a role in litigation other than Aboriginal law prior to its appearance in the Supreme Court of Canada in *George*. In a particularly egregious case decided by the Upper Canada Court of Queen's Bench, in which the Crown sold clergy lands to one party, took money from him, gave him a receipt, and then attempted to grant the same lands to a second party, Chief Justice John Beverly Robinson cited the Honour of the Crown as a reason for preventing the Crown from reneging on the original sale.[100] In *Holland v Ross*, the Supreme Court of Canada held that in issuing a patent without inspecting the property to ensure that all homestead duties had been completed was a waiver of the right to cancel a patent if it was subsequently discovered that not all of the duties had

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99 *Ontario v Canada, supra* note 8 at 511, Gwynne J, dissenting. There is also an inconsistency between Gwynne's view of "perfect" nature of the Crown's title prior to the execution of the Robinson Treaties and his characterization of the "Honour of the Crown" An 1852 decision of the Court of Queen's Bench of Upper Canada mentioned previously held that a Crown grant should be read in favour of the grantee if the Crown received valuable consideration for it but should be read in favour of the Crown if a grant is gratuitous. *Doe d Henderson v Westover*, *supra* note 97. Given Gwynne's characterization of the impact of the Robinson Treaties on Crown title, it is difficult to imagine that Gwynne would treat the Crown undertakings in the Treaties as anything other than gratuitous.

100 *Doe d Henderson v Westover, supra* note 97.at 468, Robinson CJ (UCCA)..

been completed. Chief Justice Ritchie held that the Honour of the Crown prevented the cancellation of the patent.[101]

In *The Queen v Belleau*, the Exchequer Court cited the Honour of the Crown as one of the considerations in holding that the trustees who sold debentures on behalf of the province of Canada to fund the improvement of a provincial highway on the north shore of the Saint Lawrence River near Quebec City were entitled to reimbursement for the value of the debentures when they came due. Justice Fournier held that any other interpretation would be "contrary to the dignity and honour of the Crown.[102] A majority of the Supreme Court of Canada affirmed the decision without reference to the Honour of the Crown,[103] but this decision was reversed by the Judicial Committee of the House of Lords, again without reference to the Honour of the Crown.[104]The Honour of the Crown was referenced briefly by Chief Justice Ritchie but played no role in the decision in *Windsor & Annapolis Railway Company v the Queen and the Western Railway Company*, which turned on the question of whether a wrong committed by Crown agents was a tort or a breach of contract.[105]

On other occasions, nineteenth century Canadian courts used the Honour of the Crown to allow the Crown to evade responsibility for problems of its own making. In *Doe d Malloch v Principal Officers of Her Majesty's Ordnance*,[106] the Crown had excised and sold a parcel of land originally reserved for the construction of the Rideau Canal after an official incorrectly reported that the land would not be needed for the construction of the canal. When the mistake was discovered, the Crown moved to cancel the patent to the lands sold. The Upper Canada

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101 *Holland v Ross* (1891), 19 SCR 566 at 571.
102 *The Queen v Belleau* (1881), 7 SCR 53 at 71
103 *Ibid* at 204.
104 *Ibid* at 215.
105 *Windsor & Annapolis Railway Company v the Queen and Wester Railway Company* (1885), 10 SCR 335 at 371, Ritchie CJ, var'd (1886), 11 App Cas 607.
106 *Doe d Malloch v Principal Officers of Her Majesty's Ordnance*, (1847), 3 UCQB 387.

Court of Queen's Bench held that the sale of the land was void. The reason given was that the Crown would never have intentionally sold lands that had been purchased for the purpose of constructing an important public work, since that would have been a breach of the Honour of the Crown to her subjects requiring the canal construction. Accordingly, Chief Justice Robinson concluded that the Crown must have been deceived into selling the land.[107] On another occasion, the Crown had sold land along the Sydehham River, with one of the conditions of sale being the construction of a sawmill on the land. After the sawmill began operating, it began to release sawdust into the river, which ultimately damaged the harbour of the nearby town of Owen Sound. On behalf of the town, the Attorney General sought an injunction to prevent further release of the sawdust. The operators of the sawmill argued that the release of sawdust was an inevitable outcome of the operation of a sawmill and its grant should be interpreted as including an implied licence allowing it. In issuing the injunction, the Upper Canada Court of Chancery held that there could be no suggestion that the Crown would have granted a licence to commit a public nuisance, since that would have derogated from the Honour of the Crown.[108] These two decisions represent ways in which the Honour of the Crown could indirectly shield the Crown against responsibility for problems in either created or exacerbated. In the late nineteenth century, the Supreme Court of Canada went further and illustrated how the Honour of the Crown could directly shield the Crown from liability. *R v McFarlane* arose out of the operation by the Crown of a number of slides, dams, piers, and booms on the Ottawa River and its tributaries as public works to assist the timber industry.[109] As a result of the negligent operation of equipment at one site on the Madawaska River, a

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107 *Ibid* at para 3.
108 *Attorney General v Harrison* (1866), 12 Gr 466 at para 9 (UC CC).
109 *R v McFarlane* (1882), 7 SCR 216 at 216.

timber company suffered damages for which it sued the Crown.[110] In the Exchequer Court, the Crown filed a demurrer admitting all of the facts alleged by the plaintiff, but asserting immunity from liability as a matter of law.[111] The demurrer was rejected at trial[112]. On appeal, the only Justice who dissented from a decision to allow the Crown's appeal was the judge who had rendered the decision of the Exchequer Court.[113] After noting near the start of his judgment that "the Queen, not being a private individual, was not subject to the liabilities of private individuals,"[114] Chief Justice Ritchie concluded with the statement that the attempt

> "to make Her Majesty amenable to her subjects in her courts for the proper exercise of her prerogatival rights…amounts to a direct and unwarrantable attack on Her Majesty's prerogative rights and is derogatory to the honor of her Crown and an imputation that ought not in my opinion to be permitted to appear on the records of this court."[115]

Common Law Source of the Honour of the Crown

In *R. v. George*, Justice Cartwright relied on *Churchwardens*[116] to support his interpretation of Treaty 29 in a way that that avoided the conclusion that the Sovereign and Parliament were "subject to the reproach of having taken away by unilateral action and without the rights solemnly assured to the Indians and their posterity by treaty."[117] Justice Binnie's interpretation of *Churchwardens* was that the Honour of the Crown was "specifically invoked by courts in the early 17th century to ensure that a Crown grant was effective to accomplish its

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110 *Ibid* at 219.
111 *Ibid* at 220.
112 *Ibid* at 221.
113 *Ibid* at 243, Ritchie CJ.
114 *Ibid* at 234, Ritchie CJ
115 *Ibid* at 239, Ritchie CJ.
116 *Churchwardens, supra* note 10.
117 *George, supra* note 7 at 279, Cartwright J, dissenting.

intended purpose."[118]Binnie also cited a second seventeenth century case, *Roger Earl of Rutland's Case*,[119] in support of the same principle.[120]

Churchwardens, which two modern scholars have characterized as having a "Sherlock Holmesian" name,[121] dealt with a 1585 demise by Elizabeth I of a parish church and rectory for the Parish of St. Saviour in Southwark in what is now central London, to a number of individuals for a period of 21 years. Five years later, while the initial patent was still in effect, the Queen demised the rectory to the same persons named in the 1585 grant, who had by 1590 been incorporated as the Churchwardens of Saint Saviour Parish, Southwark, for a period of 50 years upon cancellation of the earlier grant and the payment of £20 to the Court of Chancery. The payment was made, but the first grant was never returned for cancellation.[122] The issue in the litigation was whether the second demise relating to the rectory had ever become effective given that the earlier grant had not been returned for cancellation. If the second demise had not been issued because the conditions precedent to it had not been met, the original demise of both the parish church and the rectory would have ended in 1606.

In deciding the case, Sir Edward Coke, the Chief Justice of the Court of King's Bench, referred to a similar case, that of *Roger the Earl of Rutland's Case*,[123] that had come before him when he sat on the Court of Common Pleas five years earlier. That case dealt with a grant by Elizabeth I of a life interest to one Thomas of. After the death of Elizabeth, James I issued

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118 *Marshall, supra* note 6 at 492-493, Binnie J.

119 *Roger the Earl of Rutland, supra* note 12.

120 *Marshall, supra* note 6 at 492-493, Binnie J.

121 Mariana Valverde and Adriel Weaver, "'The Crown Wears Many Hats': Canadian Aboriginal law and the Black-boxing of Empire" in Kyle McGee, ed., *Latour and the Passage of Law* (Edinburgh: Edinburgh University Press, 2015) 93 at 98. The "Holmesian" reference was part of the process of belittling the practice of grounding the Honour of the Crown regarding the Indigenous-Crown relationship in what the authors refer to as early seventeenth century English "private law cases." With regard to this criticism, one party to *Churchwardens* was a corporate body made up of private citizens, but it was certainly a public law case since the decision turned on the actions of Elizabeth I and James I.

122 *Churchwardens, supra* note 10 at 66b-67a.

123 *Roger the Earl of Rutland, supra* note 12.

a second grant of the same land as a life estate to the Earl of Rutland, but the grant was silent as to when it began. The issue was whether, upon the death of Thomas of Markham, the second grant to the Earl of Rutland began. The Earl of Shrewsbury, who had taken possession of the lands upon the death of Thomas Markham, argued that the grant to the Earl of Rutland was void as a result of uncertainty because of the absence of an effective date. He also argued that James I had mistakenly issued a grant to the Earl of Rutland of lands to which there was already a subsisting grant, and as such the grant to the Earl of Rutland was a null and void.[124] Coke found for the Earl of Rutland, holding that his grant had become effective upon the death of Thomas Markham. He gave two reasons, one narrow and specifically related to the facts of the case, and the other more a statement of general principle. The first was that James I was not mistaken in the second grant, because that document made specific reference to the existence of the life interest of Thomas of Markham, although it did not specify that the effective date of the second grant was Markham's death.[125] The more general reason given was that if there are two interpretations of a royal grant, one of which would result in it being a nullity, a court should select the interpretation that would result in the grant being valid, since this approach would be for the benefit of the relevant subject and uphold the honour of the King by preventing any suggestion that the King had the intent to make a void grant.[126] Coke adopted this reasoning in his *Churchwardens* decision, finding that since the 50 year grant made reference to the 21 year grant, the intention of the grant was such that it was not necessary for the original grant to be returned for cancellation.[127] However, he added as a general rule of interpretation words that were almost identical to those in the *Earl of Rutland's* case. That was

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124 *Ibid.* at 55a-55b.
125 *Ibid.* at 55b-56a.
126 *Ibid.* at 56a.
127 *Churchwardens, supra* note 10 at 66a.

> when it [a Crown grant] may receive two constructions, and by force of one construction the grant may according to the rule of law be adjudged good, and by another it shall be adjudged void: then for the King's honour, and for the benefit of his subject, such construction shall be made, that the King's charter shall take effect, for it was not the King's intent to make a void grant.[128]

Of the precedents cited by Coke for this principle, the earliest case is *Sir John Molyn's Case*,[129] a 1598 Exchequer decision also written by him. That case cited no specific authority regarding the construction to be given to a royal grant, but it makes reference to "the gravity of the ancient sages of the law, to construe the king's grant beneficially for his honour and the relief of the subject, and not to make any strict or literal construction in subversion of such grants."[130] An 1855 treatise on Letters Patent cites *Churchwardens*, *Roger the Earl of Rutland*, and *Sir John Molyn's Case* as authority for the interpretation of letters patent "beneficially for his [the King's] honour and the relief of the subject."[131]

The reference in *Sir John Molyn's Case* to "the gravity of the ancient sages of the law" was consistent with Coke's belief in the common law as an unbroken chain reaching back to antiquity.[132] Coke expressed a preference for seeking out precedents that could be applied by analogy to the case before him as opposed to using abstract reasoning to reach a decision, and Coke's has been characterized as believing that "the antiquity of a precedent was enough to prove its wisdom."[133] However, the reference to "the gravity of the ancient sages of the law" rather than to specific cases is not inconsistent with Coke's actual practice, which was not to

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128 *Ibid.* at 67b.

129 *Sir John Molyn's Case* (1598), 6 Co Rep 5b, 77 ER 261.

130 *Ibid* at 6a.

131 John Coryton, *A Treatise on the Law of Letters-Patent, for the Sole Use of Inventions in the United Kingdom of Great Britain and Ireland: including the practice associated with the grant* (Philadelphia: T & AW Johnson, 1855) at 124.

132 Harold J Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale (1994) 103:7 Yale LJ 1651 at 1680.

133 Jason S Crye, "Ancient Constitutionalism: Sir Edward Coke's Contribution to the Anglo-American Legal Tradition" (2009) 3:1 J Juris 235 at 249.

look to a single case but rather to "a body of principles whose authority he seems to derive from their undisputed acceptance over a number of years."[134] As such, Coke did not cite any specific precedent or precedents.

The context in which Coke decided *Churchwardens* suggests that for Coke there was more at stake in the cases than the interpretation of Crown grants. When James I ascended the throne in 1603, he brought with him the conviction, expressed in his 1598 book *The True Laws of Free Monarchies* that his authority was unconstrained by any duty to his subjects, and that he was only answerable to God for the conduct of his office.[135.] Although Coke's tenure as Solicitor General and Attorney General under Elizabeth I had shown him to be "conspicuously subservient to the royal interest,"[136] he dedicated the last 30 years of his life battling what he saw as the threat of royal absolutism posed by James I and his son Charles I.[137]

Coke set out to illustrate that the common law was more authoritative than the royal prerogative in that the former imposed limits on the latter.[138] While *Churchwardens* lacks the

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134 Theodore Plucknett, "The Genesis of Coke's Reports" (1941-1942) 27:2 Cornell L Q 190 at 213. In Coke's case, the reference to "principles" should not be confused with the Ronald Dworkin's reference to of principles flowing from general theories of law that operate at a high level of abstraction. Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1986) at 90. For Coke, principles reflected the collective wisdom of judges who had previously considered similar cases. Allen Dillard Boyer, "Understanding Authority, Autonomy, and Will: Sir Edward Coke and the Elizabethan Origins of Judicial Review" (1997-1998) 39:1 BCL Rev 43 at 61.

135 Berman, *supra* note 132 at 1671; Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (University Park, Pennsylvania: Penn State University Press, 1992) at 42.

136 Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law [Part II]" (1928-1929) 42:3 Harvard L Rev 365 at 367.

137 Paul Raffield, "Contract, Classicism, and the Commonweal: Coke's Reports and the Foundation of the Modern English Constitution" (2005) 17:1 Law and Literature 69 at 74.

138 *Ibid.*

drama or the significance of *Prohibitions del Roy*[139] or the *Case of Proclamations*,[140] it is in the same tradition as the more famous cases.[141] Coke did not set out to direct all of his efforts against James I. *Sir John Molyn's Case* was decided during the reign of Elizabeth I and *Roger the Earl of Rutland* involved private parties each of whom claimed to hold a grant from the Crown, with Coke upholding the grant issued by James. But in *Churchwardens* James I was, while unidentified, a party to the case since if the 1590 demise was invalid, the original 1585 demise had expired, and he would have been free to issue a grant of the property to whomever he pleased for whatever consideration he specified.

In his struggle against Stuart absolutism, history was the most important tool available to Coke. After his dismissal from the bench and his election to Parliament, Coke assisted the leaders of that body in their confrontations with Charles I by searching through historical records to find any precedent limiting the authority of the King.[142] One result of this search was Coke's use of *Magna Carta* as evidence of the existence of a body of rights that a reigning

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139 *Prohibitions del Roy* arose out of the attempt by James I to remove a land dispute from the Court of Common Pleas and reserve it for his own decision. This action was reviewed by Coke, the Barons of Exchequer, and "all the judges of England." Speaking for this body, Coke held that since at least 1066, the King could not, on his own, act as judge in any civil or criminal case and that these could only be heard by "Courts of Justice, according to the law and customs of England." The case is significant for two reasons. First, it provided Coke with the opportunity to set out his theory that adjudication was a matter of applying "artificial reason and judgment of law, which law is an act which requires long study and experience, before a man can attain to the cognizance of it." Second, after James I expressed his displeasure with the decision, Coke reached back to the 13th century to quote Bracton's statement that while the King was above all other persons, he was below God and the law. *Prohibitions del Roy* (1607), 12 Co Rep 63, 77 ER 1342.

140 In 1610, Coke, as Chief Justice of the Court of Common Pleas and two Barons of the Exchequer were asked whether the King had the authority to issue a proclamation to prohibit the construction of new buildings in London. Their unanimous response (for which Coke was largely responsible) was that he could not. They held that the law of England had three sources (common law, statute law, and custom), and that a proclamation was not a part of any of them. *Case of Proclamations* (1610), 12 Co Rep 74, 77 ER 1352.

141 I am not suggesting that the Honour of the Crown as described by Coke had its source in his struggle with James I. Coke's first reference to the Honour of the Crown in *Sir John Molyn's Case* was in 1598, during the reign of Elizabeth I. *Sir John Molyn's Case*, *supra* note 113.

142 Augusto Zimmerman, "Sir Edward Coke and the Sovereignty of Law" (2017) 17 Macq L Rev 128 at 138.

monarch was required to respect.[143] Coke was largely responsible for the revival of interest in that document after centuries of obscurity.[144] In an approach resembling that taken by Justice Judson in *Calder* regarding the relationship between Aboriginal title and the *Royal Proclamation*,[145] Coke stressed that *Magna Carta* was a confirmation of rights that had their source in the common law rather than being the source of those rights.[146] As seen in *Prohibitions del Roy*, Coke also turned to the works of Henry de Bracton, who in the late thirteenth century wrote the most important work on English law before the seventeenth century – a treatise, *On the Laws and Customs of England*, which included an annotated collection of 494 cases decided by the Courts of King's Bench and Eyre during the first 24 years of the reign of Henry III [1216-1240]. [147] `As noted above, Bracton was the source of Coke's statement that the King ought to be below no man, but he should be below God and the law.[148]

Ultimately, it is impossible to identify the "ancient sages of the law" invoked by Coke. His views were certainly consistent with Bracton's writing and with *Magna Carta.* He shared in the belief, dating from the twelfth century, that before 1066 there was a "Golden Age" of Saxon law preceding the Norman conquest, [149] which William the Conqueror embraced when he professed to "restore" what he described as the laws of Edward the Confessor[150] and he included in his coronation as William I an oath that he claimed had been used in

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143 Charles Haines, *The American Doctrine of Judicial Supremacy*, 2nd ed (New York: Russell and Russell, 1959) at 32-33.

144 Edward S. Corwin, *supra* note 136 at 170.

145 *Calder v Attorney General of British Columbia,* [1973] SCR 313 at 328-329, Judson J, aff'g (1970), 13 DLR (3rd) 64 (BCCA), aff'g (1969), 8 DLR (3rd) 59 (BCSC).

146 Marc L. Roark, "Retelling English Sovereignty" (2015) 4:1 Brit J Am Leg 81 at 108.

147 FW Maitland, ed., *Bracton's Notebook: A Collection of Cases Decided in the King's Courts during the Reign of Henry III* (London: Cambridge University Press, 1887) Volume I at 52-53.

148. *Ibid,* Volume I at 31.

149. Sir John Fortescue, *The Governance of England: Otherwise Called the Difference between an Absolute and a Limited Democracy*, ed. by Charles Plummer (London: Oxford University Press, 1885) at 101.

150. Frederic William Maitland, "Outlines of English Legal History" in H. A. L. Fisher, ed., *The Collected Papers of Frederic William Maitland* (Cambridge: Cambridge University Press, 1911) 419 at 431.

coronations for several centuries.[151] This included the promise that his decisions as ruler would be consistent with equity and mercy.[152]

Compared to the high stakes and personal risks Coke took in his confrontations with James I over the issues of prerogative and proclamations, the decision in *Churchwardens* might seem less consequential. It is not. Four centuries after the decisions were made, the issues addressed in *Prohibitions del Roy* and the *Case of Proclamations*, the monarch's prerogative and the authority to rule through proclamations exist only as historical artifacts, but the principle that when faced with two possible interpretations of Crown actions or intentions a court will select the alternative that reflects the most honourable, which as a practical matter will likely the interpretation least positive for the Crown, has been elevated by the Supreme Court of Canada to be the dominant interpretive tool in Aboriginal law. Even in the absence of any specific precedent that Coke relied on in his judgments other than his own decisions, the general concept of limiting Crown authority by insisting upon honourable conduct was a consistent theme in the common law before the seventeenth century. As to the ongoing importance of Coke's decisions, particularly *Churchwardens*, the Federal Court of Canada reviewed Coke's approach to the interpretation of Crown grants in *Abbott v Canada*, one of only two non-Aboriginal law cases to contain references to *Churchwardens*. After approving Coke's words, the judgment continued that Coke, "a learned and practical man whose influence has been enormous in establishing the form and development of the common law, is from the age of Shakespeare, but the concept is not dated."[153]

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151. Ernst H Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theory*, 2nd ed. (Princeton: Princeton University Press, 1957) at 347.
152 Berman, *supra* note 132 at 1671.
153 *Abbott v Canada,* 2001 FCT 242 at para 36, aff'd 2002 FCT 186.

Conclusion Regarding the Source of the Honour of the Crown

As set out above, there is no evidence that the Honour of the Crown played any significant role in Canadian law before *Churchwardens* was cited by Justice Cartwright in *R v George.*[154] Since *George*, *Churchwardens* has been referenced in only two non-Aboriginal law cases, both dealing with the renewability of Crown leases in national parks. One of these, *The Queen v Walker*,[155] reached the Supreme Court of Canada. It involved cottage leases in Jasper National Park, which had been issued in 1924 and 1925 for 42-year terms, but which were renewable for one or more additional terms of equal length. At the end of the first term, the Crown refused to renew the leases and the lessees took legal action for a declaration of their right for the renewals they sought.[156] At the time the leases were issued, there were two Regulations in place under which the leases could be issued. One dated from 1909 and authorized leases of "any term not exceeding forty-two years, with the right of renewal," while the 1913 Regulation provided that leases "may be granted for a period of forty-two years renewable in like periods."[157] The leases issued in 1924 and 1925 had the term and renewal provisions consistent with the 1913 Regulations but were silent as to which Regulation was relied on to issue them. Canada took the position that if the leases were issued under the 1909 Regulation, they were void because they exceeded the authority contained in the Regulation.

For the majority, Justice Martland indicated that after a review of the evidence that the leases were probably issued under the 1913 Regulation,[158] but he added that he believed that *Churchwardens,* particularly Coke's statement that "for the King's honour" the preferred

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154 *George, supra* note 7 at 270, Cartwright J, dissenting.
155 *The Queen v Walker*, [1970] SCR 649, aff'g [1969] 1 Ex CR 419.
156 *Ibid* at 652-653, Martland J.
157 *Ibid* at 657-658, Martland J.
158 *Ibid* at 659, Martland J.

interpretation was the one that would not result in a grant being void dealt with the case.[159] The second non-Aboriginal case referencing Coke, which was quoted on page 194, also dealt with cabins, this time located in Riding Mountain National Park. In it, the Federal Court followed Martland's decision in *Watson*, and this was also the case that contained the comment quoted earlier about the timelessness of Coke's method of interpreting Crown grants.[160]

One final point to be considered while moving from the source to the nature of the Honour of the Crown is the question of whether in its modern manifestation it is limited to Aboriginal law. Although there was likely no *a priori* reason for this a century ago, the answer is that it is now almost exclusively a phenomenon of Aboriginal law. Leaving aside the handful of non-Aboriginal law cases that reference Coke's decisions in *Churchwardens* or *Roger the Earl of Rutland* without making specific reference to the Honour of the Crown, the last time the Honour of the Crown was referenced in a non-Aboriginal law case by the Supreme Court of Canada was *Holland v Ross* in 1891.[161]A review of the Nature of the Honour of the Crown will illustrate how it is particularly suited to resolve Aboriginal law issues.

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159 *Ibid* at 662, Martland J. *Walker* was decided four years after *George.* Justice Martland was a member of the Supreme Court at the time Justice Cartwright referenced *Churchwardens.* In fact, Martland wrote the majority judgment in *George* from which Cartwright dissented.

160 *Abbott, supra* note 153. *Abbott* involved lessees of cottages in Riding Mountain National Park, who sought a declaration that they have a right of perpetual renewal even though there is no such provision in their leases. Their claim was dismissed as being statute barred by the Manitoba *Limitations of Actions Act,* CCSM 1987, c L150. Upon appeal, the lessees argued that notwithstanding the fact that there was no remedy to which they were entitled, their right had been not extinguished and they were still entitled to a declaration. This is of course the same argument that was accepted by the majority of the Supreme Court in *Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14 [2013] 1 SCR 623, rev'g 2010 MBCA 71, rev'g 2007 MBQB 293. In *Abbott,* the argument failed in the Federal Court of Appeal and the Supreme Court of Canada dismissed an application for leave to appeal. *Abbott v Canada,* 2006 FCA 342 at para 8, aff'g 2005 FC 163, application for leave to appeal to the Supreme Court of Canada dismissed with costs, 2007 CanLII 16775 (SCC).

161 *Holland v Ross, supra* note 101.

THE NATURE OF THE HONOUR OF THE CROWN

Limitation on the Authority of the Crown

It is understandable why the approach taken by Chief Justice Coke in *Earl of Rutland* and *Churchwardens of Southwark* would have been attractive to Justices Cartwright and Binnie. The principle that conflicting written instruments executed by the Crown should be interpreted so as to be most consistent with the Crown's honour was precisely the position expressed by Justice Cartwright in *George* and Justice Binnie's judgment in *Marshall*. Both Justices concluded that having entered into a treaty that guaranteed a right to hunt and fish, the Honour of the Crown required that any subsequent enactment by the Crown be interpreted so as to be consistent with the protection promised by that treaty. The approach taken by Justice Cartwright cannot actually be characterized as treaty interpretation. The terms of Treaty 29 were not at issue. For Justice Cartwright, the issue was actually one of statutory interpretation, namely whether Treaty 29 was a "treaty" within the meaning of section 87 of the *Indian Act*[162] and therefore shielded Calvin George from the prohibition under the *Migratory Birds Convention Act*, a law of general application.[163] Justice Binnie's judgment does engage in treaty interpretation, as there is no literal confirmation of Mi'kmaq fishing rights in the words of the Treaty of 1760 and it was necessary to read it into the that document.[164] However, Cartwright's dissent and Binnie's judgment share the view that having made a commitment in a treaty, future Crown future actions were constrained by the need to address honourably any potential impact of that action on the treaty commitment. In that way, the Honour of the Crown has an effect similar effect as the impact of the words "recognized and affirmed" in s 35(1) of

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162 *Indian Act,* RSA 1952, c 149, s 87.
163 *Migratory Birds Convention Act*, RSC 1952, c 179.
164 *Marshall, supra* note 6 at 493-494, Binnie J.

the *Constitution Act, 1982*, which *Sparrow* held to "import some restraint on the exercise of sovereign power."[165]

Similarly, the Honour of the Crown has been used in consultation and accommodation cases to limit the Crown's decision-making authority regarding the management of Crown lands and resources where an action or decision may have an impact on credibly asserted Aboriginal or treaty rights. Despite Chief Justice Lamer's *obiter* suggestion in *Delgamuukw*,[166] the Supreme Court has stopped short of recognizing an Indigenous "veto" of a Crown land or resource management decision.[167] Previously, this prohibition against a veto was less than absolute, as it was expressed specifically in the context of cases such as *Haida*, in which Aboriginal title has not been established. However, in *Tsilhqot'in*, the Supreme Court held that Aboriginal title was established, and unlike the situation in *Haida,* the Supreme Court was actually confronted by the question of the possible requirement for Indigenous consent. While on the narrow question of whether a refusal to consent could have the effect of being a veto, the Court indicated that the absence of consent did not have the effect of a veto,[168] any apparent victory for the Crown in that result would be overwhelmingly Pyrrhic. The Court made no attempt to hide its clear message that the Crown would find it preferable to obtain Indigenous consent to a potential infringement of Aboriginal rights and title as opposed to the obligation to establish that "any infringements are justified by a compelling and substantial public purpose and are not inconsistent with the

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165 *R v. Sparrow,* [1990] 1 SCR 1075 at 1109, aff'g [1987] 5 WWR 577 (B.C.CA). While true beyond any doubt, this point could have been expressed somewhat differently than the Court did in *Sparrow*, since it could be misinterpreted (and in some influential circles has been misinterpreted) as suggesting that section 35(1) is the source of the limitation on the use of sovereign power that has a negative impact on the exercise of an Aboriginal right.

166. *Delgamuukw v British Columbia (Attorney General),* [1997] 3 SCR 1010 at 1113, Lamer CJC, rev'g [1993] 5 WWR 97 (BCCA), rev'g [1991] 3 WWR 97 (BCSC).

167. *Haida, supra* note 1 at para 48.

168. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 2, 76, 88, and 90, rev'g *William v British Columbia*, 2012 BCCA 285, var'g *William v British Columbia*, 2007 BCSC 1700.

Crown's fiduciary duty to the Aboriginal group."[169] The decision described a Crown choice to proceed with a decision in the absence of consent as one fraught with danger, including the possibility of having a project shut down at any point because of the inadequacy of the consultation and accommodation necessary to proceed without consent.[170] Further, even in the absence of an Indigenous veto, courts themselves can exercise at least a short-term veto if the justification of proceeding without consent is insufficient. There was little doubt as to how arduous justifying the infringement would be when the Court advised the Crown that it could avoid the need to justify the infringement by taking the easier route of obtaining consent.[171] The Supreme Court's rejection of an Indigenous veto was repeated in the majority judgment in *Ktunaxa Nation v British Columbia.*[172] In the course of overturning the approval of the Northern Gateway Project by the Governor in Council, the majority judgment in the Federal Court of Appeal repeated that the duty of consultation and accommodation neither provides for an Indigenous veto nor requires agreement before a project can proceed.[173]

This analysis, however, exists at the level of theory rather than practice. If Indigenous-Crown relations consist of efforts by the Crown to insist that it will proceed with decisions regarding the use of Aboriginal title land, or for that matter, public lands within the boundaries of a treaty of cession without engaging in a sincere effort to consult and accommodate Indigenous concerns, the Crown is pursuing what is for several reasons a high-risk strategy. The Supreme Court identified one risk in *Tsilhqot'in* when the decision cautioned that a project undertaken without Indigenous consent is at risk throughout the project's life, particularly if

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169 *Ibid* at para 2.
170 *Ibid* at para 92.
171 *Ibid* at para 97.
172 *Ktunaxa Nation v British Columbia (Forests, Lands, and Natural Resource Operations)*, 2017 SCC 54 at paras 80, 83, McLachlin CJC and Rowe J, aff'g 2015 BCCA 352, aff'g 2014 BCSC 568.
173 *Gitxaala Nation v Canada*, 2016 FCA at para 179, Dawson and Stratas JJA.

the legal situation changes with asserted Aboriginal title becoming proven Aboriginal title.[174] Second, while meeting the concerns of Indigenous peoples regarding the potential impact of a project and securing agreement for that project may be an expensive, time-consuming process, the justification process, required in the absence of agreement will inevitably be (at least) equally as long and costly because of its very nature. *Delgamuukw* confirms that Crown decisions regarding resource development must be consistent with "the reconciliation of the prior occupation of North America by Indigenous peoples with the assertion of Crown sovereignty" [emphasis in original].[175] The second step in the justification process is that, as with the regulation of Indigenous harvesting, land use decisions must be "consistent with the special fiduciary relationship between the Crown and Indigenous peoples."[176] In the context of Aboriginal title, justification must take into account the particular nature of Aboriginal title. First, Aboriginal title encompasses the right to exclusive use and occupation of land. Second, Aboriginal title encompasses the right to choose to what uses land can be put, subject to the limit cited *Tsilhqot'in* that those uses cannot destroy the ability of the land to sustain future generations of Indigenous peoples. Third, lands held pursuant to Aboriginal title have an inescapable economic component.[177] There are additional risks facing the Crown if it proceeds with a land use decision in the absence of Indigenous consent. Even if the law does not provide for the possibility of an Indigenous veto, superior courts, culminating in the Supreme Court of Canada do have a *de facto* veto that they will exercise when appropriate.

The issue of Indigenous consent has been the major obstacle to Canada's ratification of the *United Nations Declaration on the Rights of Indigenous Peoples*, which contains a

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174 *Tsilhqot'in, supra* note 184 at para 92. At the very least, such a change in the legal nature of the interest would repeat the consent/justification alternatives, whereas most agreements would address such a contingency at the outset.

175 *Delgamuukw, supra* note 166 at 1111, Lamer CJC.

176 *Ibid* at 1108, Lamer CJC.

177 *Ibid* at 1111-1112, Lamer CJC.

provision requiring that where a proposed resource or other project may have an impact on Aboriginal rights, the affected Indigenous peoples must provide "free and informed consent prior to the approval of any project."[178] Canada's past opposition to the *United Nations Declaration* reflected the concern that the need for Indigenous consent can lead to an Indigenous veto,[179] and while the Supreme Court of Canada has stated that Canadian law does not provide for a veto,[180] even on Aboriginal title lands,[181] Indigenous leaders have accused the Crown of focusing on the threat of a veto to avoid the need to seek consent.[182]

The *United Nations Declaration on the Rights of Indigenous Peoples Act*[183] received Royal Assent on June 21, 1921. The purpose of the legislation is to "affirm the Declaration as a universal international human rights instrument with application in Canadian law."[184] The legislation commits the Government of Canada to work in consultation and cooperation with Indigenous peoples to develop and present to Parliament an "action plan to achieve the objectives of the Declaration."[185] In dealing with the possibly contentious "free, prior, and informed consent" the Department of Justice issued a Backgrounder on the same day the legislation passed. The document breaks down the phrase and explains that "free" means freedom from manipulation and coercion, "informed" means receiving adequate and timely information, and "prior' means early enough that Indigenous concerns can be incorporated or addressed effectively as part of the decision-making process. The one word that is not defined

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178 The United Nations General Assembly. 2007. *Declaration on the Rights of Indigenous Peoples.*

179 Alyssa M Scott, "Free, Prior and Informed Consent in Canada: The Relation of FPIC to Canada and Indigenous consultation on uranium mining in northern Saskatchewan' (MA Major Research Paper, University of Toronto, 2016) at 24.

180 *Haida, supra* note 1 at para 48.

181 *Tsilhqot'in, supra* note 168 at paras 2, 76, 88, 90, 91, and 124.

182 Gloria Galloway, "Trudeau's promises to aboriginal peoples feared to be unachievable", *The Globe and Mail* (22 October 2015), online: <www.theglobeandmail.com>.

183 *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14.

184 *Ibid,* s 4(a)

185 *Ibid,* s 6(a)

is "consent," although the word that the document uses as a synonym is "consensus."[186] This is broadly consistent with the Honour of the Crown doctrine, which requires the Crown to make every effort to obtain Indigenous agreement while allowing it to move forward in the absence of consent if that action can be justified.[187]

While promising, the approach taken by the Canadian government is a less than perfect application of the Honour of the Crown. The spectre of Sir Edward Coke's reference to "interpretations" looms in the background, raising the possibility that while the legislation is consistent with the meaning of "consent" as that term has developed as a term of art in the Supreme Court of Canada's jurisprudence, it cannot be denied that one meaning of "consent" is consent, and in the plain meaning of the term the absence of consent is at least implicitly a veto. My reading of the Supreme Court of Canada's decisions is that it is unlikely that the Court will reach that interpretation itself, given the number of times its decisions have expressly accompanied references to consent with the possibility of justification as an alternative. However, it is theoretically possible that an apparent Crown commitment to the absolute need for consent might be interpreted as a unilateral Crown undertaking not to proceed in the absence of consent.[188] A more promising approach to consent is that in its own publications the United Nations uses the term "consent" as a term of art that is consistent with the Honour of the Crown as described by the Supreme Court of Canada. The United Nations High Commissioner for Human Rights has interpreted "free, prior, and informed consent" as requiring states to have

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186 Department of Justice Canada, Backgrounder, *United Nations Declaration on the Rights of Indigenous Peoples Act* (June 21, 2021). online <www.justice.gc.ca/eng/declaration/about-apropos.pdf>.

187 In discussing accommodation, the Supreme Court of Canada concluded in 2004 that "commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them. *Haida, supra* note 1 at para 49.

188 A concurring opinion in a recent decision by the Alberta Court of Appeal, in which one member of the Court would have treated a promise by a former Alberta Premier to reach agreement on an Access Management Agreement prior to a specific oil sands project as the equivalent of a treaty promise. The decision, *Fort McKay First Nation v Prosper Petroleum and the Alberta Energy Regulator*, 2021 ABCA 163, is discussed in Chapter V.

consent as the objective of consultation rather than the necessary outcome before action can be taken.[189]

The Past, the Present, and the Honour of the Crown

The historic facts that define Indigenous-Crown relationship are not difficult to identify. Michael Adams has observed that while the scope of Aboriginal rights and Crown commitments illustrates ongoing flux, at the heart of the relationship is the dual recognition that Indigenous peoples were sovereign in Canada prior to European contact but that there is no doubt that the Crown is the sole sovereign power today.[190] The recognition of these realities is the only background that is necessary to address what the Court aims to accomplish with the Honour of the Crown, and to understand the doctrine's essential characteristics.

The single most important aspect of the Honour of the Crown is that while it is informed by the past, it operates only in the present. There is absolutely no doubt that past events are of tremendous importance in addressing issues related to the Honour of the Crown. Certainly, the reason for the significance of the doctrine arises out of the historical events of the past 400 years, starting with the first assertion of European sovereignty.[191] Paul McHugh has emphasized the relationship between the Honour of the Crown and history, stating that the Honour of the Crown "has become a legal device with retroactive application into settings where the relevant actors conducted themselves without any sense of this being a factor affecting the lawfulness of their conduct."[192] I question the use of the word "retroactive". While the Honour of the Crown is retrospective in that it considers and interprets past events and

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189 United Nations High Commissioner for Human Rights, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions.* UN Doc HR/PUB/13/2, August 2013 at 26.

190 Michael Adams, "Towards Reconciliation: A Proposal for a New theory of Crown Sovereignty" (2016) 49:1 UBC L Ref 1 at 1.

191 Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 SCLR (2d) 433 at 445.

192 P.G. McHugh, "Time Whereof – Memory, History and Law in the Jurisprudence of Aboriginal Rights" (2014) 77:1 Sask L Rev 137 at 160.

extends to analysing the past intentions of parties, it operates very much in the present. Rather than pass judgment on past actions, Courts use knowledge about past actions to determine the obligations of the Crown if it is to act consistently with the Honour of the Crown in the present. In other words, it is the present consequences of history that determines the present meaning of the Honour of the Crown rather past events themselves or their consequences at that time. Despite the use of word "retroactive", McHugh's specific comments on the *Manitoba Métis Federation* decision[193] describe a retrospective rather than a retroactive approach. In his words, the Honour of the Crown is not historical interpretation, but rather "current policy-making." In his words, it is "law doing its job through the mechanism of section 35."[194]

But while the application of the Honour of the Crown is crucial to what Mark Walters has described as the redemptive nature of Aboriginal law,[195] the effect is neither restorative nor restitutionary. The door has closed on the nineteenth century, and it is no longer possible to distribute over a million acres to the Métis children of Manitoba. In *Anarchy, State, and Utopia,* Robert Nozick illustrates the impossibility of constructing a subjunctive alternate history, because we have no way to evaluate and resolve the thousands of separate "if-then" statements built into such an approach to the past.[196] The Honour of the Crown is non-subjunctive. It does not attempt to create a contemporary Indigenous-Crown relationship as it would exist had past Crown actions been conducted with the full benefit of our contemporary moral vision. It recognizes what Walters describes as the both the reality and the "moral frailty" of Crown sovereignty and suggests actions that "remedy the problem by placing special duties upon the Crown in relation to Indigenous peoples."[197]

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193 *Ibid* at 166-170.
194 *Ibid* at 168.
195 Mark Walters, "The Morality of Aboriginal law" (2006) 31:2 Queen's LJ 470 at 474.
196 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 152-160.
197 Walters, *supra* note 195 at 512.

Focusing on Justice Binnie's *Marshall* decision as part of a larger study of treaty interpretation, Janna Promislow has observed that the Honour of the Crown not only opens up options for choosing to characterize a treaty term in a particular way or to "read in" additional terms, it is axiomatic that it also precludes other interpretations from being available because of a conflict with what the Honour of the Crown would require.[198] The example she provides is Binnie's statement in *Marshall* that an interpretation that would turn "a positive Mi'kmaq trade demand into a negative Mi'kmaq commitment [not to trade other than at British truckhouses]" would be inconsistent with the Honour of the Crown.[199] Justice McLachlin, in her dissent, agreed with the trial judge that at most the treaty right was to trade at truckhouses until their disappearance by 1768,[200] and she charged that Binnie transformed a "specific right agreed to by both parties into an unintended right of broad and undefined scope.[201] In another Honour of the Crown decision, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, Binnie read in an implied term requiring consultation by the Crown before "taking up" of land notwithstanding the absence of any reference in Treaty 8 to any limitation to the Crown's right to "take up land" outside than reserve lands.[202] In determining an interpretation consistent with the Honour of the Crown, a court does not judge the intentions or the conduct of past representatives of the Crown. The only generation that is subject to moral evaluation in terms of the Honour of the Crown is the present one.

The early part of the majority judgment in *Manitoba Métis Federation v Canada*[203] detailed the repeated failures by the Crown to implement its promise in a constitutional

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198 Janna Promislow, "Treaties in History and Law", (2014) 47:3 UBC L Rev 1085 at 1159.
199 *Ibid* at 1158, quoting *Marshall, supra* note 6 at 498-499, Binnie J.
200. *Marshall, supra* note 6 at 525-526, McLachlin J, dissenting.
201 *Ibid* at 524-525, McLachlin J, dissenting.
202 *Mikisew Cree First Nation v Canada [Minister of Canadian Heritage]*, 2005 SCC 69, rev'g 2004 FCA 66, aff'g 2001 FCT 1426.
203 *Manitoba Métis Federation*, *supra* note 160.

document (*Manitoba Act, 1870*) to distribute 1,400,000 acres of land among Manitoba Métis children, a process that was ultimately abandoned by about 1885.[204] The majority determined that the goal of good governance imposed a duty on the Crown to act diligently to implement this promise, which was of a constitutional nature, and that the failure was evidence of a lack of diligence that breached the Honour of the Crown.[205]

There is something particularly appropriate in applying the Honour of the Crown to situations where the Crown makes promises. As long ago as the thirteenth century, the motto of Edward I was "pacts should be kept."[206] The promise in *Manitoba Métis Federation* became caught up with constitutionally-protected rights because of its source, but it also reflected a much more general proposition that the Honour of the Crown requires that Crown promises are to be interpreted consistently with the expectation that the Crown will honour them.[207] The introduction of the duty of diligence is particularly promising because a lack of it can be established even in the absence of bad faith.[208]

Finally, while the majority judgment in *Manitoba Métis Federation* results from the recognition of past failures, the actual decision is focused on the present. The decision can be seen as the conclusion that Canada made a promise to the Manitoba Métis and the Honour of the Crown is at risk because it has yet to be fulfilled more than it is a finding that the Crown actions or inaction between 1870 and 1885 was a breach of the honour of the Crown at that time. The difference between the two characterizations was fully understood by Thomas Berger, lead counsel for the Manitoba Métis Federation. Asked for his response several months after the decision, he indicated that to him the decision "showed that a promise Canada made

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204 *Ibid* at paras 19-39, McLachlin CJC & Karakatsanis J.

205 Sacha R. Paul, "Case Comment: A Comment on *Manitoba Métis Federation Inc. v Canada,* (2013-2014) 37:1 Man LJ 323 at 329.

206 Theodore Plucknett, *A Concise History of the Common Law,* 5th ed (London: Butterworth, q956) at 41.

207 *Badger, supra* note 4 at 794, Cory J.

208 *Ibid.*

in 1870 has not been fulfilled." He continued that "the fact that this decision was the result of a complete historical record that allows us now that we know the truth, to sit down and say to the Métis, how can we rectify this? You were promised land. You didn't get it. Canada's still here, the Métis are still here. What shall we do?"[209] The historical evidence established the lack of diligence but did not by itself justify the decision that Canada is in breach of the Honour of the Crown. The more significant breach of the Honour of the Crown is that Canada remains in default of the promises made to Manitoba Metis in 1870.

The Honour of the Crown and Remedies

The redemptive nature of the Honour of the Crown is reflected in the remedies that are offered by it. On the one hand, the Honour of the Crown must also lead to substantive remedies. The Crown must do more than simply display the good manners to say "thank you" for the outcome of the past centuries.[210] On the other hand, the Honour of the Crown neither operates in a vacuum does not requires a specific remedy, and as such in fact it is unlikely that Indigenous peoples would be successful in a claim alleging a freestanding breach of the Honour of the Crown. Rather, the Honour of the Crown is breached when the Crown acts (or fails to act) and that action or inaction amounts to a breach of the Honour of the Crown. In cases to date in which Indigenous peoples have been successful, the remedies have usually been negative – the Crown has been precluded from doing something, be it issuing a disposition or permit,[211] acting on its own in building a road,[212] or enforcing a regulatory constraint on an Aboriginal right.[213] In these cases, the conclusion that the Crown has infringed an Aboriginal or treaty right without justification has had the same effect as the granting of an injunction. The

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209 *Winnipeg Free Press,* November 16, 2013, at D3.
210 Jeffrey G. Hewitt, "Reconsidering Reconciliation: The Long Game" (2014) 67 SCLR (2nd) 259 at 274.
211 *Haida, supra* note 1 at para 10.
212 *Mikisew Cree, supra* note 202 at para 4.
213 *Sparrow, supra*, note 164 at 1120-1121.

Crown is precluded from taking the action it proposes until it does something that satisfies the duty to uphold the Honour of the Crown. That something is not specific in the decision in the litigation, but the effect of the litigation is to preserve the *status quo* and prevent the Crown from doing what it wishes to do until it takes some action, and that action must be consistent with its honour. Theoretically, a decision precluding or setting aside a project approval may be the end of the matter, since the Crown or the proponent of a resource project may elect to do nothing and defer whatever action it was planning. More often, however, a decision that the Honour of the Crown has been breached is a resource that judges use to invite the parties to design their own remedy.[214] It can lead to negotiations between Indigenous peoples and the Crown or between Indigenous peoples and project proponents aimed at reaching agreement on terms that would allow a decision or an approval to proceed consistently with the Honour of the Crown. Typically, such an agreement would make changes to a project that would reduce the negative impact on Indigenous peoples or provide for them to share in the economic benefits of a project, possibly including participation in the project, or both. But the flexibility that allows the parties to agree on a remedy does not make the Honour of the Crown any less enforceable. The Crown cannot proceed until something changes. The risk to the Crown inherent in attempting to move forward without an agreement with Indigenous peoples who could continue to argue a breach of the Honour of the Crown means that as a practical matter few projects will proceed without Indigenous agreement. While in a legal sense it is a court that has the authority to decide whether the Crown is acting honourably, the consent of Indigenous peoples in such a situation may be a practical necessity.

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214 J. Timothy McCabe, *The Honour of the Crown and its Fiduciary Duties to Indigenous peoples* (Markham: Lexis Nexis Canada,2008) at 67.

This is not to say that a breach of the Honour of the Crown cannot lead to a specific remedy as a matter of definition. Chapter V discusses claims that the Honour of the Crown has been breached by the failure to fulfil provisions of historic treaties or promises of a constitutional nature, which have the potential to provide positive remedies if the prohibition against personal relief in claims that are otherwise statute-barred does not render any relief impossible. However, it is more likely that remedies in such cases will resemble the assessment of damages in a tort action rather than an order that a treaty provision or constitutional promise be implemented in accordance with its terms. There are several reasons for this, including the limited range of remedies a court can provide,[215] but also because of the passage of time since the treaties were signed or the promises made. Specifically, claims based on a lack of diligence arise out of the failure to fulfil the original promise. Proving a lack of diligence will require considerable delay during which time the promise could have been fulfilled, and the passage of time brings change that prevents the implementation of the original promise. Accordingly, by the time it becomes clear that a lack of diligence can justify a claim that the honour of the Crown has been breached, it is possible, even likely, that a court will not be able to order fulfilment of the original promise as intended at the time the promise was made. For example, the settlement of Manitoba and the occupation of land near the Métis homeland on the Red River that has taken place over the last 150 years, precludes any remedy that would place 1,400,000 acres within the original boundaries of Manitoba.

But while indirect, there is a link between decisions such as *Manitoba Métis Federation* and a substantive remedy. That link is at the very heart of the Honour of the Crown. Fictitious or not, the proposition that the English Crown is subject to duties and limits imposed by law

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215 The range of remedies available in the Specific Claims Tribunal process is extremely narrow, as the Tribunal is limited to compensation awards of $150 million or less. *Specific Claims Tribunal Act*, SC 2008, c 22, s 20(1).

has been recognized as being authoritative for a millennium. The suggestion that the Crown could be confronted with a declaration that it had breached its honour without being compelled to rectify the matter barely merits mention.[216] In place of imposing a specific legal remedy, a court is more likely to be less prescriptive and invite the Crown to exercise some choice in how it will rectify a breach of its honour. In response to the decision in *Manitoba Métis Federation*, the federal government entered into discussion with that organization, and in May 2016 the parties executed a *Memorandum of Understanding on Advancing Reconciliation.*[217] The goal set out in the document was the development of a framework agreement consistent with the Supreme Court of Canada's decision in *Manitoba Metis Federation Inc. v. Canada*.[218] The Memorandum set out a process for the negotiation of a modern treaty between the parties. News reports of the signing estimated that the treaty, when signed, "could be worth billions."[219] In November 2016 the same parties executed a Framework Agreement setting out the process for reaching a Final Agreement (or a series of agreements) consistent with *Manitoba Métis Federation.*[220] So while specific remedies will not be found in court decisions finding a breach of the Honour of the Crown, there is no doubt that the obligation of the Crown to provide a remedy, while not technically enforceable, is compelling as a constitutional imperative.[221]

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216 *Manitoba Métis Federation, supra* note 160 at para 79, McLachlin CJC & Karakatsanis J.

217 *Framework Agreement on Advancing Reconciliation* executed November 27, 2016, by the Manitoba Métis Federation and Her Majesty the Queen in Right of Canada, represented by the Minister of Indigenous and Northern Affairs.
online <www.rcaanc-cirnac.gc.ca/eng/1502395273330/1539711712698>.

218 *Memorandum of Understanding on Advancing Reconciliation* executed May 27, 2016, by the Manitoba Métis Federation and Her Majesty the Queen in Right of Canada, represented by the Minister of Indian Affairs and Northern Development.
online <www.mmf.mb.ca/docs/MOU_Land_Claim_Booklet_Final_2.pdf>.

219 Graham Slaughter, "Potential billion-dollar deal for Metis as feds address historic land dispute" CTV News, May 27, 2016. online <www.ctvnews.ca/canada/potential-billion-dollar-deal-for-metis-as-feds-address-historic-land-dispute-1.2921150>.

220 *Framework Agreement on Advancing Reconciliation* executed November 27, 2016, by the Manitoba Métis Federation and Her Majesty the Queen in Right of Canada, represented by the Minister of Indigenous and Northern Affairs. online <rcaanc-cirnac.gc.ca/eng/1502395273330/1539711712698>.

221 Paul, *supra* note 205 at 330.

Despite concerns about circumstances where "comparatively small and powerless First Nations" must deal with Canada or a province in negotiations,[222] a favourable court decision relating to the Honour of the Crown represents a substantial balancing of power in such negotiations.

222 Mary Eberts, "Still Colonizing after All These Years" (2013) 64 UNBLJ 123 at 147-148.

CHAPTER V

THE HONOUR OF THE CROWN, 2014-2021

Chapter III described how Supreme Court decisions from *Haida* decision in 2004[1] through *Manitoba Métis Federation* in 2013[2] consistently focused on the Honour of the Crown as the dominant consideration in the Court's decision making, for the most part at the expense of the use of fiduciary duty. Over the same time frame, Aboriginal title did not play the significant role in Supreme Court jurisprudence that might have been predicted after *Delgamuukw*, with the only Supreme Court decision dealing with Aboriginal title applying the test for determining its existence set out in *Delgamuukw* to conclude that a Mi'kmaq Aboriginal title claim in parts of New Brunswick and Nova Scotia failed to meet that test.[3] Chapter III also discussed two 2014 decisions of the Supreme Court that were inconsistent with the trends described above. The first was *Tsilhqot'in*, which held that the Tsilhqot'in Nation had succeeded in proving a claim to Aboriginal title, and that this result changed the Crown's obligations in managing Aboriginal title lands from one governed by the Honour of the Crown to one reflecting fiduciary duty.[4] The second was *Grassy Narrows*, in which the judgment suggested that in taking up land under Treaty 3, Ontario's actions were required to be consistent with both the Honour of the Crown and fiduciary duty.[5] In

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1 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, rev'g 2002 BCCA 462, var'g 2002 BCCA 147, rev'g 2000 BCSC 1280.

2 *Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623, rev'g 2010 MBCA 71, rev'g 2007 MBQB 293.

3 *R v Marshall/Bernard*, 2005 SCC 43, [2005] 2 SCR 220, rev'g 2003 NBCA 55, aff'g 2002 NBQB 82, aff'g [2000] 3 CNLR 184 (NBPC), [*Bernard*], rev'g 2003 NSCA 105, 2002 NSSC 57, aff'g 2001 NSPC 2 [*Marshall*].

4 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, reversing 2012 BCCA 285, varying 2007 BCSC 1700.

5 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 50, [2014] 2 SCR 447, aff'g *Keewatin v Ontario (Minister of Natural Resources),* 2013 ONCA 158, rev'g *Keewatin v Minister of Natural Resources,* 2011 ONSC 4801.

this chapter, I will review Canadian jurisprudence since 2014, which reveals that the Honour of the Crown remains the dominant paradigm in Aboriginal law and that while, but the precise role that fiduciary duty will play in Aboriginal law is uncertain. The ongoing interaction among the Honour of the Crown, fiduciary duty, and Aboriginal title will be one of the issues discussed in Chapter VI, the conclusion to my dissertation,

Because of the continuing prominence of the Honour of the Crown, this chapter is organized around the three areas of Aboriginal law in which it has the most impact - treaty interpretation and implementation, the duty to consult, and the diligent fulfilment of Crown promises of a constitutional nature.

TREATY INTERPRETATION AND IMPLEMENTATION

Interpretation as "Reading In"

As noted in Chapter III, the Honour of the Crown first appeared in Canadian jurisprudence in cases revolving around treaty interpretation, beginning with the 1981 decision of the Ontario Court of Appeal in *R v Taylor and Williams.*[6] In the years immediately after *Taylor and Williams*, Timothy McCabe saw the Honour of the Crown as having little potential outside of treaty interpretation, although he acknowledged that it might have felt it did "latent jurisprudential possibility" with regard to that issue[7] More recently, James [Sákéj] Youngblood Henderson identified seven uses of Honour of the Crown to promote the interests of Indigenous Canadians, all of which relate to the negotiation, interpretation, and implementation of treaties.[8]

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6 *R. v. Taylor and Williams* (1981), 62 CCC (2nd) 227 (ON CA), aff'g (1979), 55 CCC (2nd) 172 (ON SCDC), leave to appeal to S.C.C. refused December 21, 1981.

7 Timothy McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Persons* (Markham, Ontario: LexisNexis Canada Inc., 2005) at 2.

8 There is some duplication in the list, which contains a series of quotes from Supreme Court of Canada decisions describing the Honour of the Crown. These combine to establish that the Honour of the Crown "infuses" the making and "application" of treaties, including the fulfilment of individual treaty commitments; it guides the interpretation of treaties, requiring that treaties be interpreted to maintain the honour and integrity of the Crown; and it assumes that the Crown intends to fulfil its promises and commitments. James

One method of interpreting treaties is the practice of "reading in" additional terms of a treaty. The Supreme Court has been reluctant to encourage widespread use of this approach, particularly in the absence of ambiguity,[9] and in *Marshall* Justice McLachlin criticized Justice Binnie for reading in "an unintended right of broad and undefined scope."[10] While noting this criticism, Catherine Bell and Karin Buss characterize Binnie's approach in *Marshall* as a "proposition that terms can be read into an incomplete treaty document in order to advance the general treaty objectives of the parties, to enable a contemporary and meaningful exercise of a treaty right, and to maintain the honour and integrity of the Crown."[11] While this is an accurate substantive description of the process used by Binnie, I characterize it somewhat differently in order to avoid the unfortunate impression that the process is one of invention. I describe it as identifying conditions precedent for or inevitable corollaries of written treaty terms necessary to interpret the treaty honourably. To illustrate, the provision that fish would be traded at British-maintained truck houses contained within it the condition precedent that persons trading the product had a recognized right to acquire that product by fishing.[12] Similarly, the right to continue the practice of hub-and-spoke hunting includes within it the right to construct the infrastructure necessary to maintain hubs at appropriate locations.[13] *Taylor and Williams* applied conditions precedent and inevitable corollaries to the interpretation of a treaty as a whole as opposed to the interpretation of specific terms. Aboriginal title lands opened to European settlement in a treaty of surrender in which no reserve lands are to be set aside must be subject to both the condition

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[Sákéj] Youngblood Henderson, "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72:1 Sask L Rev. 29 at 61-62.

9 Catherine Bell and Karin Buss, "The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000) 63:2 Sask L Rev 667 at 672-674.

10 *R v Marshall,* [1999] 3 S.C.R 456 at 525-526, McLachlin J, dissenting, rev'g [1997] 3 CNLR 209 (NSCA).

11 Bell and Buss, *supra* note 9 at 674.

12 *Marshall, supra* note 10 at para 492-493, Binnie J.

13 *R. v. Sundown*, [1999] SCR 393, aff'g [1997] 4 CNLR 241 (Sask CA), aff'g [1995] 3 CNLR 152 (Sask QB), rev'g [1994] 2 CNLR 174, (Sask. PC).

precedent and the corollary that the treaty must be interpreted in a manner that is consistent with the continued survival of the Indigenous peoples who surrendered the lands. While Treaty 20 made no reference to the protection of Indigenous harvesting, the decision in *Taylor and Williams* does not mean that the Ontario Court of Appeal "read in" such a term. There was no need to do so. It is more accurate to conclude to say that the decision was based on the honourable interpretation of the Treaty 20 as a whole. The document foresaw that European settlers would move into the surrendered lands but made no provision for the departure of the Indigenous parties to the treaty from the area. If the agreement did not foresee the continuation of pre-treaty practices, how would Indigenous peoples survive the implementation of Treaty 20? [14]

Positive Obligations, Limitations, and the Specific Claims Tribunal

In the area of treaty interpretation and implementation, the Honour of the Crown has two obvious limitations. The first is doubt as to whether the Honour of the Crown can be used to compel the performance of "positive" treaty terms, those that provide treaty beneficiaries with tangible benefits. This reflects the nature of the Honour of the Crown, which does not itself provide specific remedies. As between private parties, the range of available litigation remedies has been broadened by the Supreme Court of Canada's direction that equitable remedies are available in appropriate circumstances even in the absence of a finding of a breach of fiduciary obligation.[15] However, remedies such as specific performance are unavailable against the Crown as a matter of law.[16]

The second challenge to litigation against the Crown regarding the implementation of treaties is the application of limitation periods and the equitable doctrine of laches. The Supreme

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14 *Taylor and Williams, supra* note 6.

15 *Lac Minerals Ltd. v. International Corona Resources Ltd.,* [1989] 2 SCR 574, aff'g (1987) 62 OR (2nd) 1 (CA), aff'g 53 OR (2nd) 737 (SC).

16 *Crown Liability and Proceedings Act,* RSC 1985, c C-50, s22. In Alberta the corresponding legislation is *Proceedings against the Crown Act,* RSA 2000, c P-25, s 17(1).

Court of Canada has held that both provincial limitations legislation and the doctrine of laches apply to claims by Indigenous peoples against the Crown.[17] This is particularly problematic as it relates to the terms of treaties executed more than a century earlier. The motions judge in *Descendants of Papaschase Indian Band* found that an action challenging the legality of a surrender of reserve land in 1887 was barred for a number of reasons,[18] including the limitations period set in the Alberta *Limitation of Actions Act.*[19] The motions judge was of the view that the named plaintiffs could not satisfy the requirements to bring forward a representative action, and this was the principle reason cited in the judgment dismissing the claim.[20] However, he added that the claim was also statute-barred because the cause of action was discoverable more than 25 years before the action was filed, when it was the subject of a much-cited 1979 Master of Arts thesis.[21] It was this delay rather than the lapse of more than a century between the surrender and the action being brought that was the strongest factor behind the dismissal.[22] The attempt to challenge the validity of a surrender after more than 100 years was undermined by the passage of time, but also because of the absence of documentary support for the plaintiff's position and the seeming impossibility of finding other evidence to support the claim.[23] The decision of the motions judge was set aside by the Alberta Court of Appeal, which held that the question of standing was not a preliminary matter, but rather a triable issue, as was the discoverability of the claim several decades

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17 *Attorney General of Canada v Lameman et al*, 2008 SCC 14, rev'g *Lameman et al v Canada (Attorney General)*, 2006 ABCA 392, aff'g *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655.

18 *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655, rev'd 2006 ABCA 392, aff'd 2008 SCC 14, [2008] 1 SCR 372.

19 *Limitations Act,* RSA 200, c L-12.

20 *Papaschase, supra* note 18, paras 217-223.

21 *Ibid* at para 6. Ken Tyler, "A Tax-Eating Proposition: The History of the Papaschase Indian Reserve" (MA Thesis, University of Alberta, 1979).

22 *Ibid* at para 152.

23 *Ibid* at para 201.

before the litigation was filed.[24] The Supreme Court of Canada restored the decision of the motions judge, concluding that in the absence of any evidence responding to the information revealed in the Master's thesis, it was a reversible error for the Court of Appeal to suggest that there was any chance that the litigation was not statute-barred.[25] The limitations issue, very much a secondary conclusion by the motions judge, was decisive before the Supreme Court.

By the time the Supreme Court of Canada released the *Lameman et al* decision in April 2008, Parliament was close to the final passage of the *Specific Claims Tribunal Act*.[26] It created the Specific Claims Tribunal, a body empowered to award damages of up to $150,000,000 for damages arising out of specific claims, including claims that allege that Canada has failed to fulfil its treaty obligations. Section 19 of the *Specific Claims Tribunal Act* provides that the Tribunal "shall not consider any rule or doctrine that would have the effect of limiting claims or prescribing rights against the Crown because of the passage of time or delay."[27]

The creation of the Specific Claims Tribunal with its authority to impose monetary damages upon the Crown has enhanced the prospects of pursuing claims that seek to impose positive obligations on the Crown through treaty implementation. Specific claims are claims arising out of the interpretation and implementation of treaties, as well as the management of lands and monies held by the Crown pursuant to the *Indian Act* or other federal legislation.[28] Claims relating to the management of lands and monies arise whether or not the claimant's interest in the lands or monies arises from a treaty or another source. Between June 2011, when it became possible to file claims with the Tribunal and June 30, 2021, half (65 out of 130) of the claims filed

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24 *Lameman v Canaada (Attorney General)*, 2006 ABCA 392 at paras 132-144, Côté JA, rev'g 2004 ABQB 655, rev'd 2008 SCC 14, [2008] 1 SCR 372.

25 *Lameman, supra* note 17.

26 *Specific Claims Tribunal Act,* SC 2008, c 22.

27 *Ibid* at s 19.

28 Indian and Northern Affairs Canada, *Outstanding Business: a native claims policy: specific claims* (Ottawa: Indian and Northern Affairs Canada, 1982).

with the Tribunal arose out of alleged breaches of treaty.[29] The remaining claims relate to the consequences of the loss of reserve land by surrender, expropriation, or flooding. More than 20 of the treaty claims allege that the Crown has failed to provide the benefits specified in treaties, including reserve land and other tangible assistance.

With regard to actions seeking the fulfilment of positive treaty obligations, the very existence of the Specific Claims Tribunal has encouraged the settlement of specific claims that have been filed with it. Of the eight treaties (Treaties 3-10) executed between 1873 and 1906, all but Treaty 9 included provisions that the Crown would provide treaty signatories with assistance to develop agriculture as a way of life to replace the disappearing traditional economy based on hunting and fishing. This assistance was in the form of farming implements, seed, and livestock, in quantities that varied from treaty to treaty and band population. In 2012, two Alberta Treaty 8 first nations (Swan River[30] and Athabasca Chipewyan[31]), one Treaty 6 first nation (Sunchild),[32] and one Treaty 7 first nation (Blood)[33]filed claims with the Tribunal asserting that the Crown had failed to fulfil these obligations. Two other Treaty 8 first nations filed similar claims in 2013[34] and

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29 Specific Claims Tribunal, Claims. online <www. sct-trp.ca/curre/index_e.asp>.

30 In the Specific Claims Tribunal, SWAN RIVER FIRST NATION, Claimant v HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Aboriginal Affairs and Northern Development, Respondent, Declaration of Claim, December 12,2012. 001-SCT 6005-12 Doc 1 online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20126005>.

31 In the Specific Claims Tribunal, ATHABASCA CHIPEWYAN FIRST NATION, Claimant v HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Aboriginal Affairs and Northern Development, Respondent, Declaration of Claim, December 13, 2012. SCT 6006-12 Doc 1 online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20126006>.

32 In the Specific Claims Tribunal, SUNCHILD NATION, Claimant v HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Aboriginal Affairs and Northern Development, Respondent, Declaration of Claim, September 17, 1912. 001-SCT 6003-12 Doc 1 online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20126003>.

33 In the Specific Claims Tribunal, BLOOD TRIBE, also known as Kainaiwa or Kainai First Nation or the Blood Indian Band, As represented by the Chief and Councillors of the Blood Tribe Claimant v HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by the Minister of Aboriginal Affairs and Northern Development, Respondent, Declaration of Claim, September 18, 1912. 001-SCT 6004-12 Doc 1 online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20126004>.

34 In the Specific Claims Tribunal, MIKISEW CREE FIRST NATION, Claimant v HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Aboriginal Affairs and Northern Development, Respondent, Declaration of Claim, June 6, 2013. 001-SCT 6002-13 Doc 1

2015[35] respectively. All of the Treaty 8 claims made specific reference to the Honour of the Crown, pleading that the Honour of the Crown "requires Canada to act fairly and honourably during treaty implementation,"[36] that "Canada has refused or failed to honour and fulfill its obligation under Treaty 8 to provide … Agricultural Benefits,"[37] or that the Claimant "pleads and specifically relies upon the established principles of treaty interpretation and the Honour of the Crown."[38] All of the actions were discontinued after the respective Claimants[39] reached settlements with the Crown and received settlements (inclusive of costs) of $54,129,428 (Athabasca Chipewyan), $135,972,938 (Mikisew Cree), $143,228,312 (Sturgeon Lake), and $58,527,796 (Swan River).[40]

While Specific Claim Tribunal files outside Treaty 8 have not been settled, there has been progress in that direction. The Sunchild Declaration of Claim filed in 2012 alleging that Canada has failed to fulfil the obligations in Treaty 6 regarding agricultural implements and assistance contained the assertion that the "Honour of the Crown requires Canada to act fairly and honourably during treaty implementation, and it has not done so in this case."[41] The case was split into validation and potential compensation phases,[42] and the Tribunal ordered on August 15, 2017 that the validation phase be put in temporary abeyance to facilitate settlement negotiations on

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online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20136002>.

35 In the Specific Claims Tribunal, STURGEON LAKE CREE NATION, Claimant v HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Aboriginal Affairs and Northern Development, Respondent, Declaration of Claim, October 14, 2015. 001-SCT 6001-15 Doc 1
online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20156001>.

36 Swan River, *supra* note 30, Declaration of Claim at para 31; Athabasca Chipewyan, *supra* note 31, Declaration of Claim at para 25.

37 Mikisew Cree, *supra* note 34, Declaration of Claim at para 20.

38 *Sturgeon* Lake, *supra* note 35 Declaration of Claim at para 25.

39 Athabasca Chipewyan, *supra* note 31, Order March 2, 2018; Sturgeon Lake, *supra* note 35, Order, April 12, 2018; Mikisew Cree, *supra* note 34, Order, April 17, 2018; Swan River, *supra* note 30, Order, May 2, 2018.

40 Canada, Crown-Indigenous Relations and Northern Affairs, Reporting Centre on Specific Claims, *Settlement Report on Specific Claims*, May 18, 2020.
online <services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx>.

41 Sunchild, *surpra* note 32, Declaration of Claim at para 34.

42 *Ibid,* Order, September 30, 2013.

compensation.[43] On July 17, 2018 this temporary abeyance was superseded by a stay of proceedings, again to facilitate settlement negotiations,[44] and the stay has been extended on six occasions, most recently on May 12, 2020.[45] A stay of proceedings was ordered in the Blood agricultural benefits claim in April 2018, with the added proviso that the Tribunal would to oversee the negotiations through the use of case management conferences.[46] A year later, the parties advised the Tribunal that Blood had made a settlement offer and the parties would be meeting about it in the near future.[47] As of the end of 2020, negotiations were ongoing, with the Tribunal continuing to schedule quarterly case management conferences.[48]

Currently, all agricultural benefits claims arising Treaties 6, 7, and 8 filed with the Tribunal before 2018 have either been settled or are in negotiations occasioned by Canada's willingness to acknowledge the validity of the claims. Three subsequent claimants, Beardy's and Okemasis,[49] Red Pheasant,[50] and Enoch[51] have included agricultural implements in broader treaty benefits

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43 *Ibid,* Order, August 15, 2017.

44 *Ibid*, Order, July 17, 2018.

45 *Ibid,* Order May 12, 2020. In early 2021, the Specific Claims Tribunal ceased its practice of making the Endorsements and Orders following Case Management Conferences publicly available. As such, it is not possible to determine the dates of subsequent extension of the stay of proceedings. However, as of August 10, 2021, the stay of proceedings remains in place, at least until a Case Management Conference scheduled for September 7, 2021.

46 *Blood, supra* note 33, Order April 19, 1918.

47 *Ibid,* Endorsement and Order, April 1, 2019.

48 *Ibid,* Endorsement and Order, December 4, 2019. Updating the status of this claim is not possible for the same reason set out with regard to the Sunchild claim, *supra* note 32. As of August 10, 2021, no Case Management Conference is scheduled.

49 In the Specific Claims Tribunal, BEARDY'S AND OKEMASIS FIRST NATION, Claimant v HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development, Respondent, Declaration of Claim, April 3, 2018. 001-SCT 5001-18 Doc 1. online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20185001>.

50 In the Specific Claims Tribunal, RED PHEASANT CREE NATION, Claimant v HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development, Respondent, Declaration of Claim, December 2, 2019. 001-SCT 5010-19 Doc 1. online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20195010>.

51 In the Specific Claims Tribunal, ENOCH CREE NATION, Claimant v HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister Crown and Indigenous Relations, Respondent, Declaration of Claim, December 5, 2019. 001-SCT 6002-19 Doc 1. online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20196002>.

claims. Three Treaty 10 first nations have filed agricultural benefits claims, two in 2017[52] and one in 2020,[53] all of which are styled as asserting breaches of the Honour of the Crown.[54]

Although overshadowed by the magnitude of the agricultural benefits cases, the Driftpile First Nation, a party to Treaty 8, filed a claim with the Tribunal in 2012 relating to the promise in Treaty 8 to provide ammunition and twine for fishing on an annual basis.[55] The claim asserted that the Honour of the Crown required Canada to take a broad, purposive approach to the interpretation of its promise to provide ammunition and twine and to practice diligence in fulfilling the obligation,[56] but that history "showed a pattern of persistent errors, indifference, and negligence" to an extent that breached the Honour of the Crown.[57] In October 2014, the claim was placed in abeyance to allow for negotiations aimed at settlement.[58] These succeeded, and the claim was discontinued in April 2016.[59]

The Honour of the Crown has also played a substantial procedural role in the work of the Tribunal. The Tribunal decision in *Madawaska Maliseet First Nation v the Queen*[60] applied the Honour of the Crown in an evidentiary context, holding that where ambiguity exists that could be

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52 In *the Specific Claims Tribunal, BIRCH NARROWS FIRST NATION AND BUFFALO RIVER DENE NATION, Claimants v HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development, Respondent,* Declaration of Claim, December 4, 2017. 001-SCT 5001-17 Doc 1. online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20195010>.

53 *In the Specific Claims Tribunal, CANOE LAKE CREE NATION, Claimant v HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development, Respondent,* Declaration of Claim, January 21, 2020. 001-SCT 5011-19 Doc 1. online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20195011>.

54 *Birch Narrows and Buffalo River, supra* note 52*,* Amended Declaration of Claim at para 39*; Canoe Lake, supra* note 53 at paras 40, 42, 44.

55 *In the Specific Claims Tribunal, DRIFTPILE FIRST NATION # 450, Claimant v HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development, Respondent, Declaration of Claim,* September 18, 2013. 001-SCT 6003-13 Doc 1. online <www.sct-trp.ca/curre/details_e.asp?ClaimID=20136003>.

56 *Ibid* at para 29.

57 *Ibid* at para 30.

58 *Ibid*, Order, October 14, 2014.

59 *Ibid,* Notice of Discontinuance, April 5, 2016.

60 *Madawaska Maliseet First Nation v the Queen,* 2017 SCTC 5.

resolved by identifiable documents created or held by the Crown, the inability to produce those documents can justify resolving that ambiguity against the Crown.[61]

As noted above, only half of the cases filed with the Specific Claims Tribunal relate to alleged breaches of treaties. The remainder of Tribunal cases related to the improper surrender or taking of reserve land, the mismanagement of lands or moneys, or the failure to set aside reserve lands in a non-treaty context. The Honour of the Crown is an issue in such cases, but to date most validity decisions by the Specific Claim Tribunal have related to the loss of parcels of reserve land in which the claimant's interest is sufficiently cognizable to give rise to Crown fiduciary duty even in the narrowest construction of that term. *Osoyoos Indian Band v the Queen* dealt with 3.97 acres of reserve land taken for railway purposes but not returned to reserve status after the land was no longer needed for that purpose.[62] In his judgment, Chief Judge Harry Slade noted that while the duty on the Crown was fiduciary, the refusal to negotiate whether there had been such a fiduciary breach was itself a breach of the Honour of the Crown.[63] Similarly, in 2008 Canada had in place a policy for dealing with what it considered claims of minimal monetary value. In such cases, the practice was to make a single, non-negotiable offer with the advice that if the offer was not accepted, the file would be closed. In *Aundeck Omni Kaning v the Queen,* the Tribunal held that the practice of making non-negotiable offers was not only disrespectful to claimants, it was also a breach of the Honour of the Crown as a refusal to negotiate in good faith.[64]

In July 2011, the second case filed with the Tribunal related to the payment of annuities, which was a promise made in perpetuity in Treaty 6. The claim was filed by Beardy's and Okemasis First Nation, and was related to the punitive decision by Canada to withhold annuity

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61 *Ibid* at para 368.
62 *Osoyoos Indian Band v the Queen*, 2012 SCTC 3 at paras 1-4.
63 *Ibid* at para 131.
64 *Aundeck Omni Kaning v the Queen,* 2014 SCTC 1 at para 87.

payments from entire bands from 1885 to 1888 based on the Indian Commissioner's conclusion that these bands had acted as "rebels" in the Riel uprising in the spring of 1885.[65] After the collection of documentary evidence and a nine-day hearing in 2014, the Tribunal ruled in May 2015 that the withholding of annuities had been unlawful, and amounted to a breach by Canada of the annuities clause of Treaty 6.[66] Relying on the Supreme Court of Canada's decision in *Manitoba Métis Federation*,[67] the Tribunal held that there was no honourable ground on which the Crown could rely to justify the withholding of annuities.[68] After finding the Crown's actions dishonourable, the Tribunal went further in fashioning a remedy. The decision interpreted the reference to the perpetual payment of annuities in Treaty 6 to mean that there was a cognizable Indian interest in the annuities sufficient to give rise to a fiduciary obligation.[69]

It is impossible to determine the precise reason for characterizing the decision to treat the claim as a breach of fiduciary duty. It may have simply reflected the use of "fiduciary obligation" as a term of art in the description of the Tribunal's jurisdiction in the *Specific Claims Tribunal Act.*[70] Alternatively, it may have been an unintended consequence of the Tribunal's analysis of whether the claim was within the jurisdiction of the Tribunal. With regard to that issue, Canada took the position that annuities were individual benefits that were outside the Tribunal's

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65 In the Specific Claims Tribunal, BEARDY'S & OKEMASIS BAND #96 AND #97, Claimant v HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA As represented by the Minister of Aboriginal Affairs and Northern Development, Respondent, Declaration of Claim, July 11, 2011. 001-SCT 5001-11 Doc 1. online <sct-trp.ca/curre/details_e.asp?ClaimID=20115001>.

66 *Beardy's and Okemasis Band #96 and #97 v Canada,* 2015 STC 3. The decision lists the James Smith Cree Nation, the Chakastapaysin Band, the Little Pine First Nation, the Lucky Man First Nation, Mosquito Grizzly Bear's Head Lean Man First Nation, Muskeg Cree Nation, One Arrow First Nation, Onion Lake Cree Nation, Poundmaker Cree Nation, Red Pheasant First Nation, Sweetgrass Cree Nation, Young Chippewayan First Nation, and Thunderchild First Nation as Intervenors.

67 *Ibid.* at para 423.

68 *Ibid.* at para 431.

69 *Ibid.* at para 426.

70 *Specific Claims Tribunal Act, supra* note 26, s. 14(1)(c).

jurisdiction.[71] The primary justification for taking a claim to the Tribunal is that it relates to "a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty."[72] This category does not entirely fit the *Beardy's* case unless annuities can be characterized as "other assets" due to a band. One of the reasons given by the Crown for seeking to dismiss the case was that annuities were not "other assets" because the legislation defined assets as "tangible property."[73] In reaching this decision using the Honour of the Crown, the Tribunal defined annuity payments as tangible, cognizable property.[74] This decision resulted from the conclusion that the Honour of the Crown required the Tribunal to be uninfluenced by the general legal proposition that money is not tangible but rather to consider how the recipients of annuity payments would have characterized them.[75] Annuity payments represented an annual injection of liquidity into the economy of an Indigenous community that played an essential role in the its economic life. As such, the cumulative annuity payments made to all individuals in a band amounted to a communal asset, and non-payment was a breach of the Honour of the Crown that related to a tangible asset and therefore a fiduciary breach.[76] It is likely that this understanding of the Indigenous viewpoint led to the use of equitable compensation in *Beardy's*.

In *Beardy's and Okemasis*, the Tribunal used its discretion at the outset to divide the case into two stages, a practice that soon became standard practice in Tribunal cases. The first stage of *Beardy's* ended with the decision on liability, and it was followed by a separate process to determine compensation that included expert reports, an evidentiary hearing, memoranda of fact

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71 There is no prohibition against a claim relating to the suspension of annuity payments, and Canada's objection reflected the difference between collective treaty rights (which are within the jurisdiction of the Tribunal) and individual payments such as annuities (which Canada argued were not within the Tribunal's jurisdiction).

72 *Specific Claims Tribunal Act, supra* note 26, s 14(1)(a).

73 Canada argued that the annuity payments were not "tangible property", relying on the general proposition that money is not tangible property. *Beardy's, supra* note 66 at paras 14, 269.

74 *Ibid* at para 399, 406.

75 *Ibid* at paras 384, 393.

76 *Ibid* at para 426.

and law, and oral argument. At least in part because of the conclusion that the failure to pay Beardy's and Okemasis Band members was a breach of fiduciary duty, the Tribunal held that equitable compensation was appropriate.[77] The Tribunal chose a method of taking the actual loss to Beardy's and Okemasis members in the 1880s, which was agreed by the parties to be $4,250[78] and found a current equivalent value by calculating the amount that would result from the investment of that amount at a the Band Trust Fund rate since the time the monies should have been received.[79] The equitable nature of the calculation precluded any reduction in the investment because of the likelihood that some of the compensation would have been spent upon receipt.[80] The result of this analysis was that the investment of the $4,250 in the 1880s would have resulted in a current value of $4,500,000, and the Tribunal awarded Beardy's and Okemasis that amount in compensation.[81]

The first detailed discussion of the circumstances in which the Crown can be said to breach a fiduciary duty in a situation not relating to a surrender of reserve land was found in the 2018 decision of the Supreme Court of Canada in *Williams Lake Indian Band v. Canada (Indian and Northern Development).*[82] The case arose out of events that took place between 1858, when the Colony of British Columbia was created, and the implementation of the British Columbia *Act of Union* signed in 1871. Before and in 1858, the Williams Lake Band occupied lands at Chimney

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77 *Beardy's and Okemasis First Nation v Canada,* 2016 SCT 15 at para 17.

78 *Ibid.* at para 16.

79 *Ibid.* at para 25.

80 *Ibid.* at para 153.

81 *Ibid.* at paras. 25, 174. The figure of $4,500,000 was the value as at April 1, 2016. The Tribunal directed the parties to calculate between them the additional interest (using the Band Trust Fund Rate) from April 1, 2016 to the time of payment. *Ibid.* at para 174. The parties did reach agreement, and on February 10, 2017, the Tribunal issued a Consent Order indicating that the total compensation was $4,580,522.35, which included interest to February 15, 2017. Canada was directed to pay the total compensation by February 15, 2017, which it did. *Beardy's and Okemasis First Nation v Canada*, SCT 5001-11, Order, February 10, 2017. "Beardy's and Okemasis First Nation receiving $4.5 million compensation," online <globalnews.ca/news/3250267/beardys-and-okemasis-first-nation-receiving-4-5m-compensation>.

82 *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83, rev'g 2016 FCA 63, aff'g 2014 SCTC 3.

Creek, at the west end of Williams Lake.[83] In 1860, the Governor of British Columbia issued *Proclamation 15*, which set out the rules by which settlers could select (pre-empt) unoccupied lands in the Colony. Section 1 indicated that pre-emption would not be recognized on "the site of an existent or proposed town, auriferous land … or an Indian reserve or settlement.[84] Notwithstanding this direction, Williams Lake members were expelled from Chimney Creek and the lands there were pre-empted.[85] The *Act of Union* provided that British Columbia would transfer to Canada administration and control of Indian settlements and Canada would confirm these lands as reserves.[86] When this process was being implemented in 1879, both provincial and federal officials were aware of the expulsion of Williams Lake members from Chimney Creek.[87] Rather than remedy the situation, federal officials chose to acquiesce in the expulsion and pre-emption,[88] and the Williams Lake Reserve was located at the opposite end of Williams Lake well away from the lakeshore.

The claim filed by Williams Lake with the Specific Claims Tribunal set out two grounds for the claim against Canada. The first was an allegation direct liability resulting from the failure to rectify the dispossession of Williams Lake members from the village when Canada was setting aside reserves in British Columbia after 1871.[89] The second claim relied on the provision in the *Specific Claims Tribunal Act* that claims could only be made against the Crown in right of Canada, but that the definition of "Crown" in the legislation made Canada liable for the conduct of the pre-

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83 *Williams Lake Indian Band v Canada (Indian Affairs and Northern Development)*, 2014 SCTC at paras 26, 27, 60-65, 71, 72, rev'd *Canada v Williams Lake Band,* 2016 FCA 63, aff'd *Williams Lake Indian Band v Canada (Indian and Northern Development)*, 2018 SCC 4.

84 *Ibid* at para 117.

85 *Ibid* at para 132.

86 *Ibid* at para 337.

87 *Ibid* at para 306, 307.

88 *Ibid* at para 331.

89 *Ibid* at para 340.

Confederation governments of Great Britain and pre-existing colonies.[90] The claim involving a breach of fiduciary duty against colonial British Columbia was based on *Proclamation 15,* issued by the Governor as the representative of the Crown that was a unilateral undertaking to protect *Williams Lake* in the occupation of specific lands and British Columbia failed to fulfil that promise. The Tribunal found that Canada had breached its fiduciary obligations to Williams Lake and was also liable for the Colony of British Columbia's breach of fiduciary duty because of the expanded meaning of "the Crown" in the legislation.[91]

The *Specific Claims Tribunal Act* provides for judicial review of Tribunal decisions by the Federal Court of Appeal and, with leave, the Supreme Court of Canada.[92] The Crown made an application for judicial review of the *Williams Lake* decision, and the Federal Court of Appeal set aside the Tribunal decision, holding that Canada had not breached any fiduciary obligation to Williams Lake and that the deeming provision in the legislative did not make Canada liable for the pre-Confederation conduct of British Columbia. Rather than return the matter to the Tribunal for reconsideration, the Court of Appeal dismissed the claim.[93]

When Williams Lake appealed the decision of the Court of Appeal, the Supreme Court was faced with three questions. The first was whether Canada's post-1871 conduct regarding the proper location for reserve land breached its fiduciary duty to Williams Lake. The second was whether British Columbia's failure to prevent the expulsion of Williams Lake members from their community, failure to reverse the expulsion, and failure to advise Canada in 1871 where reserve land should be located represented breaches of fiduciary duty. The third question was contingent,

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90 *Specific Claims Tribunal Act, supra* note 26, ss 14(1)(b) and 14(2).

91 *Williams Lake. supra* note 83 at para 340.

92 *Ibid* at para 160.

93 *Canada v Williams Lake Band,* 2016 FCA 63, rev'g *Williams Lake Band v Canada (Indian and Northern Affairs)*, 2014 SCTC 3, rev'd *Williams Lake Band v Canada (Indian and Northern Affairs)*, 2018 SCC 4.

and only arose if the answer to the second question was yes. This asked whether Canada was liable for British Columbia's breach of fiduciary duty as a result of the expanded meaning of "Crown" in the *Specific Claims Tribunal Act.* Seven judges agreed that Canada had breached its fiduciary duty to Williams Lake and all nine judges agreed that British Columbia had breached its similar duty. Five of the nine judges concluded that Canada was liable for British Columbia's breach of its fiduciary duty. Ultimately, the decision of the Supreme Court was one of statutory interpretation, focusing on the issue of whether the case fell within the jurisdiction of the Tribunal as set out in the *Specific Claims Tribunal Act*. With regard to the finding that both British Columbia and Canada had breached their fiduciary duties, the decision was consistent with the statement in *Wewaykum* that depending on their specific facts, some land-related obligations give rise to a fiduciary duty and others do not.[94]

The history of the Tribunal suggests that its significance arises out of what it says and does about the Honour of the Crown and the fact that its very existence promotes the Honour of the Crown. It is a body in which a claim cannot be barred as a result of limitations or laches,"[95] in which the financial costs to claimants can be offset by federal funding to pursue claims,[96] in which claimants do not face the potential liability to pay court costs to the Crown if unsuccessful,[97] and which has the authority to issue monetary awards of up to $150,000,000 per case against the federal government.[98] In addition to having the jurisdiction to consider cases relating to the taking or mismanagement of Indian lands or monies, its mandate extends to virtually all obligations assumed

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94 *Williams Lake, supra* note 82 at para 83.

95 *Specific Claims Tribunal Act, supra* note 26, s. 19.

96 Crown-Indigenous Relations and Northern Affairs Canada, "Guidelines for Funding Claims at the Specific Claims Tribunal of Canada".
online <www.rcaanc-cirnac.gc.ca/eng/1529407308942/1551970638039#chp1>.

97 Although the Tribunal may award costs, the circumstances are limited to cases in which a party has acted in bad faith, has refused to comply with an order by the Tribunal, or has refused a reasonable settlement offer. SOR/2011-119, Rule 111(1).

98 *Specific Claims Tribunal Act, supra* note 26, s. 20(1)(b).

by the Crown in treaties. The only substantive limitation on claims is that a claim may not be "based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights."[99] The Canadian government considers matters related to harvesting are more appropriately matters of consultation and accommodation, the second Aboriginal law field in which the Honour of the Crown is prominent.

THE DUTY TO CONSULT

Relationship between the Honour of the Crown and the Duty to Consult

Since the *Haida Nation* decision on consultation and accommodation) was released in November 2004,[100] the Supreme Court has referred to the Honour of the Crown in 25 cases. In 17 of these cases, the Crown's duty to consult was either the dominant issue or consultation played a significant role in the Court's analysis. As an example of the latter situation, the *Tsilhqot'in* decision's primary significance is that it was the first occasion in which an Indigenous litigant convinced the Supreme Court that it held a particular piece of land by Aboriginal title. However, a significant portion of the decision in terms of immediate impact relates to the effect of Aboriginal title on the Crown's duty to consult, and if necessary, accommodate the Tsilhqot'in Nation before making decisions about the management of these lands.[101] The close link between the Honour of the Crown and the duty to consult is not surprising. The duty to consult is grounded in the Honour

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99 *Ibid,* s 15(1)(g).

100 *Haida , supra* note 1.

101 In making this observation, I am fully aware that *Tsilhqot'in* states that the Crown's duties regarding Aboriginal title land arises from fiduciary duty. *Tsilhqot'in, supra* note 4 at paras 80, 87, 90, 119, rev'g *William v British Columbia,* 2012 BCCA 285, rev'g *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700. However, the Crown's actions will still be judged by a continuum of requirements established by the Honour of the Crown, which requires no more than notice at one extreme and stops just short of an Indigenous veto on the other. The duty will increase substantially on Aboriginal title land but will be a matter of judging the Crown's actions from the perspective of a different spot on the continuum rather than through the application of a different test. In any event, fiduciary duty is not distinct from the Honour of the Crown in its essential nature – the Honour of the Crown applies to every aspect of the Indigenous-Crown relationship, and fiduciary duty is a subset of the Honour of the Crown that applies under certain conditions, one of which relates to lands held by Aboriginal title.

of the Crown.[102] The Honour of the Crown arises out of "the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty."[103] Each situation in which consultation takes place is a microcosm of the operation of the Honour of the Crown generally.

The Honour of the Crown and the duty to consult share certain characteristics. Neither exists as a free-standing cause of action. Both are transitive in that consultation has no meaning in the absence of action (or inaction) by the parties relating to consultation in a specific factual context and the Honour of the Crown is not an issue until the Crown takes or contemplates some action that might infringe an Aboriginal or treaty right. Both are dependent on context in that what is required to satisfy the Honour of the Crown or the duty to consult cannot be determined without knowing the circumstances, such as the nature of the Indigenous-Crown interaction, the potential impact of the Crown's action (or inaction) on an Indigenous party, the situation, goals, capacity, and conduct of the Indigenous party, and the range of possible options. Both operate better interactively, without one party having the burden of making or claiming the authority to make a unilateral decision as to the adequacy of consultation or consistency with the Honour of the Crown.

However, the Honour of the Crown is broader than the duty to consult. Like the requirement to satisfy the obligations of a fiduciary, situations that impose a duty to consult are a subset of situations that invoke the Honour of the Crown, and as such consultation can satisfy the Honour of the Crown in some but not all situations. While the Honour of the Crown is relevant to the entire relationship between the Crown and Indigenous peoples, consultation deals with specific circumstances, often a single Crown action. The duty to consult and the Honour of the Crown have important differences. Except in cases relating to credible but unproven claims to Aboriginal title,

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102 *Haida, supra* note 1 at para 16.
103 *Ibid* at para 26.

the duty to consult does not arise until the three-part test set out in *Haida* is satisfied[104] while the Honour of the Crown is ever-present.

Three Federal Court of Appeal decisions dealing with pipeline approvals illustrate the difficulty of determining how the substantive issue of the Honour of the Crown is transformed into procedural issues regarding the duty to consult and after following this procedure transformed back into the substantive issue of whether the Honour of the Crown has been satisfied. The first, *Gitxaala Nation v Canada*, set aside both a federal Order-in-Council requiring the National Energy Board to issue two Certificates of Public Convenience and Necessity and the two certificates that had been issued by the Board.[105] Opponents of the pipeline also sought judicial review of a report prepared by the Joint Review Panel recommending approval of the project.[106] The second application was dismissed,[107] but the majority decision quashing the Order-in-Council focused on Phase IV, one stage of the consultation process that was conducted at the same time as the work of the Joint Review Panel.[108]

The majority concluded that federal officials conducting Phase IV were so focused on an arbitrary time-frame that they rejected requests for an extension of time for the process,[109] even though this refusal prevented adequate responses to "focused and brief" questions raised by Indigenous peoples.[110] The majority also expressed concern about two other aspects of the management of Phase IV. First, the conduct of federal officials seemed designed to confirm that consultation would not lead to any substantive change to mitigation measures, through the

104 *Haida, supra* note 1 at para 35.
105 *Gitxaala Nation v Canada,* 2016 FCA 187 at para 343, Dawson and Stratas JJA.
106 *Ibid* at para 2, Dawson and Stratas JJA.
107 *Ibid* at para 342, Dawson and Stratas JJA.
108 *Ibid* at para 244, Dawson and Stratas JJA.
109 *Ibid* at para 251-252, Dawson and Stratas JJA.
110 *Ibid* at para 253, Dawson and Stratas JJA.

expression of unwillingness to "raise expectations"[111] and the frequent repetition by federal officials that they had no authority to "make decisions".[112] Second, the majority cited three occasions on which officials reported information to their supervisors about environmental risk and possible mitigation that was at the very least inaccurate and may have been misleading.[113]

When the Federal Court of Appeal considered approval of the Trans-Mountain Pipeline in *Tsleil-Waututh Nation v Canada* in 2018, counsel for the Crown argued that most of the consultation failings that were so obvious in *Gitxaala* had been rectified.[114] The Court acknowledged that the time-frame for the process was increased substantially, Indigenous participants in the process were encouraged to make representations to Cabinet directly, and Crown Ministers with decision-making authority were available to the process[115] Nevertheless, the Court set aside the approval of the project. In consultation, the Crown took the position that it lacked the authority to impose conditions on the project beyond those imposed by the National Energy Board.[116] This position also appeared in written submissions to the Federal Court of Appeal, although in oral argument Crown counsel acknowledged that this position was incorrect.[117] Speaking for the Court, Justice Dawson concluded that the Crown's failure to recognize its authority undermined the consultation process.[118]

As a result of the Federal Court of Appeal decision, one phase of the federal consultation process was repeated and the National Energy Board conducted a reconsideration hearing. At the

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111 *Ibid* at para 276, Dawson and Stratas JJA.
112 *Ibid* at para 264, Dawson and Stratas JJA.
113 *Ibid* at paras 255-258, Dawson and Stratas JJA.
114 *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 551.
115 *Ibid* at paras 552, 554.
116 *Ibid* at para 633.
117 *Ibid* at para 635. It is not surprising that the Crown's authority was established by the end of oral argument before Justice Dawson, since she was one of the authors of *Gitxaala*, which had confirmed that authority. *Ibid* at para 634.
118 *Ibid* at paras 637, 727, 728, 760.

end of these processes, Canada approved the construction of the Trans Mountain Pipeline in June 2019. In *Coldwater First Nation v Canada,* four of the six applicants in *Tsleil-Waututh* sought judicial review again.[119] The Federal Court of Appeal dismissed the application. The Court concluded that the evidence before it illustrated "a genuine effort in ascertaining and taking into account the key concerns of the applicants, considering them, engaging in two-way communication, and considering and sometimes agreeing to accommodations, all very much consistent with the concepts of reconciliation and the Honour of the Crown."[120] One applicant, the Squamish Nation, contended that federal officials had "altered" submissions of its experts without the knowledge of the authors.[121] While observing that if true this would raise a serious concern about the Honour of the Crown, the Court dismissed the charge in the absence of any evidence supporting it and the documentary record that confirmed that all changes had been reviewed with the applicant's experts before submission.[122] The Court concluded that "Squamish is not entitled to ask this Court to conclude that Canada's conduct was inconsistent with the Honour of the Crown."[123]

The three pipeline cases suggest that in assessing consultation efforts, challenges to the Honour of the Crown are not limited to allegations of lack of diligence. Both successful judicial review applications raised the issue of the conduct of federal officials. In *Gitxaala*, the misrepresentation of Indigenous submissions was sufficient to raise questions about the Honour of the Crown. In *Tsleil-Waututh*, the position taken by federal authorities about their incapacity to

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119 *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34, leave to appeal to the Supreme Court of Canada dismissed, July 2, 2020, 2020 CanLII 43130 (SCC).
120 *Ibid* at para 76.
121 *Ibid* at para 138.
122 *Ibid* at para 139.
123 *Ibid* at para 140.

add conditions to a National Energy Board approval was reckless at least and could not pass a "reasonableness" test.

A Saskatchewan Court of Queen's Bench decision released in April 2020 summarized the relationship between the Honour of the Crown and consultation when it observed that while the Honour of the Crown imposes a duty to act honourably, it does not impose a duty to consult. However, if a duty to consult exists, then the Crown must consult genuinely and in good faith.[124] This reflects the fact that there are two separate Honour of the Crown issues related to the duty to consult. The first, establishing whether the duty exists in an individual case, is entirely a substantive matter. The relationship between the Honour of the Crown and the conduct of consultation once it is required is primarily procedural but retains a substantive element. Further, while the Crown's intent is important in determining questions relating to its honour, it is not determinative. *Tsleil-Waututh* establishes that the even if Crown officials make a sincere mistake about the extent of their authority, the Honour of the Crown has not been satisfied if it results in a consultation process that is fatally flawed.

In the regulatory process, tension can arise between the consultation that is required in a particular instance and the broader question of the Honour of the Crown. In a 2012 article in the *Alberta Law Review*, three practitioners who primarily represent industry in regulatory matters caution that "great mischief can arise when the Honour of the Crown and the duty to consult are conflated or not properly distinguished."[125] Their specific concern reflects the fear that if the relationship between consultation and the Honour of the Crown is emphasized too much, the result may be that the consultation process will be subsumed in efforts to resolve all issues related to the

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124 *George Gordon First Nation v Saskatchewan,* 2020 SKQB 90 at para 94.

125 Chris W. Sanderson, Keith B. Bergner, and Michelle S. Jones, "The Crown's Duty to Consult Indigenous peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty" (2012) 49:4 Alta L Rev 821 at 829.

Honour of the Crown, which would complicate and delay the regulatory process.[126] The recent decision by the Alberta Court of Appeal setting aside the approval of a Prosper oil sands project within five kilometres of the Fort McKay First Nation reserve near Moose Lake, north and west of Fort MacKay[127] illustrates this issue.

Because of the cultural importance of Moose Lake to the Fort McKay First Nation, the Nation has been pressing Alberta for protection for the area since 2001.[128] When the late Jim Prentice was Premier of Alberta, he signed a Letter of Intent with the Fort McKay Chief in March 2015 that committed the parties to working together to reach agreement on an Access Management Plan for the Moose Lake area before the end of 2015.[129] Although this goal was not met, the Alberta Energy Regulator ("Regulator") suspended consideration of an application by Prosper Petroleum for approval of its project in May 2016 to allow the talks with Fort McKay to continue past the deadline.[130] When no progress was made after six months, the approval process began again. When the Regulator was setting the terms of the public hearing regarding the project in the spring of 2018, it elected not to consider anything related to the proposed Access Management Plan because there was no such plan.[131] Further, the Regulator is forbidden by statute from considering the adequacy of Indigenous consultation by Alberta.[132] The sole question facing the Regulator was whether the project was in the "public interest."[133] The Regulator approved the

126 *Ibid.* at 830.
127 *Fort McKay First Nation v Prosper Petroleum Ltd. and the Alberta Energy Regulator,* 2020 ABCA 163.
128 *Ibid.* at paras 2, 8, Veldhuis and Strekaf JJA.
129 *Ibid* at para 13, Veldhuis and Strekaf JJA.
130 *Ibid* at para 18, Veldhuis and Strekaf JJA.
131 *Ibid* at para 20, Veldhuis and Strekaf JJA.
132 *Ibid* at para 24, Veldhuis and Strekaf JJA.
133 *Ibid* at para 23, Veldhuis and Strekaf JJA.

project in June 2018,[134] which led to Fort McKay's application for judicial review in the Alberta Court of Appeal.[135]

In its written submission to the Court of Appeal, Alberta took the position that the Honour of the Crown "is a narrow and circumscribed doctrine that only applies in four situations, none of which require the AER to delay approval of a project while the Crown and a First Nation are discussing a land management policy."[136] It also argued that the consideration of the Honour of the Crown could not be done without breaching the prohibition against considering the adequacy of Crown consultation.[137] The Court of Appeal disagreed, describing the Honour of the Crown by putting an expansive characterization on the four situations to which *Manitoba Métis Federation* had applied the Honour of the Crown.[138] The Court set aside the regulatory approval, returned the matter to the Regulator, and directed that the Regulator consider whether moving forward with the project in the absence of an Access Management Plan was consistent with the Honour of the Crown.[139] The answer to that question is an integral part in determining whether approval of the project is in the "public interest," since the public interest is served by the Crown both acting honourably and meeting its constitutional obligations.[140]

At first glance, this may appear to be a situation in which it would be unfair to Prosper Petroleum to have its project put on hold until the completion of an Access Management Plan. There are several answers to this concern. First, that is not what the Court of Appeal did. Second, it is arguable that such an outcome would be appropriate. There is no doubt that if an Access Management Plan did nothing more than codify the suggestions made by former Premier Prentice,

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134 *Ibid* at para 27, Veldhuis and Strekaf JJA.
135 *Ibid* at para 30, Veldhuis and Strekaf JJA.
136 *Ibid* at para 34, Veldhuis and Strekaf JJA.
137 *Ibid* at para 35, Veldhuis and Strekaf JJA.
138 *Ibid* at paras 37-42, Veldhuis and Strekaf JJA.
139 *Ibid* at para 43, Veldhuis and Strekaf JJA.
140 *Ibid* at para 44, Veldhuis and Strekaf JJA.

the construction of an oil sands project within five kilometres of the Moose Lake Reserve would be forbidden.[141] A concurring judgment contended that the majority had not gone far enough in analyzing the Honour of the Crown and suggested that the "Prentice Promise" was analogous to a treaty provision or a unilateral undertaking similar to the promise in *Manitoba Metis Federation*.[142] Third, the Supreme Court of Canada has shown that it is alive to the differences between the Honour of the Crown and the duty to consult.

The Supreme Court of Canada's 2010 decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*[143] demonstrated the Court's awareness of the incapacity of the duty to consult to address all issues arising out of the Honour of the Crown. The case began when the British Columbia Power and Hydro Authority proposed to enter into an energy purchase agreement with Rio Tinto Alcan Inc. to purchase electricity that was surplus to Rio Tinto's needs, an arrangement that required a decision by the British Columbia Utilities Commission ("Commission") that the proposed energy purchase agreement was in the public interest.[144] The Carrier Sekani Tribal Council opposed the application not because the energy purchase agreement would have a contemporary impact on it, but because the original dispositions for water diversion going back to the 1950s were a continuing breach of Carrier-Sekani's Aboriginal rights and title.[145] The Commission concluded that this was not within its jurisdiction since its public interest test made use of an economic model, and it approved the energy purchase agreement.[146] Carrier Sekani sought judicial review in the British Columbia Court of Appeal, which overturned the approval

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141 The letter from the Premier committed Alberta to a buffer of 10 kilometers. *Ibid* at para 13, Veldhuis and Strekaf JJA.

142 *Ibid* at 77, Greckol JA, concurring.

143 *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCC 43, rev'g *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67.

144 *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 at paras 2-4, rev'd *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCC 43.

145 *Ibid.* at para 9.

146 *Ibid.* at para 11.

and returned the matter to the Commission.[147] The Court of Appeal based its decision on the finding that the Commission had both the authority[148] and the duty[149] to consider whether consultation was required.

Writing for a unanimous Supreme Court of Canada, Chief Justice McLachlin reversed the decision of the British Columbia Court of Appeal and restored the decision of the Commission.[150] She held that consultation was limited to evidence relating to potential for adverse impacts on current Aboriginal rights or title. "Past wrongs, including previous breaches of the duty to consult, do not suffice."[151] Rather than seeking relief for past wrongs in a consultation context, it would be necessary for Carrier Sekani to seek a remedy elsewhere, such as in a claim for damages.[152]

Boundaries of the Duty to Consult

Rio Tinto places a limitation on the duty to consult in terms of time frame, although it must be stressed that this is a limit on the range of the duty to consult, not that of the Honour of the Crown. But another recent case suggests that the application of the Honour of the Crown may expand the range of instances dealing with contemporary issues that can give rise to a duty to consult. *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*[153] was filed by the Mikisew Cree First Nation ("Mikisew"), a Treaty 8 first nation with reserves in and near Fort Chipewyan, Alberta, whose traditional territory stretches about 100 miles south of Fort Chipewyan west of the Athabasca River. The litigation was triggered by the 2012 passage of two "Omnibus Bills" (Bills C-38 and C-45) which, after Royal Assent, became the *Jobs, Growth, and Long-term*

147 *Ibid.* at para 69.
148 *Ibid.* at para 50.
149 *Ibid.* at para 51.
150 *Rio Tinto, supra* note 143 at para 93.
151 *Ibid.* at para 45.
152 *Ibid.* at para 49.
153 *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40, [2018] 2 SCR 765, aff'g *Canada (Governor General in Council) v Mikisew Cree First Nation,* 2016 FCA 311, rev'g *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244.

Prosperity Act[154] and the *Jobs and Growth* Act[155] respectively. Both pieces of legislation made significant changes to Canada's environmental laws. Mikisew sought a series of declarations confirming that the Crown had a duty to consult with it when each of the Omnibus Bills had been introduced in Parliament, while conceding that since the ultimate federal "action" in the case was the passage of legislation there were no grounds for judicial review in the traditional sense.[156]

In the Federal Court of Canada, Justice Hughes held that there was no duty to consult during the time that proposed legislation was being studied, prepared, drafted, or approved by Cabinet. He concluded that to find a duty to consult at those stages to be judicial interference in the legislative process.[157] His conclusion was based on the belief that all of these functions were part of the legislative process, and that the executive did not play a role until the time arrived to implement the legislation. However, he held that once a bill was introduced in the House of Commons, a duty to consult arose.[158] His justification for this conclusion was that it was after a bill had been drafted and was introduced in the House of Commons that any threat it posed to Mikisew's treaty rights could be identified.[159] In reaching the decision he did, Justice Hughes appears to have been influenced by the fact that the two Omnibus Bills were treated as "confidence Bills" that passed through the House of Commons very swiftly in a process that did not even provide for a public hearing process to which Mikisew would otherwise have had access.[160] However, he did not explain in his judgment why the requirement for consultation at a mid-point in the legislative process is not judicial interference with it. Both parties agreed that no consultation

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154 *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.
155 *Jobs and Growth Act*, SC 2012, c 31.
156 *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244, rev'd . *Canada (Governor General in Council) v Mikisew Cree First Nation,* 2016 FCA 311, rev'd *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40, [2018] 2 SCR 765.
157 *Ibid* at paras 3-6.
158 *Ibid* at paras 36, 71-72.
159 *Ibid* at paras 88-99.
160 *Ibid* at para 104.

had taken place, so once Justice Hughes determined that there should have been consultation, the case moved on to remedy.[161] This was problematic since the legislation had been in effect for two years by the time of the hearing. Accordingly, he limited himself to a declaration that the Crown should have notified Mikisew and provided it an opportunity to make submissions once the bills had been introduced in Parliament.[162]

Both parties appealed, the Crown seeking to set aside the declaration and Mikisew seeking a more substantive remedy. Writing for the majority in the Federal Court of Appeal, Justice de Montigny addressed the substantive matters in the case while expressing doubt as to whether the case was within the jurisdiction of the Federal Court under section 18.1 of the *Federal Court Act.*[163] He rejected the Mikisew contention that it is a relatively simple matter to determine when members of Cabinet are playing an executive role and when they are acting as legislators, commenting that "it would be artificial to parse out the elements of a minister's functions associated with either its executive or legislative functions".[164] He ultimately concluded that members of Cabinet exercise a legislative function and are not subject to judicial review at any point during the preparation or passage of the legislation.[165] While agreeing with the result, Justice Pelletier expressly addressed the case in terms of whether the Honour of the Crown was engaged in the preparation of legislation. He concluded that it was not, particularly with regard to legislation of general application such as the legislation arising out of the "Omnibus Bills", which would apply throughout Canada.[166] More generally, he held that the duty to consult cannot be interpreted "in such a way as to render effective

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161 *Ibid* at para 105.

162 *Ibid* at para 110.

163 *Canada (Governor General in Council) v Mikisew Cree First Nation,* 2016 FCA 311 at paras 21-29, de Montigny JA , rev'g *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244; aff'd *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40, [2018] 2 SCR 765' *Federal Court Act,* RSC 1985, c F-7, ss. 18.1(1), 18.1(2).

164 *Governor General in Council*, *supra* note 163 at paras 26-29, de Montigny JA.

165 *Ibid* at para 30, de Montigny JA.

166 *Ibid* at para 91, Pelletier JA.

government impossible," which would be the outcome if Indigenous consultation were necessary with regard to the legislative process.[167]

Despite his decision on the merits of the case, which reflected his concern that to allow the Federal Court decision to stand raised the spectre of judicial supervision of the legislative process,[168] Justice de Montigny was troubled by the outcome of the case. He was uncomfortable with the result that the division between the executive and legislative functions on which the case turned did not reflect the complexity of the Parliamentary process. He observed that even if it is difficult to find any point at which there is a freestanding duty to consult, the complete absence of consultation could be prejudicial to a future attempt to justify legislation either with regard to the *Sparrow* test or more generally in terms of justification regarding section 1 of the *Constitution Act, 1982*.[169]

The concerns expressed by Justice de Montigny reflect a situation in which the practice of government differs from the theory of a division of government into the legislative, executive, and judicial functions. This is particularly true in a Parliamentary system since members of Cabinet are drawn from the legislative branch and retain office only so long as they retain the confidence of the legislature.[170] As early as the mid-nineteenth century this was recognized by Walter Bagehot, who wrote that the "efficient secret of the English Constitution" was the "close union, the near fusion, of the executive and legislative functions."[171] A study by the Law Reform Commission of Canada of the functioning of government under the *Constitution Act, 1982* warned that an executive independent of the legislature would be "an unacceptable infringement of the

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167 *Ibid* at para 92, Pelletier JA.
168 *Ibid* at para 59, de Montigny JA.
169 *Ibid* at para 56, de Montigny JA.
170 Walter Bagehot, *The English Constitution* (London: Thomas Nelson and Sons, 1867) at 40.
171 *Ibid* at 81.

general sovereignty of Parliament."[172] However, *de facto* control of government has come to lie with Cabinet (and increasingly with the office of the Prime Minister), which maintains its practical superiority to Parliament by being able to control the ordering and timing of legislation while at the same time it has co-opted the prerogative from the monarch.[173]

The exclusion of the legislative branch of government from the definition of the Crown is consistent with Supreme Court of Canada jurisprudence. The issue was considered by the Court in its decision in 1955 decision in *Wardle v Manitoba Farm Loan Association*, which held that under Manitoba legislation the Crown and the Legislative Assembly were distinct.[174] A half century later, the Federal Court of Canada used *Wardle* in support of the conclusion that "the Crown" is used as shorthand to refer to the executive branch in Canada and that it is incorrect to describe Parliament or a provincial legislature as part of "the Crown".[175]

When the Mikisew appeal was decided by the Supreme Court of Canada, it was clear that while all nine justices were concerned with the issues that troubled Justice de Montigny, there were at least three and possibly four different approaches to dealing with the matter. On the narrow point, which I suggest was the only matter of law decided in the case, all nine justices agreed that the Federal Court had no jurisdiction to have considered the Mikisew litigation from the beginning. Speaking for herself, Chief Justice Wagner, and Justice Gascon, Justice Karakatsanis held that because the actions challenged by Mikisew were "exclusively legislative in nature" they did not fall within the definition of "the Crown" as that term is used in section 17(1) of the *Federal Court*

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172 Law Reform Commission of Canada, *The Royal Status of the Federal Administration*, Working Paper 40 (Ottawa: Law Reform Commission of Canada, 1985 at 37.

173 David E Smith, *The Invisible Crown: The First Principles of the Canadian Government*, 2nd ed (Toronto and Buffalo: University of Toronto Press, 2013) at 31; Zachary Davis, "The Duty to Consult and Legislative Action" (2016) 79 Sask L Rev 17 at 36.

174 *Wardle v Manitoba Farm Loan Association*, [1956] SCR 3 at 18, Kellock J, rev'g [1954] 4 DLR 572 (MBCA), aff'g (1953), 9 WWR (NS) 529 (MBQB). Although not reported until 1956, the decision was rendered November 15, 1955.

175 *Gauthier v Canada (Speaker of the House of Commons)*, 2006 FC 570 at para 11.

Act, which sets out the jurisdiction of that body.[176]Justice Abella, writing for herself and Justice Martin, agreed, although she added the caveat that while she agreed that the appeal must fail on jurisdictional grounds she agreed with the substantive Mikisew assertion that legislation that might have a negative impact on Aboriginal or treaty rights did give rise to a duty to consult.[177]Justice Brown and Justice Rowe, the latter writing on behalf of himself and Justices Moldaver and Côté also agreed, but they went further and contended that the Mikisew litigation should be dismissed not only on grounds of statutory jurisdiction, but also because the claim threatened the separation of powers and parliamentary privilege.[178]

The judgment of Justice Karakatsanis gives the clear impression that she and her colleagues that joined in her judgment shared some of the concerns expressed by Justice de Montigny. While attempting to build a wall around the legislative process,[179] she attempted to convey the message that if legislation did pose a threat to Aboriginal or treaty rights, Indigenous peoples would not be without a remedy. Justice Karakatsanis raised one of the possibilities mentioned by Justice de Montigny, that legislation that was passed without any consultation with Indigenous peoples might be harder to justify under the second part of the *Sparrow* test,[180] and she also referenced the possibility of seeking declaratory relief.[181]

Fairly early in her judgment, Justice Abella suggested that as constitutional principles, the Honour of the Crown is at least equal to parliamentary sovereignty and may indeed trump it.[182] While the tone of Justice Abella's judgment differs from that of Justice Karakatsanis, there is not

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176 *Mikisew Cree, supra* note 153 at para 16, Karakatsanis J; *Federal Court Act, supra* note 164, s 17(1).
177 *Mikisew Cree, supra* note 153 at para 55, Abella J.
178 *Ibid* at paras 101-102, Brown J and at para 148 Rowe J.
179 *Ibid* at paras 30-41, Karakatsanis J.
180 *Ibid* at para 48, Karakatsanis J.
181 *Ibid* at para 47, Karakatsanis J.
182 *Ibid* at paras 54-55, Abella J. In paragraph 55, Justice Abella juxtaposed the Honour of the Crown, which she describes as a "constitutional imperative," and parliamentary sovereignty, which she characterizes as an "assertion" by the legislature.

a huge substantive difference between them. Justice Abella conceded near the end of her judgment that in terms of practical remedies in the event that legislation inimical to Aboriginal or treaty rights is enacted without consultation, the only remedy is to challenge the legislation after it is enacted, and she does not suggest the possibility of prior restraint on legislative action.[183] Further, the type of consultation she suggested, requiring notification and an opportunity to make submissions,[184] is normally available in the legislative process but did not take place with regard to the "Omnibus Bills" because of a decision made by Cabinet as to how to proceed in Parliament.[185]

Justice Brown's judgment suggests that he would have been perfectly happy to decide the case as solely a matter of jurisdiction but felt compelled to write more to limit the what he perceived as the damage resulting from the attempt by Justice Karakatsanis to reassure Indigenous peoples that the Supreme Court would not leave them without a remedy in the event that legislation breaches Aboriginal or treaty rights On five separate points in his judgment, Justice Brown took specific issue with points raised by Justice Karakatsanis.[186] The two primary objectives of Justice Rowe's opinion seem to be establishing that the law already contains considerable protection for Aboriginal and treaty rights[187] and to point out a number of practical problems that would arise out of attempts to require consultation regarding the legislative process.[188]

As the fundamental issue in the *Mikisew Cree* litigation turned out to be a jurisdictional one that was resolved fairly easily, the case need not have broad significance. Also, despite the rhetoric in the various judgments, there was unanimity not only on jurisdiction but on the question

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183 *Ibid* at para 93, Abella J.
184 *Ibid* at para 92, Abella J.
185 *Courtoreille, supra* note 156 and para 104.
186 *Mikisew Cree, supra* note 153 at paras 103, 106, 136, 142, and 143, Brown J.
187 *Ibid* at paras 150-159, Rowe J.
188 *Ibid* at para 165.

of whether the Honour of the Crown can be invoked to justify prior restraint in the legislative process.

CROWN PROMISES OF A CONSTITUTIONAL NATURE

In *Manitoba Métis Federation*, the majority of the Supreme Court of Canada granted a declaration that a provision of the *Manitoba Act* promising that 1,400,000 acres of land in what is now southern Manitoba would be distributed among children of the Métis of Manitoba had been "given constitutional authority by the *Constitution Act, 1871*" and "was not implemented in accordance with the Honour of the Crown, itself a 'constitutional principle." The declaration was made notwithstanding the fact that any claim for personal relief was statute-barred by limitation of actions legislation.[189] The majority of the Court analogized the declaration that it was making to a decision that a statute is unconstitutional, reflecting the proposition that an unconstitutional law is void, a defect that cannot be remedied by the passage of time.[190] The longer-term consequences of *Manitoba Métis Federation* remain to be seen, but the issue that courts will be required to address has been clarified – how wide is the exemption to the application of limitations provisions?

Justice Rothstein's vigourous dissent in *Manitoba Métis Federation* was focused on the majority's decision to deny the Crown the protection of the Manitoba *Limitation of Actions Act*.[191] He charged that "[W]ithout doing so explicitly, it appears that the majority has departed from the legal certainty created by *Wewaykum* and *Lameman.*"[192] The 2008 *Lameman* decision seemed to

189 *Manitoba Métis Federation, supra* note 2 at para 138, McLachlin CJC & Karakatsanis J.
190 *Ibid* at paras 134-135, McLachlin CJC & Karakatsanis J.
191 *The Limitation of Actions Act,* CCSM, c L150.
192 *Manitoba Métis Federation, supra* note 2 at para 254, Rothstein J, dissenting.

leave no doubt that the limitation periods applied to Aboriginal law cases to the same extent that it did to all litigation.[193]

Two 2020 decisions from Ontario and Saskatchewan applied the exception to limitation periods in circumstances that provide personal relief. In *Restoule v Canada and Ontario*, 23 first nations who are parties to the 1850 Robinson Huron claim compensation for the failure of the Crown to fulfil the treaty promise to increase annuities should certain conditions precedent be met.[194] The original annuities set in 1850 were increased in 1875,[195] but the plaintiffs in *Restoule* assert that the obligation to increase is a continuing obligation as circumstances warrant. Ontario applied for summary judgment, arguing that the claim was statute-barred by the provisions of the Ontario *Limitations Act.*[196] In rejecting Ontario's position, the trial judge cited *Manitoba Métis Federation* as authority for his conclusion that the honour of the Crown must "be considered in some cases before deciding whether an Aboriginal claim can or should be statute barred on the basis of an applicable limitation period."[197]

The second case, *Watson et al v Canada* related to the dissolution of two Treaty 4 signatory bands that were incorporated into a third band, with the consequential surrender of two reserves.[198] After a trial that heard evidence from five oral history witnesses, ten lay witnesses (four of them for Canada) and five expert witnesses (two of them for Canada),[199] the trial judge focused on the Honour of the Crown in his decision. He noted that the Honour of the Crown informs the negotiation and implementation of treaties, and that it is the Honour of the Crown that requires

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193 *Lameman, supra* note 17 at para 13.
194 *Restoule v Canada (Attorney General)*, 2020 ONSC 3932, var'd 2020 ONCA 779.
195 This increase resulted in *Province of Ontario v. Dominion of Canada and Province of Quebec. In re Land Claims* (1895), 25 SCR 434, aff'd [1897] AC 199 (JCPC), which was discussed in detail in Chapter V.
196 *Limitations Act,* RSO 1990, c L-15.
197 *Restoule, supra* note 194 at para 190.
198 *Watson et al v Canada*, 2020 FC 129.
199 *Ibid.* at paras. 22-33, 35-38, and 50-66.

both the purposive interpretation and diligent implementation of treaties.[200] On the evidence that he heard, he concluded that Canada had breached the Honour of the Crown by amalgamating the three bands without the consent of all of the parties.[201] He was also convinced that one part of the amalgamation, the loss of two reserves, was a breach of fiduciary duty, but he did not include this in the declaration because the fiduciary duty had its source in the Honour of the Crown and including the latter in a declaration was sufficient.[202] The decision relied heavily on *Manitoba Métis Federation*, while conceding that the case before him did not deal with the "fulfilment of promises made to Indigenous peoples in constitutional statutes."[203] The trial judge addressed this concern by noting the reference to treaty rights in s 35 of the *Constitution Act, 1982* and the fact that one of the reasons the Supreme Court gave for its decision in *Manitoba Métis Federation* was that the promise set out in the *Manitoba Act* was that "[A]n analogy may be drawn between such a constitutional obligation and a treaty promise."[204] Even then, he did not cite the failure to fulfil a particular treaty promise, but rather concluded that the amalgamation of three bands and the surrender of two reserves breached the treaty itself and the breach treaty rights, which are of a constitutional nature, was a breach of the Honour of the Crown that justified the declaration he made.[205]

The plaintiffs in *Watson* were seeking both a declaration and monetary damages. The trial judge could see no reason the two claims could not be made in the same litigation, provided that it was understood that the declaration played no role in supporting the claim for damages.[206] However, unlike *Restoule*, where the distinction between personal relief and a declaration was

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200 *Ibid* at para 265.
201 *Ibid* at paras 294-295, 299. 308.
202 *Ibid.* at para 265.
203 *Ibid.* at paras 499 - 500.
204 *Ibid.*
205 *Ibid* at para 204.
206 *Ibid* at para 478, 512.

never mentioned,[207] the trial judge in *Watson* confirmed that he was aware of the limits to his authority to award monetary damages. He interpreted *Manitoba Métis Federation* as requiring him to make a declaration only if it would have a practical effect[208] without violating the prohibition of providing personal relief. He explained that the purpose of his declaration was to facilitate and inform negotiations between the parties toward a settlement.[209]

There is no question that *Watson* expands the grounds for exception from the application of limitation periods and laches beyond those set out in *Manitoba Métis Federation*. In the earlier case, the Supreme Court of Canada gave two justifications for the exception. The first was the constitutional nature of the promise made to the Métis of Manitoba in s 31 of the *Manitoba Act*. In addition to the dominant consideration that an express promise was made to the Métis of Manitoba in a document that is a Schedule to the *Constitution Act, 1982*,[210] the Chief Justice and Justice Karakatsanis analogized the promise to a treaty provision[211] and characterized a breach of that promise as the equivalent of an unconstitutional statute.[212] The second justification was that limiting the remedy to a declaration still protected the Crown from any award of substantive damages against it.[213] While Justice Rothstein objected to all of these points in his dissent, he took particular exception to the last one. He characterized the suggestion that the Crown was shielded from the consequences of any substantive damages being imposed on it as somewhat disingenuous given the reality that the declaration would almost inevitably lead to other remedies whether or not these are imposed by a court.[214]

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207 *Restoule, supra* note 194.
208 *Watson, supra* note 198 at para 397.
209 *Ibid* at para 495..
210 *Manitoba Act 1870,* SC 1870, c 3, ss 31, 32, reprinted in RSC 1985, Appendix II, Schedule, Item 8.
211 *Manitoba Métis Federation*, *supra* note 2 at para 71, McLachlin CJC and Karakatsanis J.
212 *Ibid* at paras 135-136, McLachlin CJC and Karakatsanis J.
213 *Ibid* at para 143, McLachlin CJC and Karakatsanis J.
214 *Ibid* at para 261, Rothstein J, dissenting.

Unlike *Manitoba Métis*, *Watson* did not deal with failure to implement a promise in a constitutional status and instead deals with what the trial judge characterized as a breach of a term of Treaty 4.[215] This characterization is not strictly correct, as the reserve clause of Treaty 4 was fulfilled when reserves were surveyed for the Chacachas and Kakisiwew Bands, both of which were signatories to the Treaty.[216] The harm suffered by the Chacachas and Kakisiwew Bands resulted from the loss of their reserves with five years of their survey as part of an amalgamation of both bands with the Ochapowace Band.[217] This was not in fact a breach of the treaty, but rather a constructive surrender of reserve land without compliance with the relevant provisions of the *Indian Act*, which was a breach of the *Indian Act* and a breach of fiduciary duty.[218]

Watson was also more generous than *Manitoba Métis Federation* with regard to the availability of other remedies, in that the trial judge was prepared to make a declaration notwithstanding the fact that the plaintiffs were also seeking monetary damages. This seems to go beyond the approach taken in *Manitoba Métis Federation*, where the majority was influenced by not only the absence of any personal remedy but also by the consideration that the plaintiffs did not even seek any such remedy.[219] Justice Rothstein's dissent implied that this justification for issuing a declaration was somewhat disingenuous. He pointed out that because of the inevitability of the Crown entering into negotiations in response to a declaration that it had breached the Honour of the Crown, such a declaration does in fact provide another remedy, namely the obligation to negotiate an agreement to expunge the breach of its honour.[220] In *Watson*, the trial judge was

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215 *Watson, supra* note 198 at para 489.
216 *Ibid* at paras 109-117.
217 *Ibid* at paras 128-140.
218 At the time of the amalgamation, the operative legislative framework was that set out in the *Indian Act, 1876*, SC 1876, c 18, s 26.
219 *Manitoba Métis Federation*, *supra* note 2 at para 71, McLachlin CJC and Karakatsanis J.
220 *Ibid* at para 261, Rothstein J, dissenting.

candid, acknowledging that he was issuing a declaration for the specific purpose of facilitating negotiations.[221]

In his dissent in *Manitoba Métis Federation*, Justice Rothstein raised the spectre that the majority's exception to the operation of the relevant limitation of actions statute would undermine the legal certainty brought by the application of limitation periods not only in *Lameman* but also in *Wewaykum*.[222] The decision in *Watson* was clearly a further move in this direction, but *Watson* in itself cannot be seen as standing for the general proposition allegations of breaches of the Honour of the Crown will prevent an action from being statute-barred. In 2012, the year before the decision in *Manitoba Métis Federation*, a Federal Court decision held that the Crown was entitled to summary judgment in *Peepeekisis v the Queen.*[223] In that case, Peepeekisis alleged that it had lost reserve land by the illegal addition of members and the subsequent alienation of reserve land to these persons.[224] A motions judge granted the Crown's application for summary judgment, concluding that the cause of action was discoverable by 1956, 36 years before the action began,[225] and that the delay in bringing the action far exceeded the most generous application of the Saskatchewan *Limitation of Actions Act.*[226] The motions judge relied on *Lameman* as authority for the proposition that limitation legislation was applicable to Aboriginal claims.[227]

The Federal Court of Appeal did not consider the matter until after the Supreme Court of Canada's decision in *Manitoba Métis Federation* was released, so it was necessary for the Court of Appeal to consider its impact. After hearing the position of both parties on the question of

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221 *Watson, supra* note 198 at para 495.
222 *Manitoba Métis Federation*, *supra* note 2 at para 254, Rothstein J, dissenting.
223 *Peepeekisis Band v Canada*, 2012 FC 915 at para 109; aff'd 2013 FCA 191.
224 *Ibid* at paras 3-5.
225 *Ibid* at paras 76, 102, 104, 107.
226 *Ibid* at para 108. The longest limitation period set in the legislation was 10 years. *Limitation of Actions Act*, RSS 1978, c L-15, ss 12(1), 13(1).
227 *Peepeekisis, supra* note 223 at para 78.

whether the Peepeekisis claim could be analogized to that of the Manitoba Métis Federation, the Court elected to base its decision on the statement in the earlier decision that "declaratory relief may be the only way to give effect to the honour of the Crown"[228] [emphasis added by the Court of Appeal]. The Court of Appeal held that since the Peepeekisis claim was within the mandate of the Specific Claims Tribunal the conditions for a declaration were not met.[229] The judgment added that the Court of Appeal expressly declined to address the question of whether a declaration would be appropriate in the absence of the Specific Claims Tribunal.[230] *Manitoba Métis Federation* was also interpreted narrowly in *Samson v Canada,* where Justice James Russell (who was also the motions judge in *Peepeekisis*) wrote that in *Manitoba Métis Federation* " the Supreme Court of Canada allowed a narrow and very specific exception to the general rule that limitations apply to Aboriginal claims. That exception was for a declaration that Canada had not acted honourably in

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228 *Peepeekisis Band v Canada*, 2013 FCA 191 at para 59, aff'g 2012 FC 915. While it is far from certain, I suggest that the use of the word "only" in *Manitoba Métis Federation* likely precludes pairing a declaration with potential claim for personal relief as Justice Phelan did in *Watson.*

229 *Ibid* at paras 60-61. The comparison between *Watson* and another case relating to a nineteenth century amalgamation and the loss of reserve land illustrates how the question of standing before the Specific Claims Tribunal can be arbitrary substantively. In *Watson* three signatory bands to Treaty 4 were amalgamated and the reserve land that was retained was that which had originally been set aside for the Ochapowace Band, the one entity that survived the amalgamation intact. The lost reserves were those originally surveyed for the Kakisiwew and Chachacas Bands, both of whom lost both their reserves and their identity (they were subsumed in the membership of the Ochapowace Band) in the amalgamation. The plaintiffs in *Watson* are descendants of Kakisiwew and Chachacas, but they and their ancestors have been members of Ochapowace for 140 years. Although Justice Gerald Phelan held that these descendants have standing to bring the action in their own names, as a representative action, the Kakisiwew and Chachacas Bands no longer exist. Thus, there is no entity that can meet the definition of a "claimant" as that term is defined in the *Specific Claims Tribunal Act*, which is "a First Nation whose specific claim has been filed with the Tribunal." *Watson, supra* note 198 at paras 103-186, 430, 522-512, *Specific Claims Tribunal Act*, *supra* note 26 at s 2. The circumstances Mosquito, Grizzly Bear's Head and Lean Man Bands has both strong similarities and significant differences. The three bands were amalgamated and two-thirds of their combined reserves were surrendered. But the tripartite nature of the amalgamated band was recognized at the time of the amalgamation, and it has become the Mosquito Grizzly Bear's Head Lean Man First Nation. This entity meets the definition of a "claimant" under the *Specific Claims Tribunal Act*, and in May 2021 the Tribunal awarded it compensation of more than $141,000,000 in compensation for the illegal surrender of reserve land upon amalgamation. The Tribunal's judgment in January 2021 was about $127,000,000 as of September 2017, and the total compensation was calculated by bringing this amount forward to January 2021. *Mosquito Grizzly Bear's Head Lean Man First Nation v Her Majesty the Queen in Right of Canada,* 2021 SCTC 1.

230 *Peepeekisis, supra* note 228 at para 62.

implementing the express constitutional obligation".[231] In a judgment released in November 2021, Justice Sébastien Grammond held that in *Manitoba Métis Federation*

> the Court noted that the policy rationales underlying limitation periods are not always relevant in the context of Indigenous claims. Nevertheless, the Court did not suggest that limitation periods would be abolished in Indigenous matters, beyond the narrow exception it carved out with respect to the constitutionality of Crown conduct.[232]

Watson is particularly significant in that the plaintiffs claim as the descendants of original Treaty 4 bands that had ceased to exist as a result of amalgamation.[233] This could provide a way to address one of the challenges facing descendants of bands that have disappeared through amalgamation who attempt to characterize the Crown actions that led to their disappearance as a breach of the Honour of the Crown. *Lameman*, which was discussed earlier, was such a case. Leaving aside the limitations issue, the case illustrated the almost impossible situation faced by plaintiffs in such cases. Although the Supreme Court of Canada focused on the limitations issue, leaving in place the Alberta Court of Appeals decision to set aside the judgment of the motions judge dealing with standing.[234] *Watson* could provide a means of addressing past wrongs such as those endured by the Papaschase descendants without running afoul of *Lameman*. Further, while Papaschase is perhaps the most egregious fact situation in which an original Treaty 6 band disappeared, at least four other Alberta bands disappeared under questionable circumstances, three of them, like Papaschase, in the first decade after the signing of Treaty 6.

The Indigenous peoples living in the vicinity of Lac La Biche were represented at the Treaty 6 negotiations at Fort Pitt by Chief Peeyaysis, who signed the treaty on September 9,

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231 *Samson v Canada*, 2015 FC 836 at para 126, var'd 2016 FCA 226.
232 *Quinn v Canada*, 2021 FC 1302, aff'g 2021 FC 320.
233 *Watson, supra* note 198 at paras 13-14.
234 This is consistent with the interpretation of *Lameman* in *Quinn, supra note* 232 at para 31.

1876.[235] In 1885, the Peeyaysis population declined from 150 to 16 because of discharges from treaty to apply for Métis scrip.[236] Only one large family remained members of Peeyaysis and about the same time as scrip became available they moved north to Calling Lake, north of the Athabasca River.[237] In 1911 the members of this family were transferred to the Bigstone Band in Treaty 8.[238]

The Peeyaysis Band came and went before receiving any reserve land, but four other bands in the Edmonton area had received reserve land prior to their disappearance. Chief Papaschase and one headman executed an adhesion to Treaty 6, along with Chiefs Alexis and Alexander at Edmonton in August 1877.[239] The next month Chief Bobtail and four headmen, who lived in the area between Ponoka and Pigeon Lake, signed an adhesion to Treaty 6 at Blackfoot Crossing east of Calgary a few days after the signing of Treaty 7.[240] Chief Michel Callihoo, whose father had been born at Kahnawake near Montreal and come west to participate in the fur trade around the start of the nineteenth century,[241] signed an adhesion to Treaty 6 at Edmonton in 1878.[242] Chief Michel had been born at Jasper, and he and his followers hunted in the mountains near Jasper until he was convinced by Father Albert Lacombe to become a party to Treaty 6 and settle near Edmonton.[243] Sharphead does not appear to have executed a formal adhesion to Treaty 6, but his followers were encountered by federal officials at Pigeon Lake in 1877 and taken into treaty.[244]

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235 *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, Department of Indian Affairs Publication QS-0574-000-EE-A-1.

236 Peeyaysis Band Annuity Paylist, November 18, 1885. LAC, RG 10, Volume 9418.

237 Lac La Biche Band Annuity Paylist, October 3, 1888. LAC, RG 10, Volume 9421.

238 Bigstone Band Annuity Paylist, September 5, 1911. LAC, RG 10, Volume 9446.

239 Adhesion by Cree Indians, Edmonton, August 21, 1877. *Treaty No 6, supra* note 162.

240 Adhesion by Cree Indians, Blackfoot Crossing, September 25, 1877. *Ibid.*

241 Trudy Nicks, "CALLIHOO, LOUIS," in *Dictionary of Canadian Biography*, vol. 7, University of Toronto/Université Laval, 2003–, accessed September 4, 2020. http://www.biographi.ca/en/bio/callihoo_louis_7E.html.

242 Adhesion by Cree Indians, September 18, 1878. *Treaty No 6, supra* note 162.

243 Chief Michel Callihoo, Biographical Information, online <www.scribd.com/document/173341787/Callihoo-Chief-Michel-b-1824>.

244 Bill Russell, "The Sharphead Band: A History of Its Land", September 1980 at 1. online www.7a53fa80-49bd-408b-80e0-274456b035a3.filesusr.com/ugd/aba05f_407b0135c09c476b844868f90493c156.pdf>.

Several years later, the majority of Sharphead members relocated to Wolf Creek, just south of Ponoka.[245]

The Department of Indian Affairs planned to survey reserves for the Michel and Papaschase Bands, who lived the closest to Edmonton, in 1880. The survey of the Michel Reserve between Villeneuve and Calahoo was completed,[246] but the survey of the Papaschase Reserve in what is now southeast Edmonton was abandoned because of a dispute between Chief Papaschase and the local Inspector of Indian Agencies regarding the appropriate size of the reserve.[247] The survey was completed in 1884,[248] the year before reserves were surveyed at Wolf Creek for Sharphead[249] and near Hobbema for Bobtail.[250] The forces that led to the emptying of the four reserves began within months of the completion of the last of the surveys. In 1885 and 1886 more than half of the members of the Bobtail Band (including Chief Bobtail and his extended family) discharged from treaty to apply for scrip.[251] A similar significant decline in population did not occur among Papaschase members until the next year, but in 1886, 101 Papaschase members, the majority of whom were members of the families of Chief Papaschase and his five brothers, as well as his widowed mother, discharged.[252] All remaining members of Papaschase transferred to the

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245 *Ibid* at 2.

246 George A. Simpson DLS to the Superintendent General of Indian Affairs, December 1, 1880. Parliament, in Canada, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880" in *Sessional Papers*, No. 14 (1880).

247 Tyler, *supra* note 21 at 50-52.

248 *Papaschase, supra* note 18 at paras 14, 22, 74.

249 Russell, *supra* note 244 at 3-4.

250 Gwynneth C.D. Jones, "Erasing the Bobtail Band: A Case Study in Government Record-Keeping", (Paper delivered at the Annual General Meeting of the Canadian, Historical Association, May 2005, unpublished) at 11.

251 *Ibid* at 11-17. In 1885, the Bobtail population dropped from 161 to 79 because of discharges. Bobtail Band Annuity Paylist, October 20, 1885. LAC, RG 10, Volume 9418. The next year the population fell to 34. Bobtail Band Annuity Paylist, October 23, 1886. LAC, RG 19, Volume 9419.

252 Papaschase Band, Annuity Paylist, October 25, 1886. LAC, RG 10, Volume 9419.

Enoch Band in 1887,[253] while the members of Bobtail were divided between the Samson and Ermineskin Bands.[254]

The circumstances of the Sharphead Band were dramatically different from those of the Papaschase and Bobtail. The Sharphead population was virtually untouched by the appearance of scrip, but later in 1886 an outbreak of measles struck the Sharphead Band, killing a third of its members in a matter of months. Those members who survived were weakened by the disease, and further deaths during the colder than usual winter that followed the measles outbreak reduced the population further. In 1890, Sharphead Band members also fell victim to an outbreak of smallpox, and by 1891 the population was reduced to between one third and one half of the 1885 membership. Understandably, the surviving members associated the diseases that had denuded the population with residence at Wolf Creek, since the Sharphead Band had settled there no more than five years before the arrival of the measles.[255] The Wolf Creek Reserve was for all practical purposes abandoned, with more than two-thirds of the former members seeking refuge with the Paul Band, the closest Stoney community. Within several years these persons were transferred to the Paul Band, while smaller numbers were transferred to the Stoney Band in Treaty 7 and Samson and Ermineskin, the closest communities.[256] The Sharphead Reserve was surrendered several years later by former members who had been transferred to other bands, but it whether this surrender complied with the surrender provisions of the *Indian Act* is highly questionable.

The appearance of scrip had a significant but less dramatic effect on the Michel Band population too, but the band's population suffered a slow but steady decline as members

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253 Enoch Band Annuity Paylist, October 3, 1887. LAC, RG 10, Volume 9420.

254 Jones, *supra* note 250 at 21-22. Annuity paylists indicate that 24 Bobtail members transferred to Samson and 11 went to Ermineskin. Annuity Paylist, Samson Band, October 8, 1887. LAC, RG 10, Volume 9420. Annuity Paylist, Ermineskin Band, October 7, 1887. LAC, RG 10, Volume 9420.

255 Brian Titley, "The Fate of the Sharphead Stoneys" (1991) 39:1 Alberta History 1 at 5-7.

256 *Ibid* at 7; Russell, *supra* note 244 at 6-7.

enfranchised to free themselves of the restrictions of the *Indian Act* between the 1880s and the 1950s. This, together with the fact that as early as 1885 observers had identified the Michel Reserve as the having the best unavailable farmland in the Edmonton area, led to repeated surrenders of reserve land, with lands taken from the Michel Reserve in 1903, 1906, and 1928.[257] In 1958, an obscure section of the *Indian Act* was used for the first time, and the remaining members of the Michel Band were enfranchised, with the land that remained part of the Michel Reserve distributed among them in fee simple that was completely alienable.[258]

In *Watson*, Justice Phelan noted the consideration that discretion should be exercised against issuing a declaration if an adequate alternative remedy is available.[259] On treaty matters, the Specific Claims Tribunals process is generally not only available, it is preferable to a constitutional declaration because the Tribunal's jurisdiction takes in most of the probable issues related to the implementation of treaties and the Tribunal does not consider defences based on limitation periods.[260] But not all matters that are derivative of a treaty relationship are within the authority and jurisdiction of the Tribunal. In cases that suggest the need for declaratory relief, the Tribunal is not an appropriate forum because it is limited to awarding cash compensation and it lacks the authority to make declarations.[261] More significantly, not all parties to the historic treaty relationship have standing before the Tribunal. Cases may be brought by "First Nations", the definition of which is limited in the *Specific Claims Tribunal Act* to entities recognized by Canada in 2008, when the legislation was enacted.[262]

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257 Peggy Martin-Maguire. *Indian Land Surrenders on the Prairies 1896-1911* (Ottawa: Indian Claims Commission 1998) at 106, 180, 250; Indian Claims Commission Hearing, Friends of Michel Society: 1958 Enfranchisement Claim, March 1998 at 2, 4, 18, 19.

258 *Ibid* at pp 7-19.

259 Watson, *supra* note 198 at paras 506-508.

260 *Specific Claims Tribunal Act, supra* note 26 at s 19.

261 *Ibid* at s 20(1)(a).

262 *Ibid* at s 2.

Events of recent decades have not disclosed any alternative remedies for descendant groups that would preclude a court from issuing a making a declaration. I have already referred to the Papaschase experience, which ended with the *Lameman* decision. In 1985 the Friends of Michel Society, comprised of descendants of Michel members attempted to file a claim under the Specific Claims Policy relating to the 1928 surrender and the 1958 enfranchisement. Indian Affairs responded that the assertion did not fit under the policy.[263] The descendants then initiated litigation in 1998,[264] which was put in abeyance when the Indian Claims Commission agreed to hear that part of the case dealing with the 1958 enfranchisement because if that enfranchisement were invalid, the Michel Band would still exist and would have access to the specific claims process.[265] The Commission concluded that Canada had no obligation "as a strict matter of law" to recognize the Society as being authorized to pursue a specific claim.[266] However, the Commission did recommend Indian Affairs negotiate with the Society in order to prevent a potentially unfair situation because if the 1958 enfranchisement were invalid, the Friends of Michel would not be able to contest this because the invalid enfranchisement would deny the Society the standing to challenge its validity.[267] The Minister did not accept the recommendation.[268] A second group comprised of descendants of Michel members who discharged to take scrip in the 1880s and later relocated to the Lesser Slave Lake had no more success in an attempt to file a claim under the Specific Claims Policy in 1991.[269] Further, a summary report in the public domain records the

263 Crown-Indigenous Relations and Northern Affairs Canada, Specific Claims Branch, Status Report on Specific Claims, Alberta Region, Michel Band Members (Association), Report as of 2020-09-04.
264 *Ibid*.
265 Indian Claims Commission, *supra* note 257 at 36.
266 *Ibid* at 36.
267 *Ibid* at 38-39.
268 Robert D Nault, Minister of Indian Affairs and Northern Development to Phil Fontaine, Chief Commissioner, Indian Specific Claims Commission, October 2, 2002 (2004) 17 ICCP 357.
269 Crown-Indigenous Relations and Northern Affairs Canada, Specific Claims Branch, Status Report on Specific Claims, Alberta Region, Big Point-Misteye Mineewatim (Association), Report as of 2020-09-04.

filing in 1884 of a claim related to "[A]lleged ownership and wrongful alienation of the Bobtail Reserve", but no further information other than the rejection of the claim in 1886.[270]

Historic promises that could justify a constitutional declaration are not limited to the treaty relationship. Alberta's eight Métis Settlements are the product of the establishment of a Métis land base, but they are the survivors of a more ambitious initiative. In the 1935, the Alberta Legislature created by the Ewing Commission to study the economic and social conditions experienced by Alberta Métis.[271] The Commission held hearings throughout northern and central Alberta, and one of its recommendations was the creation of Métis "colonies" throughout Alberta to provide a land base resembling that provided by Indian reserves.[272] The provincial government made promises at several stages in the creation of this land base. Some Métis communities that requested their transformation into a colony found their applications denied because of the decision to limit the initiative to 12 colonies but received promises of future consideration.[273] Of the 12 colonies approved, 11 were created and of these only eight remain in existence.[274] Wolf Lake, one of the disestablished colonies, had a permanent population that was forced to abandon their homes. Controversy regarding the relationship between the disestablishment of Wolf Lake and both oil and gas potential and the creation of the Primrose Lake Air Weapons Range remains.[275]

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270 Crown-Indigenous Relations and Northern Affairs Canada, Specific Claims Branch, Status Report on Specific Claims, Alberta Region, Bobtail Reserve, Report as of 2020-09-04.

271 Dennis Wall, *The Alberta Métis Letters: 1930-1940 Policy Review and Assessment* (Edmonton: DWRG Press, 2008) at 17-19.

272 *Ibid* at 21-22; Fred V. Martin, "Federal and Provincial Responsibility in the Metis Settlements of Alberta" (1998) [unpublished, archived at Treaties and Historical Research Centre, Indian and Northern Affairs Canada, Gatineau QC].

273 Examples include proposals for lands at Grande Cache rather than at Marlboro (between Edson and Hinton) and land at Conklin rather than land closer to Lac La Biche. Wall, *supra* note 248 at 28-29, 166, and 190.

274 Wall, *supra* note 248 at 26-29.

275 Chantal Roy Denis, "Wolf Lake: The Importance of Métis Connection to Land and Place" (MA Thesis, Native Studies, University of Alberta, 2017) at 44, 102.

If *Watson* illustrates the potential of *Manitoba Métis Federation* for use in contexts other than constitutional promises, a number of other cases act as reminders of the limits to the types of cases in which a constitutional declaration is available. Neither the limitation of relief sought to a declaration nor the assertion that a case arises out of a unilateral Crown undertaking ensures that a case will survive a summary judgment application In *Samson First Nation v Canada* the Crown made such an application, claiming that the action was time-barred.[276] In opposing the application, the plaintiffs noted that among the relief sought was a declaration that the Crown had breached a fiduciary duty to Samson. The plaintiffs relied upon *Manitoba Métis Federation* to argue that the inclusion of a declaration among the remedies invoked "the general rule that declaratory relief is not subject to a limitations defence."[277] In granting the Crown's application for summary judgment, the motions judge rejected Samson's argument in its entirety. He held that *Manitoba Métis Federation* created "a narrow and very specific exception to the general rule that limitations apply to Aboriginal claims."[278]

Peter Ballantyne Cree Nation v Canada (Attorney General)[279] illustrates the significance of identifying the "promise" in respect of which a declaration is sought. In an application for summary judgment required a motions judge to consider whether the Saskatchewan *Natural Resources Transfer Agreement*[280] contained a "solemn promise" that would justify a declaration as to constitutional status. The specific paragraph in question was paragraph 11, which provided that notwithstanding the transfer of Crown lands and resources to Saskatchewan, Canada would continue "to administer Indian Reserves for the benefit of the band or bands to which they have

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276 *Samson supra* note 231.
206 *Ibid* at para 125.
278 *Ibid* at para 126.
279 *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2014 SKQB 327, aff'd 2017 SKCA 5, leave to appeal to the Supreme Court of Canada dismissed without costs, 2017 CanLII 38581 (SCC).
280 *Constitution Act, 1930*, Schedule 3.

been allotted."[281] He held that although the *Natural Resource Transfer Agreement* was a constitutional document, its subject matter was administrative and that far from being a "solemn promise", paragraph 11 was clerical in nature.[282]

A 2016 Federal Court of Appeal decision regarding the implementation of a Saskatchewan treaty land entitlement claim settlement illustrated the connection between a Crown undertaking and the Honour of the Crown. In 1992 Canada, the Federation of Saskatchewan Indian Nations, Saskatchewan, and more than 20 first nations with treaty land entitlement claims executed the *Saskatchewan Treaty Land Entitlement Framework Agreement*, which set out the method by which individual claims would be settled. Under the *Framework Agreement*, Canada and Saskatchewan agreed to a formula to provide compensation to individual first nations that the latter would use to purchase private interests in land on a willing seller-willing buyer basis. Crown lands and minerals could be purchased on the same basis. Canada agreed to set aside purchased lands and minerals on new reserve lands.[283] The purchase funds for the signatory first nations were set out in the *Framework Agreement,* and agreements with other nations would be negotiated using the *Framework Agreement* as a template. In 2008 both governments entered into an agreement to provide the Pasqua First Nation just northeast of Regina, establishing a purchase fund for the acquisition of land. In the document, the three parties agreed that any dispute over the implementation of the agreement would be referred to the Federal Court of Canada.[284] Shortly after signing the agreement, Saskatchewan issued a potash lease about 100 kilometers west of the Pasqua Reserve to a private company.[285]

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281 *Ibid* at para 11.

282 *Peter Ballantyne Cree Nation, supra* note 279 at para 39.

283 *Canada v. Peigan,* 2016 FCA 133 at paras 14-19, Near and Gleason JJA, leave to appeal to Supreme Court of Canada dismissed with costs, December 22, 2016, 2016 CanLII 89832 (SCC).

284 *Ibid* at paras 3, 41.

285 *Ibid* at para 42, Near & Gleason JJA; "Germany's K & S Potash to Buy Potash One," *Globe and Mail*, November 22, 2010.

Pasqua filed an action in Federal Court against Canada and Saskatchewan, claiming that Saskatchewan knew or should have known of Pasqua's likely interest in the lands covered by the lease and had breached of the 2008 Agreement.[286] Pasqua also asserted that both Saskatchewan and Canada should have consulted with it before the disposition was issued.[287] Despite its execution of the 2008 Agreement, Saskatchewan responded that as a province it was immune from any litigation in Federal Court and attempted to have the claim against it struck.[288] A Federal Court motions judge rejected this attempt, and Saskatchewan appealed to the Federal Court of Appeal.[289]

In considering the appeal, the Federal Court of Appeal reviewed the four scenarios discussed in *Manitoba Métis* that could trigger the Honour of the Crown. These are: Crown assumption of discretionary control over a specific Indigenous interest, which gives rise to a fiduciary duty; the purposive interpretation of section 35 of the *Constitution Act, 1982* that gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Indigenous interest; treaty making and implementation, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing; and Crown conduct that accomplishes the intended purposes of treaty and statutory grants to Indigenous peoples.[290] The Court of Appeal concluded that the last of these conditions existed in the case before it, which elevated the land claims agreement to the status of a treaty.[291] But this conclusion

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online <www.theglobeandmail.com/globe-investor/germanys-ks-to-buy-potash-one/article1315766>. Neither the *Framework Agreement* nor the 2008 agreement places any geographic limitation on lands that can be purchased for addition to reserve.

286 *Ibid* at paras 42-44, Near and Gleason JJA.

287 *Ibid* at para 42, Near and Gleason JJA.

288 *Ibid* at paras 50-52, Near and Gleason JJA.

289 *Ibid* at paras 6-7 Near and Gleason JJA.

290 *Ibid* at para 62, Near and Gleason JJA.

291 *Ibid* at para 64, Near and Gleason JJA. If the *Framework Agreement* and the 2008 agreement are analogous to treaties, it is arguable that Saskatchewan's attornment to the jurisdiction of the Federal Court not once but twice might make the obligation to negotiate honourably and avoid the appearance of sharp dealing might also apply to the situation.

did not result in a complete victory for Pasqua, because while the Federal Court had "personal" jurisdiction over Saskatchewan because of the province's attornment in the 2008 agreement,[292] it did not have subject matter jurisdiction to consider issues related to provincial consultation.[293] Therefore Saskatchewan's attempt to be released completely from the case failed,[294] but 16 paragraphs detailing the failure to consult were struck from the Statement of Claim.[295]

It is likely that decisions in future litigation will focus more on the contents of a promise rather than the source. It is what the Crown promises to do that is more important than how it makes the promise. The promise in *Manitoba Métis Federation* became caught up with constitutionally-protected rights because of its source, but it also reflected a much more general proposition that the Honour of the Crown requires that Crown promises are to be interpreted consistently with the expectation that the Crown will honour them.[296]

The significance of the Honour of the Crown in treaty interpretation and implementation will continue to expand at and it will remain the dominant consideration in consultation cases. It is unlikely that there will ever be a definitive list of documents containing promises that are of sufficient solemnity to attract the application of *Manitoba Métis Federation*. *Watson, Peter Ballantyne, and Peigan* illustrate the complexity of the issue. The Supreme Court has established that the promise of land in section 31 of the *Manitoba Act, 1870* makes the list, in no small part because the fact that the document is also known as the *Constitution Act, 1870.* The same principle would at first glance apply to the *Constitution Act, 1930*, but that would require characterizing the reserve provision of the three *Natural Resources Transfer Act* as solemn promises to residents of

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292 *Ibid* at para 68, Near and Gleason JJA.
293 *Ibid* at para 89, Near and Gleason JJA.
294 *Ibid* at para 88, Near and Gleason JJA.
295 *Ibid* at para 89, Near and Gleason JJA.
296 *R v Badger*, [1996] 1 SCR 771 at 794, Cory J, var'g (1993) 135 AR 286 (CA).

reserves, a suggestion that the Saskatchewan Court of Appeal rejected in *Peter Ballantyne.* However, a separate paragraph of the *Natural Resource Transfer Agreements* that meets at least some of the characteristics of a promise that could make *Manitoba Métis Federation* applicable to it. All three agreements contain the provision that "[I]n order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence" provincial laws of general application regarding hunting and fishing apply to "Indians of the Province" subject to the recognition of a right to harvest for food at all times of the year on all unoccupied Crown lands."[297] That is not technically a promise to "the Indians of the Province," but it sets out a purpose for the agreement that reflects a treaty promise and arguably engages provinces in the fulfilment of this promise. Such an interpretation can be implied from the outcome in *Peigan*, where Saskatchewan remains a party to a case in a court that as a matter of law has no jurisdiction over it. The *Fort McKay* decision also places Alberta in an awkward position. While courts lack the authority to compel Alberta to fulfil the commitment made by a former Premier, these courts do have the authority to limit Alberta's authority to deal with the lands in question until it voluntarily follows up on the undertaking.

As discussed earlier, one central issue for the Honour of the Crown is the relation between Crown obligation and limitation periods. But it is conceivable that "diligence" may give rise to a rethinking of the application of limitation periods in Honour of the Crown cases. If a lack of diligence in implementing a Crown promise is indeed a cause of action, when does the clock start on a limitation period? It cannot be when the promise is made, because at that point there has been no lack of diligence. It should not start until there is some suggestion that the promise is not being

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[297] The provision is in the *Constitution Act, 1930,* Schedules 1 (Manitoba), 2 (Alberta), and 3 (Saskatchewan). It is paragraph 13 in Schedule 1 and paragraph 12 in Schedules 2 and 3 .

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implemented. What type of evidence would suggest this? Is there an "industry standard" that determines what is reasonable delay and what is evidence of a lack of diligence? Is an Indigenous party entitled to make some allowance for delay in recognition of the fact that it is a government that will be doing the implementation? Does the clock start to run if the Crown is able to provide reasonable excuses for the delay? Is the test for a lack of diligence an objective or a subjective test? Will it be necessary to include in an agreement identifiable benchmarks complete with time frames and if co can these be amended by agreement? There are more questions that will be asked and answered in future cases, but there is certainly one question to which an answer is known. The answer to whether it is appropriate for a limitation period of six years to apply to a promise that may be implemented, if all goes well, in 15 years or longer the answer is no.

There is an inherent tension between the timelessness of constitutional undertakings and the practical reasons for limitation periods. In reading *Manitoba Metis Federation*, it is easy to see the clash between Justice Rothstein's frustration with what he saw as backsliding after the Supreme Court had finally taken a stand on the application of limitation statutes to Aboriginal law cases only five years earlier[298] and the majority's buyer's remorse upon realizing that it faced the possibility of closing the door to all attempts to redress centuries-old constitutional grievances.[299] At the same time, the emphasis on whether claims are statute-barred threatens to obscure the fact that while evidence as to what current behaviour by the Crown is honourable is guided by an understanding of past events, the ultimate goal of the Honour of the Crown is to give the Crown the opportunity to behave honourably today. It is a recognition of the ways the law is limited in dealing with the actions and inaction of generations of Crown servants. But while limited in prescribing remedies, courts are not limited in encouraging the parties to design their own remedy.

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298 *Manitoba Métis Federation, supra* note 2 at para 254, Rothstein J, dissenting.

299 *Ibid* at para 140, McLachlin CJC and Karakatsanis J.

Of course, the extent to which courts can encourage the Crown in this endeavour varies, but at the least this will include the slightest hint of a threat. In the area of specific claims, the Specific Claims Tribunal has put in practice a two-stage process. In the first stage, the Tribunal makes a binding decision that the Crown has actively or passively committed a wrong. At that point, the Crown has the opportunity to work with a claimant to find a way of righting that wrong. If this does not happen, the Tribunal has the authority to impose a remedy. This is not an ideal answer, as the Tribunal cannot compel the Crown to implement a treaty. But the Tribunal can, provide monetary compensation in the same way that a court faced with a tort can.

Similarly, while courts cannot compel the Crown to fulfil its duty to consult, it can prevent progress toward Crown initiatives until the Crown does so. The legal challenges faced by pipelines over the last decade establish this. *Gitxaala* and *Tsleil-Waututh* illustrate that courts have shown a willingness to make this process iterative – the Crown can keep trying until it gets it rights, but it does have to get it right.

Finally, the declaratory power cited in *Manitoba Métis Federation* and applied in *Watson* is not without effect. A declaration is not an academic statement about the distant past. It is a stain on the Honour of the Crown, which is ongoing and not focused solely on the past, and it will remain in place until something is done about it. How long the stain will remain in place depends on what the Crown chooses to do to remove it.

CHAPTER VI

CONCLUSION

SUMMARY

Aboriginal law, that body of law dealing with the relationship between Indigenous peoples and the Crown, is a product of the past 50 years, beginning with the Supreme Court of Canada's 1973 decision in *Calder*. My focus in Chapter I and Chapter II was for the most part focused on the last 30 years of the twentieth century, when Aboriginal law was dominated by a focus on Aboriginal title and fiduciary duty. The first two of Canada's trilogy of Aboriginal title cases, *Calder* and *Delgamuukw* act more or less as bookends for this time period. However, my review of Aboriginal title also considered *Guerin* and *Sparrow*, in which Supreme Court of Canada judges injected Aboriginal title considerations (unnecessarily but effectively) into the two cases. Chapter II also discussed the history of fiduciary duty, from its appearance in *Guerin* (in part at least to a misunderstanding), the inflated expectations that followed the decision, the limitation of fiduciary duty to reserve land matters in *Blueberry River*, and the further limitation to some matters related to reserve land in *Wewaykuum* and *Ross River*).

Most of Chapter III related to two developments – the appearance and growth of the Honour of the Crown in Canadian law and the gradual displacement of fiduciary duty in Canadian law by the Honour of the Crown in matters relating to the treaty relationship, the Indigenous-Crown relationship in the context of asserted but unproven Aboriginal title, and the Métis-Crown relationship, which brought with it a new field of Aboriginal dealing with the fulfilment of Crown promises of a constitutional nature. But Chapter III ended with the reappearance of Aboriginal title, which brought with it the possibility of an expanded role for fiduciary duty.

Befitting the dominance of the Honour of the Crown, Chapters IV and V focus primarily on it. In *Haida*, when Chief Justice McLachlin seized upon the Honour of the Crown as the

dominant paradigm in Canadian Aboriginal law, she cited as authority two decisions of the Supreme Court of Canada that had been decided no more than 10 years earlier. Some research into the concept's genealogy found two possible sources, one in nineteenth century Canada and the other in seventeenth century England. I traced both of those and set out my reasons for rejecting the domestic sources as worthy of being characterized as precursors of the Honour of the Crown and preferring the seventeenth century English source because of its appearance there in a context that is more appropriate for its current role in Canadian law. While there was no *a priori* reason the Honour of the Crown as it was expressed in seventeenth century England would not grow to apply to the relationship between non-Indigenous peoples and the Crown, it did not. This likely relates largely to the fact that the direct relationship with the Crown is much more a part of the lives of Indigenous peoples than it is for non-Indigenous peoples. Later in this chapter I refer to the recent decision in *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City),* a decision that causes me considerable concern. Despite this concern, I agree fully with that decision that the Honour of the Crown "is unique and exclusive to Aboriginal law and it is not a principal [*sic*] of the general civil law."[1]

In Chapter V I also discussed two aspects of the Honour of the Crown that are particularly useful in Canadian Aboriginal law. The first is that although it is informed by the past, it operates in the present, and as such it does not ask "was that nineteenth century action consistent with the Honour of the Crown?" Rather it asks "given what happened in the nineteenth century what must the Crown do now to be consistent with the Honour of the Crown? I further suggested that the fact that the Honour of the Crown does not provide a specific remedy actually gives in the freedom to develop a wide range of remedies, including those that are designed by consensus between parties.

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1 *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City),* 2021 ONSC 1209 at para 46.

The Honour of the Crown has come to operate mostly in the areas of treaty interpretation and implementation, the duty to consult and accommodate, and the fulfilment of Crown promises of a constitutional nature. In Chapter V I traced recent developments in each of these areas over the past several years. In treaty implementation, probably the most important development has been the creation of the Specific Claims Tribunal, which is able to make binding decisions on claims and award compensation of up to $150,000,000 against the federal Crown.[2] The use of the Honour of the Crown in conjunction with the Tribunal has shown considerable success in requiring the federal Crown to implement positive treaty promises, including those involving material assistance and land. The Honour of the Crown has come to dominate consultation and accommodation. This will continue, although it is important not to confuse the two, remembering that the Honour of the Crown is broader than the duty to consult. The impact of the Honour of the Crown in the fulfilment of Crown promises of a constitutional nature is the area in which the future is both the most promising and most uncertain. There has been some initial success, which is of course subject to appeal, in cases where Indigenous people who have had no historic access to the courts are benefitting from the fact that in some cases, litigation regarding the fulfilment of these promises may include protection against statutes of limitation.

In Chapter I, the first of the questions I raised about the Honour of the Crown was the reason it emerged as the dominant paradigm in Aboriginal law at the time it did. While it and the other questions have been answered throughout my dissertation and earlier in this chapter, that question is of particular importance. In her *Haida* judgment,[3] Chief Justice McLachlin was candid that the Honour of the Crown was needed because evidence of the unsuitability of

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2 One consequence of the Tribunal, which is also being seen in other courts, is the use of fiduciary duty to award equitable compensation.

3 *Haida Nation v British Columbia (Minister of Forests)*, 2002 BCCA 147, aff'd 2002 BCCA 462, rev'g 2000 BCSC 1280, var'd 2004 SCC 73.

fiduciary duty as a general paradigm in Aboriginal law was becoming increasingly evident at the same time as the British Columbia Court of Appeal was showing increased enthusiasm for the use of fiduciary duty to describe the nature of the obligation of the Crown (and private industry)[4] to Indigenous peoples. Fiduciary duty entered Canadian law in *Guerin* through Justice Dickson's mistaken belief that what three of his colleagues on the Court (for whom Justice Wilson spoke in her judgment) could see was clearly a "full blown"[5] trust could not be referred to as a trust because the previous year Justice Estey had written a judgment that a surrender of reserve land of a completely different nature than the surrender in *Guerin* did not give rise to a trust.

Leonard Rotman, the leading advocate for characterizing the Indigenous-Crown relationship as fiduciary, acknowledged in 1996 that the fiduciary relationship was not well understood.[6] Those among the minority who did understand fiduciary law thought very little of Justice Dickson's approach. Robert Flannigan, who taught trust and fiduciary law at the University of Saskatchewan Law School, described Dickson's decision to approach the *Guerin* fact situation from a fiduciary perspective as "attributable to misrepresentation, conflation, and a focus on irrelevant idiosyncrasy."[7] He added that Dickson had defended the use of fiduciary duty to avoid exploitation of Indigenous peoples by third parties notwithstanding the fact that this was not even one of the goals of fiduciary law, which concerned itself with controlling the opportunism of fiduciaries themselves.[8] Suggesting that he would have preferred restoring the trial decision or the approach taken by Justice Estey to view the Crown as an agent, Professor Flannigan expressed the view that the Crown's obligation regarding surrendered land was a

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4 *Haida Nation v British Columbia (Minister of Forests)*, 2002 BCCA 462, aff'g 2002 BCCA 147, rev'g 2000 BCSC 1280, rev'd 2004 SCC 73.

5 *Guerin v the Queen*, [1984] 2 SCR 335 at 355, Wilson J, rev'g [1983] 2 FC 656 (FCA), aff'g on other grounds [1982] 2 FC 385 (FCTD).

6 Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto Buffalo and London: University of Toronto Press, 1996) at 3.

7 Robert Flannigan, "The Boundaries of Fiduciary Law" (2004), 83:1 Can Bar Rev 35 at 64.

8 *Ibid* at 62-63.

nominate duty such as that of an agent or trustee, and any failure in that role was a breach of the nominate duty.[9]

Professor Flannigan was not alone in his criticism. Donovan Waters, the eminent Canadian trust lawyer and teacher, criticized Justice Dickson's judgment in a less strenuous but equally forceful manner, expressing regret over the Supreme Court's decision to eschew the law of trust, which in his view was unnecessarily put aside with the result that the Court denied itself "the benefit of the well-established body of private trust law here in Canada."[10]

An additional shortcoming of the concept of Crown fiduciary duty is its association with situations characterized by severe power imbalance and dependence. The Supreme Court of Canada itself has been careful to separate its comments about fiduciary duty from any suggestion of paternalism.[11] Justice Dickson exemplified this approach when he explained that the breach of fiduciary duty occurred in *Guerin* when Crown officials failed to return to the Musqueam membership for additional instructions upon learning that they would be unable to finalize a golf course lease upon the terms discussed with membership at the surrender meeting.[12] A fiduciary relationship is not in itself a question of status – many lawyers or investment counsellors do not presume to be the social or financial equals of some of their clients, but discretion on one side and dependence on the other are inevitably found within the operation of the fiduciary relationship itself. The very fact that potential investors seek the assistance of investment counsellors results from the fear of the inability to make wise decisions in a technically sophisticated field on their own. When this consideration is added to the Indigenous-Crown relationship it is difficult to avoid the impression of dependence. Paul

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9 *Ibid* at 64.

10 Donovan MW Waters, "New Directions in the employment of Equitable Doctrines: The Canadian Experience" in TG Youman, ed, *Equity, Fiduciaries and Trusts* (Toronto Calgary and Vancouver: Carswell, 1989) 411 at 423.

11 Peter W. Hutchins, David Schulze, and Carol Henning, "When Do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59:1 Sask L Rev 97 at 126-127.

12 Robert J Sharpe and Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 447.

McHugh recognized this in 2014 when he observed that there is "a tone of *parens patriae* (the Crown's protection of the special, exposed classes of subjects who would otherwise lack representation) in the responsibility of the Crown for aboriginal interests."[13] In a 2010 concurring judgment, Supreme Court Justice Deschamps referred to the "paternalistic overtones" of fiduciary duty.[14]

It is no surprise that the *Haida* decision was announced only two years after the Court's decision in *Wewaykum*, which held that the suggestion fiduciary duty is "a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship … overshoots the mark."[15]. The decision continued that fiduciary duty "does not exist at large but in relation to specific Indian interests", which to that date had included lands, and even then not all land issues.[16] Beyond the surrender of reserve land in *Guerin* and *Blueberry River*, the fiduciary duty described in *Ross River Dena Council Band v. Canada* relating to "lands occupied by the Band" related to land in a village that had been occupied for more than 50 years and not the occupation of "lands" in the sense of traditional territory.[17] In the case before the Court, no reserve had been created in the absence of the intention to do so by officials who had that authority.[18]

The combined impact of *Ross River* and *Wewaykum* was to seal off significant steps in relation to reserve creation from the application of fiduciary duty and to exclude the application of fiduciary duty to these steps. This reflected the Supreme Courts' desire to limit the expansion

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13 PD McHugh, "Time Whereof – Memory, History, and Law in the Jurisprudence of Aboriginal Rights" (2014) 77:2 *Saskatchewan Law Review* 137 at 159.

14 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 105, Deschamps J, concurring, [2010] 3 SCR 103, aff'g *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*2008 YKCA 13, rev'g 2007 YKSC 28.

15 *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 81, [2002] 4 SCR 245, aff'g *Wewaykum Indian Band v Wewayakai Indian Band*, (1999) 171 FTR 320 (FCA), aff'g *Roberts v The Queen* (1995), 99 FTR 1 (FCTD).

16 *Ibid* at para 86.

17 *Ross River Dena Council Band v Canada*, 2002 SCC 54 at paras 76-77 LeBel J, [2002] 2 SCR 816, aff'g (1999), 182 DLR (4th) 116, (YTCA) rev'g [1998] 3 CNLR 284 (YTSC).

18 *Ibid* at paras 67, 71, LeBel J.

of fiduciary duty beyond its application to the management of existing reserves (which in *Guerin* and *Blueberry River* was actually a limitation to the management of surrendered portions of existing reserves). In *Elders Advocates of Society v Alberta,* Chief Justice McLachlin explained the reasons for recognizing that the Indigenous-Crown relationship was fiduciary arose out of the "unique and historical nature of Crown-Aboriginal relations,"[19] but even in this context Crown actions only gave rise to a fiduciary duty when they resembled those in which "a fiduciary duty has been recognized on private actors."[20]

When confronted with the expansive characterization of fiduciary duty in the two decision of the British Columbia Court of Appeal in *Haida,*[21] the Supreme Court was faced with a choice between reversing its approach of limiting the application of fiduciary duty and expanding it to situations that did not involve the similarity to real property trusts or agency, or finding another way to describe the Indigenous Crown relationship in those instances that fell short of this and did not give rise to a fiduciary duty. This would apply to the large majority of interactions within the Indigenous-Crown relationship, most but not all of which are non-proprietary.

Of the choices set out above, the Supreme Court chose the second approach, and the description it chose was the "Honour of the Crown."[22] This selection was aided by the fact that the Honour of the Crown was already part of the Court's jurisprudence as a result of its appearance in its treaty interpretation decisions in the 1990s, culminating in the *Marshall* decision in 1999.[23] As mentioned in Chapter III, it would be incorrect to interpret Justice McLachlin's dissent in *Marshall* as evidence of any division in the Supreme Court regarding

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19 *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24 at para 40, [2011] 2 SCR 261, var'g *Elder Advocates of Alberta Society v. Alberta* 2009 ABCA 403, aff'g 2008 ABQB 490.

20 *Ibid* at para 63.

21 *Haida, supra* notes 3.

22 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16 [2004] 3 SCR 522, rev'g 2002 BCCA 462, var' g 2002 BCCA 147, rev'g 2000 BCSC 1280.

23 *R v Marshall,* [1999] 3 S.C.R 456, rev'g [1997] 3 CNLR 209 (NSCA).

the application of the Honour of the Crown to the Indigenous Crown relationship. The requirement to uphold the Honour of the Crown was as significant in the principles of treaty interpretation set out by Justice McLachlin was it was in the formulation of Justice Binnie's judgment, with the only difference between the two being the question of whether the Honour of the Crown did or did not require reading a term guaranteeing a limited fishing right into the Treaty of 1760.

I have speculated at various points in this dissertation that there was a second reason for the emergence at the time it did. Throughout most of its history, the Honour of the Crown has operated negatively in Aboriginal law – it has prevented the Crown from doing something rather than compelling it to take some action. As such, it acts as a restraint on the exercise of Crown authority, in a manner that has similarities to the impact, described in *Sparrow,* of constitutionalization of the protection of Aboriginal and treaty rights in the *Constitution Act,1982*.[24] Indigenous leaders (and the academic commentators who support their worldview and aspirations) have contended that that there is another source of the limitation of Crown authority. This holds that there are some aspects of Indigenous life (mainly but not necessarily territorial) that are outside the reach of Crown jurisdiction, which arises out of Crown radical title. From the time of *Calder*, the Supreme Court of Canada has repeatedly rejected this position and maintaining that Crown radical title extends to the entire physical area of Canada and that Aboriginal title is a burden on that title. This position was first expressed in *Calder,*[25] and it has been repeated subsequently in *Guerin*,[26] *Sparrow,*[27] *Delgamuukw,*[28] *Haida,*[29] *and*

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24 *R v Sparrow,* [1990] 1 SCR 1075 at 1127-1127, aff'g [1987] 2 WWR 577(BCCA).

25 *Calder et. al. v Attorney-General of British Columbia*, [1973] SCR 313 at 352, Hall J, dissenting, aff'g (1970), 13 DLR (3rd) 64 (BCCA), aff'g (1969), 8 DLR (3rd) 59 (BCSC).

26 *Guerin, supra* note 5 at 382, Dickson J.

27 *Sparrow, supra* note 23 at 1103.

28 *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at 1098, Lamer CJC, rev'g [1993] 5 WWR 97 (BCCA), rev'g [1991] 3 WWR 97 (BCSC).

29 *Haida, supra* note 22 at para 6.

Tsilhqot'in.[30] With the exception of *Tsilhqot'in*, I am not suggesting that any of these statements have the force of law, as they fall short of being necessary for the Court's ultimate decision on the matter before it. At the same time, they reflect the thought of the Court and the starting point for its analysis of the Indigenous-Crown relationship. Therefore, without suggesting that the comments about Crown radical title and jurisdiction in *Calder, Guerin, Sparrow,* and *Delgamuukw* were correct*,* the very fact that the Court made these comments contributed to a dilemma facing the Supreme Court in deciding *Haida.* First, the Crown was not prevented from authorizing the transfer of the tree farm license in question to Weyerhauser on the basis that the matter exceeded the jurisdiction of the British Columbia Minister of Forests. Second, the Haida interest at stake in the matter was insufficient to give rise to a fiduciary duty to it.[31] Third, justice required that there be some constraint on the authority of the British Columbia Minister of Forests to approve the transfer of the tree farm licence in light of the potential impact of that decision on the Haida. Seen in this light, the Honour of the Crown was the tool needed to fill the void between requiring action in fulfilment of a fiduciary duty and ignoring the Haida interest that was at potential risk. As such, the Honour of the Crown was the corollary to the authority of the Minister of Forests that provided for a just outcome.

HONOUR OF THE CROWN, ABORIGINAL TITLE AND FIDUCIARY DUTY

Aboriginal Title and Fiduciary Duty

After the 2014 decision in *Tsilhqot'in*, the Supreme Court of Canada had achieved considerable clarity regarding the respective roles of the Honour of the Crown, fiduciary duty, and Aboriginal title in Aboriginal law. While most of the Indigenous-Crown relationship was governed by the Honour of the Crown there were roles for either Aboriginal title or fiduciary duty, and in one scenario both work together.

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30 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 69-75, [2014] 2 SCR 257, rev'g 2012 BCCA 285, var'g 2007 BCSC 1700.

31 *Haida, supra* note 22 at para 18.

If we think of the Indigenous-Crown relationship as a line, Aboriginal title is at one end of it and reserve land is at the other. On the one end, Aboriginal title is (as we now have confirmed by *Tsilhqot'in*) a situation in which Indigenous peoples have satisfied the test for Aboriginal title set out in Tsilhqot'in and hold an interest in land that resembles fee simple ownership in that holders of Aboriginal title have the full beneficial interest in lands, an interest that does not originate in the Crown.[32] At the other end of the line is reserve land, and while reserves are entirely the creation of the Crown, the Indigenous peoples for whom they are set aside are entitled to the full beneficial interest in the lands. It is in this way, and only in this way, that Justice Dickson's statement that the Indigenous interest in both types of land is identical[33] is correct. We know from *Tsilhqot'in* and *Guerin* that the Crown owes a fiduciary duty to the Indigenous peoples having proven Aboriginal title to lands and we have long known that the Crown is subject to a fiduciary duty in its management of reserve.

The recent Supreme Court of Canada decision in *Southwind v Canada*[34] is of interest in both contexts. This decision relates to the calculation of damages resulting from a breach of fiduciary duty by the Crown. The case did not arise out of a surrender of reserve land, but rather to the flooding of over 11,000 acres, approximately one-sixth[35] of the Lac Seul Reserve without obtaining the consent of Lac Seul.[36] Canada did negotiate compensation for the flooded lands,

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32 While the Court had referred to the existence of Crown allodial title in *Calder, Guerin*, *Sparrow, Delgamukw,* and *Haida*, all of these remarks were *obiter*, as speculating on whether Crown radical title exists in the Aboriginal title lands is idle speculation in the absence of the confirmation of the existence of Aboriginal title. When the Supreme Court recognized Tsilhqot'in Aboriginal title in lands, while referring to the continued existence of Crown radical title, both comments were necessary to the decision in the case and settled the matter unless a future Supreme Court of Canada decides otherwise. But radical title is irrelevant to my discussion of the Tsilhqot'in beneficial interest in Aboriginal title lands.

33 *Tsilhqot'in, supra* note 30 at para 69.

34 *Southwind v Canada*, 2021 SCC 28, rev'g 2019 FCA 171, var'g 2017 FC 906.

35 The total area of the Lac Seul Reserve is 66,276 acres, of which 11,304 acres were flooded. *Southwind v Canada*, 2017 FC 906 at paras 5, 106 aff'd 2019 FCA 171, var'd 2021 SCC 28.

36 *Ibid.* The flooding resulted from the construction of a dam on the English River, about 250 kilometres west of the Lac Seul Reserve, which was part of a project to provide power to the city of Winnipeg. The dam raised the level of Lac Seul by three metres. *Ibid* at para 2.

but its original demand for approximately $120,000 from Manitoba[37] was reduced as a result of negotiations, and just over $50,000 was deposited in Lac Seul's trust account.[38]

At trial, Canada denied that it had breached its fiduciary duty to Lac Seul, but the trial judge held that Canada had failed its fiduciary duty "of loyalty and good faith to Lac Seul in the discharge of its mandate as trustee of the Reserve lands"[39] In the calculation of damages, Canada had conceded that if it was found to be in breach of its fiduciary duty, equitable compensation was appropriate.[40] In calculating equitable compensation, the trial judge applied the principles set out by the Supreme Court of Canada in a non-Aboriginal law context.[41] With regard to the goal of equitable compensation, to restore what the plaintiff has lost due to the breach, he found that given the importance of the dam, Canada could not have prevented its construction and the consequent flooding. As such, the breach of fiduciary duty was not acquiescing in the flooding, it was in failing to secure adequate compensation for it.[42] Lac Seul asserted that the principles of equitable compensation required that it receive compensation for a lost opportunity to enter into a revenue-sharing agreement with the owners of the dam, since this the most favourable use it could make of the surrendered land. Lac Seul buttressed this claim by referring to the equitable compensation principle that its loss is to be calculated with the full benefit of hindsight. However, the trial judge applied the full benefit of hindsight differently to conclude that irrespective of Canada's fiduciary breach, there was no possibility that the dam owner would have entered into such an agreement.[43] Therefore, he assessed damages based on what Lac Seul would have received had twenty first century expropriation principles been applied to a deemed sale of the flooded lands. Based on the value of the land

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37 *Ibid* at para 153.
38 *Ibid* at para 208.
39 *Ibid* at paras 226.1 and 297.
40 *Ibid* at para 228.
41 *Ibid* at para 285. The trial judge drew from the principles set out in *Canson Enterprises Ltd v Broughton & Company*, [1991] 3 SCR 534, aff'g (1989), 61 DLR (4th) 732 (BCCA), aff'g (1988), 52 DLR (4th) 323 (BCSC).
42 *Ibid* at paras 292-296.
43 *Ibid* at para 318.

at the time of the flooding, additional calculable losses, and interest that would have accrued had these funds been deposited into Lac Seul's trust account, the trial judge held that calculable losses amounted to $13,900,000.[44] To this amount he added $16,100,000 in non-calculable losses[45] and awarded Lac Seul $30,000,000 in compensation.[46] He dismissed Lac Seul's claim for punitive damages.[47]

A majority of the Federal Court of Appeal affirmed the trial decision.[48] Justice Gleason dissented on two points. The first was that while a revenue sharing agreement was not possible, Canada should, as a fiduciary, have negotiated compensation that would have included a premium on the value of the land in light of the importance of the project to Manitoba.[49] Her second reason was related to the first and was that the trial judge had erred in failing to consider a flooding agreement in Alberta in which such a premium was paid.[50] Unlike the trial judge and the majority of the Federal Court of Appeal, Justice Gleason concluded that the Alberta example was sufficiently analogous to the current case to be considered.[51]

A majority of the Supreme Court of Canada reversed the decisions below. Writing for the majority, Justice Karakatsanis held that both the trial judge and the majority in the Federal Court of Appeal had failed to consider the depth of Canada's fiduciary duty to Lac Seul regarding the protection of its reserve land and its interest in that land. The majority held that the reality that the dam was going to be built irrespective of the impact on the Lac Seul Reserve did not absolve Canada from the failure to use all of the powers available to it to protect Lac Seul's interests. Since the dam on the English River was a public work, Canada had the authority to invoke section 48 of the 1927 *Indian Act*, which provided that no portion of a

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44 *Ibid* at para 508
45 *Ibid* at para 512
46 *Ibid* at para 511
47 *Ibid* at para 522
48 *Southwind v Canada*, 2019 FCA 191 at para 142, Nadon J, aff'g 2017 FC 906, rev'd 2021 SCC 28.
49 *Ibid* at paras 64, 74, Gleason J, dissenting.
50 In the Alberta flooding case, the compensation negotiated was 12 to 15 times the value of the flooded land itself. *Ibid* at para 131, Nadon J.
51 *Ibid* at para 94, Gleason J, dissenting.

reserve could be taken for "any public work" without the consent of the federal Cabinet.[52] Section 48 also gave Canada the authority to excise reserve lands by order-in-council, which could also set the compensation for the land[53] and provided for possible arbitration with the builder of the public work over compensation, and in this process, Canada would "name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation."[54] With regard to the Alberta flooding case, the majority held that it was not for the trial judge to make an *a priori* decision on the relevance of the example, particularly since it was an illustration of the result that could be obtained if Canada fulfilled its fiduciary duty.[55] Finally, the majority held that the use of an expropriation model for the loss of reserve land must be adjusted, because reserve land "is not a fungible commodity," as it "reflects the essential relationship between Indigenous Peoples and the land" and it has "an "important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself." Further, the interest of Indigenous peoples in reserve land "is heightened by the fact that, in many cases such as this one, the reserve land was set aside as part of an obligation that arose out of treaties between the Crown and Indigenous Peoples."[56] The effect this adjustment would at the very least increase the "premium" payable for lands needed for the deemed or actual purchase of reserve lands. The case was remitted to the trial court for the assessment of compensation based on the principles set out by the majority.[57] Justice Côté dissented, contending that there was no basis to interfere with the trial judge's decision regarding equitable compensation.[58]

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52 *Indian Act*, SC 1927, c 48, s 48.1.
53 *Ibid,* s 48.2.
54 *Ibid*, s 48.3.
55 *Southwind, supra* note 34 at paras 131-144, Karakatsanis J.
56 *Ibid* at para 63, Karakatsanis J.
57 *Ibid* at para 147, Karakatsanis J.
58 *Ibid* at para 194, Côté J, dissenting.

I have discussed *Southwind* at some length because it reflects the consideration I set out in Chapter V that since a significant portion of specific claims deal with the loss of reserve land, equitable compensation will continue to play a role in Aboriginal law that is more significant than might have been expected before the decisions of the Supreme Court of Canada in *Williams Lake*[59] and the Specific Claims Tribunal in *Beardy's and Okemasis*.[60] *Southwind* is also significant in that while it primarily illustrates the depth of fiduciary duty, it also has some impact on its breadth. The case does not deal with either a surrender or a "taking" under section 48 of the 1927 *Indian Act*. *Guerin* and *Blueberry River* established that the surrender gives rise to a fiduciary duty, while the 2001 Supreme Court of Canada decision in *Osoyoos v Oliver (Town)* extended the duty to "takings".[61] But in addition to clarifying the considerations in determining equitable compensation, *Southwind* extends fiduciary duty to a case in which the Crown for all practical purposes did nothing, illustrating that inaction can breach fiduciary duty to the same extent that actions can. Further, although the "deemed" expropriation provision of reserve lands is found in the *Indian Act*, there is no reason to suggest that the comments in *Southwind* regarding the unique nature of Indigenous lands and the relationship between Indigenous peoples and the land would not be equally applicable to the second part of the *Sparrow* test in determining whether a taking of Aboriginal title land is justified.

Honour of the Crown

In all other scenarios (lands where Aboriginal title is asserted but unproven, lands where Aboriginal title has not been ceded but no assertions of it have been made, lands used by Indigenous peoples who are unable as a matter of law to assert Aboriginal title, and lands in which Aboriginal title has been ceded), the Indigenous-Crown relationship is governed by the

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59 *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83, rev'g 2016 FCA 63, aff'g 2014 SCTC 3.

60 *Beardy's and Okemasis First Nation v Canada,* 2016 SCT 15.

61 *Osoyoos Indian Band v Oliver (Town)*, 2001SCC 85, [2001] 3 SCR 746, rev'g (1999), 172 D.L.R. (4th) 589 (BCCA), rev'g (1997), 45 D.L.R. (4th) 552 (BCSC).

Honour of the Crown. The Honour of the Crown governs consultation and accommodation on lands where Aboriginal title is asserted but unproven,[62] in the management of Crown lands included within a treaty of cession,[63] in fulfilling promises of a constitutional nature,[64] and in the negotiation, interpretation, and implementation of treaties. The decision in *Chippewas of Saugeen First Nation v Attorney General of Canada et al*, released on July 29, 2021,[65] is an example of the negotiation, interpretation, and implementation of treaties. The expectation following the decision of the Supreme Court of Canada in *Manitoba Métis Federation,*[66] which, as I discuss in Chapter III was that the duty of diligence would be extended to treaty implementation[67] was borne out, as the trial judge held that the governments of Upper Canada and the Province of Canada breached the Honour of the Crown in failing to implement Treaty 45½, signed in 1836. Treaty 45½ was a land purchase treaty covering an area of about 6,000 km^2 on the eastern shore of Lake Huron south of the Bruce peninsula and Georgian Bay. In it, the Chippewas of Saugeen agreed to relocate their members living in the sold lands to join those members already living in the Bruce peninsula. Through a lack of diligence, Crown officials failed to prevent the incursion of non-Indigenous settlers into the peninsula,[68] which led in 1854 to the signing of Treaty 72, by which the Chippewas sold all of the Bruce peninsula except for several reserves along its coasts. In her decision, the trial judge also ruled in favour of the plaintiffs on a matter of treaty interpretation related to Treaty 72, which allows hunting and fishing to continue after the surrendered lands were sold subject to the "incompatible use" test outlined in Treaty 8 resulting from Badger.[69]

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62 *Haida, supra* note 22.

63 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388, rev'g 2004 FCA 66, aff'g (2001), F.T.R. 48.

64 *Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623, rev'g 2010 MBCA 71, rev'g 2007 MBQB 293.

65 *Chippewas of Saugeen First Nation v Attorney General of Canada et al,* 2021 ONSC 4181.

66 *Manitoba Métis Federation, supra* note 64.

67 Peter W. Hogg and Laura Dougin, "The Honour of the Crown: Reshaping Canada's Constitutional Law" (2016) 72 SCLR (2nd) 291 at 316.

68 *Chippewas of Saugeen, supra* note 65 at paras 621, 1291(i).

69 *Ibid* at paras 1247, 1291 (ii); *R v Badger,* [1996] 1 SCR 771, aff'g [1993] 3 CNLR 143.

As I pointed out near the end of Chapter III, the clarity that the Supreme Court of Canada had brought to the relationship among the Honour of the Crown, fiduciary duty, and Aboriginal title was threatened by a single sentence *Grassy Narrows* when Chief Justice McLachlin suggested that in taking up lands ceded in a treaty, Ontario " must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests."[70] Had that statement formed the *ratio* (or, to refer back to Lord Halsbury's admonition in Chapter II, had it been anywhere in the vicinity of the *ratio*) of the decision, the statement would be significant. However, it was neither. The *ratio* in *Grassy Narrows* was whether the federal Crown has a necessary role to play in Ontario's management of its resources within the boundaries of Treaty 3.[71] The answer was that it does not.[72] To the question of what Ontario is required to do in considering Indigenous concerns regarding the management of its resources, Chief Justice McLachlin provided some details. First, it "must meet the conditions set out by this Court in *Mikisew*."[73] Second, it must consult with affected Indigenous peoples and, if necessary accommodate their interests, a duty that is grounded in the honour of the Crown" (the Chief Justice cited *Mikisew* as the authority for this statement).[74] Third, Ontario must inform itself of the potential impact of its actions on Indigenous hunting, fishing, and trapping, communicate its findings to any affected Indigenous peoples, and deal with those potentially affected with the intention of" substantially addressing their concerns" (once again, the Chief Justice cited *Mikisew* as her authority).[75] Fourth they must ensure that its actions do not leave Indigenous peoples "with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally

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70 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 50, [2014] 2 SCR 447, aff'g *Keewatin v Ontario (Minister of Natural Resources),* 2013 ONCA 158, rev'g *Keewatin v Minister of Natural Resources,* 2011 ONSC 4801.

71 *Ibid* at para 3.

72 *Ibid* at para 4.

73 *Ibid* at para 51.

74 *Ibid.*

75 *Ibid* at para 52.

hunted, fished, and trapped" (a duty first set out in *Mikisew*).[76] Fifth, if in taking up land, Ontario "does so in a manner that respects the requirements set out in *Mikisew*, doing this does not breach Treaty 3 harvesting rights."[77] In the space of three paragraphs, the Chief Justice makes five references to the Supreme Court's own decision confirming that fiduciary duty has no role in the implementation of treaties.

No decision released before 2021 cited *Grassy Narrows* to support the contention that the case imposed a fiduciary duty when lands are being taken up within treaties of cession.[78] However, on June 29, 1921, Justice Burke of the British Columbia Supreme Court issued declarations requested by the Blueberry River First Nation that in continuing to authorize industrial development without addressing Blueberry River's concerns regarding the impact of this development on its treaty rights, British Columbia has failed to uphold the Honour of the Crown and has not fulfilled "its fiduciary duty to Blueberry River by causing and permitting the cumulative impacts of industrial development without protecting Blueberry's treaty rights."[79] In her judgment, Justice Burke indicated that she was aware of the distinction between the Honour of the Crown and fiduciary duty, particularly the consideration that the Honour of the Crown gives rise to a fiduciary duty only when the Crown assumes discretionary control over a specific and cognizable Indigenous interest.[80] She made reference to the fact that in *Grassy Narrows* the Supreme Court stated that the Crown is subject both the Honour of the Crown and a fiduciary duty,[81] but she added that the Court "did not expand on what,

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76 *Ibid.*

77 *Ibid* at para 53. Prior to this statement, there was a weak argument that fulfilling the duty outlined in *Mikisew* was required but not necessarily sufficient to meet provincial obligations. This statement closes the door on that possible interpretation.

78 *Yahey v British Columbia*, 2021 BCSC 1287.

79 *Ibid* at para 3.

80 *Ibid* at para 89.

81 Neither Justice Burke nor Justice Perell, the author of *Iskatewizaagegan*, was the first to note this. In a 2017 article discussing *Grassy Narrows,* HW Roger Townsend notes that it "is significant" that the Supreme Court used the word "fiduciary" in that decision. The only comment Townsend makes related to this point is that fiduciary "implies a strict standard of loyalty and giving priority to the Aboriginal interest. HW Roger Townsend, "What Changes Did *Grassy Narrows* Make to Federalism and Other Doctrines?" (2017) 95:2 Can Bar Rev 459 at 471.

specifically, the Crown's fiduciary duties required it to do in relation to treaty rights, other than ensuring such rights were "respected."[82] Yet throughout her 1,900 paragraph judgment, she used Honour of the Crown and fiduciary interchangeably in a seemingly random manner, with the only appearance of a pattern being the use of the Honour of the Crown to refer to the duty to implement Treaty 8 and fiduciary duty being cited when discussing the protection of hunting and fishing rights, which the Supreme Court held was non-fiduciary in 2005 in *Mikisew Cree*.[83] The only explanation she gave is that because "the core" of Blueberry River's territory is zoned as a "high intensity forestry zone" in British Columbia's Sustainable Forest Management Plan, the Crown exercises discretionary control over Blueberry River's "interests" in that area,[84] but she gives no explanation how these interests meet the threshold to give rise to a fiduciary duty.

An Ontario Superior Court of Justice decision from earlier in 2021 also cited *Grassy Narrows* in support of the proposition that provinces have a fiduciary duty in managing their natural resources within areas ceded by treaty. *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City),* relates to a claim by the plaintiff First Nation, whose reserve is located on the north shore of Shoal Lake, seeking $500,000,000 for fiduciary breaches by the City of Winnipeg and the Government of Ontario for drawing water from that lake to provide Winnipeg with drinking water.[85] The decision rejected Ontario's motion to strike the Amended Statement of Claim, holding that "it is not plain and obvious that Iskatewizaagegan No. 39 does not have a tenable cause of action for breach of a *sui generis* fiduciary duty"[86] and reached the identical conclusion regarding a claim for a breach of an *ad hoc* fiduciary duty.[87]

The extent to which future courts will continue to treat the reference to fiduciary duty in *Grassy Narrows* as substantive cannot be predicted. There were no examples of this for six

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82 *Yahey, supra* note 78 at para 1160.
83 *Mikisew, supra* note 63 at para 51.
84 *Yahey, supra* note 78 at para 1170.
85 *Iskatewizaagegan, supra*, note 1 at para 1.
86 *Ibid* at para 99.
87 *Ibid* at para 108.

years after the decision was released, and then it occurred twice in four months in courts in separate jurisdictions where the later decision does not cite the earlier one. The decisions themselves struggle in suggesting how the prerequisites for a fiduciary duty (specific cognizable Indigenous interest, discretion over that interest, and an undertaking consistent with the duty of a private law trustee can be satisfied. In addition to the statements in the British Columbia decision regarding the Crown's discretionary control over Blueberry River's interests in a "high intensity forestry zone", the Ontario decision suggests that an activity that meets the test for an Aboriginal right set out in *Van der Peet* meets the test to identify a cognizable Indigenous interest.[88]

Early in my dissertation I indicated how much my work benefitted from Jamie Dickson's 2015 book *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada*. The number of references to this book throughout my dissertation are evidence of my agreement with Dickson's thesis that there is no role in Canadian Aboriginal law for the concept of Crown fiduciary duty other than in discussing instances in which the Crown has assumed discretionary control over Indigenous interests that are both tangible and cognizable. However, However, I do not agree with Dickson's criticism of Chief Justice McLachlin's judgment in *Haida* on the grounds that McLachlin's failure to make this point expressly led to Justice Rothstein's criticism in *Manitoba Métis Federation* that the majority judgment in that case changed Canadian law by basing Crown liability on the Honour of the Crown in the absence of the necessary conditions to create a fiduciary duty, a duty that Rothstein described as a new basis for Crown liability that he dubbed "fiduciary duty-light."[89] As I indicated in my own review of *Manitoba Métis Federation*, this complaint about the majority judgment was disingenuous in that even if the Honour of the Crown could be described as "fiduciary duty-

88 *Iskatewizaagegan, supra*, note 1 at para 68.
89 *Manitoba Métis Federation, supra* note 64 at para 208, Rothstein J, dissenting.

light" (a contention with which I disagree), the recognition of Crown liability in a non-fiduciary context could not have been clearer in *Haida.*

Dickson correctly identifies the concurrent existence of two types of fiduciary duty: one that resembles the duties of a private law trustee, which comes into being when the necessary conditions are met (Dickson's "conventional" fiduciary duty)[90] and one that exists, if not at large, at least when dealing with the protection of Indigenous harvesting rights or the management of resources found in Aboriginal title lands (Dickson's "non-conventional" fiduciary duty).[91] However, Dickson's 2015 proposal that the Supreme Court of Canada "substantially resolve the fundamentals of Aboriginal law by explicitly confirming that fiduciary duties owed by the Crown to Aboriginal peoples in Canada arise only pursuant to the prevailing test in conventional fiduciary law"[92] was unrealistic at the time it was made. In its 2011 decision in *Alberta v Elder Advocates of Alberta Society*,[93] the Supreme Court rejected a similar proposal made by Justice Deschamps in *Beckman v Little Salmon/Carmacks First Nation.*[94] In her judgment, Chief Justice McLachlin confirmed that in addition to cases in which the Crown is placed in a situation analogous to a private law trustee, fiduciary duty applies "in discharging the Crown's special responsibilities towards Aboriginal peoples."[95] In two 2014 decisions referenced in Dickson's book, the Supreme Court of Canada described the Crown's duties regarding the management of Crown lands held by Aboriginal title[96] and the "taking up" of lands covered by Treaty 3[97] as being fiduciary in nature. Given the persistence of the Court in describing Crown duties that are not analogous to those of a private law trustee as a fiduciary and the fact that it is unlikely that such references can be expunged completely, Dickson's

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90 Jamie Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich, 2015) at 77.
91 *Ibid* at 85.
92 *Ibid* at 149.
93 *Elder Advocates, supra* note 19.
94 This unanimity extended to include Justice Deschamps.
95 *Elder Advocates, supra* note 19 at para 25.
96 *Tsilhqot'in, supra* note 30 at paras 2, 71, 80.
97 *Grassy Narrows, supra* note 70 at para 50.

suggestion runs the risk that all references to fiduciary duty could be conflated and result in the suggestion that the existence of a fiduciary duty invariably gives rise to the obligations owed by a private law trustee. The danger of this is illustrated by the attempts in *Yahey*[98] and *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*[99] to manufacture a cognizable Indigenous interest giving rise to a fiduciary duty out of a treaty right to harvest. In his 1987 article "Understanding Aboriginal Rights", Brian Slattery argues that Indigenous harvesting rights were *sui generis* property rights similar but not identical to the *profit a prendre* recognized by the common law.[100] He noted that in *Dick v the Queen*, Justice Beetz had expressly left open the question of whether Indigenous harvesting rights were personal or an interest in land.[101] But the non-fiduciary nature of the Indigenous harvesting right was confirmed by the Supreme Court of Canada in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.[102]

The threat posed by the conflation of the two separate fiduciary duties has been somewhat ameliorated by the November 2021 decision of the Ontario Court of Appeal in *Restoule v Canada (Attorney General)*.[103] This was an appeal of two decisions by the Ontario Superior Court of Justice, one of which was discussed in Chapter V with regard to limitation periods. The case concerns a claim by the Indigenous parties to the Robinson Treaties that

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98 *Yahey, supra* note 78.

99 *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City), supra* note 1.

100 Brian Slattery, "Understanding Aboriginal Rights" (1987) 66:4 Can Bar Rev 727 at 744.

101 *Dick v the Queen*, [1985] 2 SCR 309 at 315, aff'g [1983] 2 CNRL 134, (BCCA), aff'g [1982] 3 CNLR 167 (BCSC). Beetz cited "learned authors" who had suggested that *profit a prendre* might be an interest in land. Ken Lysyk, one of the authors cited by Beetz, had suggested that if the right to harvest was an interest in land, lands on which harvesting took place might be considered "lands reserved for Indians" and provincial legislation might be inoperable there despite the operation of section 87 [now section 88] of the *Indian Act, 1952.* Kenneth Lysyk, "The Unique Constitutional Position of the Indian" (1966) 45 Can Bar Rev 513 at 518. A 1978 Case Comment on *R v Kruger and Manuel* {which I discuss in Chapter I], Anthony Jordan criticized Justice Dickson's application of section 88 of the *Indian Act, 1970* to uphold two British Columbia harvesting convictions. Jordan made reference to a 1975 Nova Scotia case [*R v Isaac* (1975). 13 NSR (2d) 460 (CA) that referred to "Indian title" as "akin to a profit a prendre". Anthony Jordan, "Government, Two – Indians, One", Case Comment, (1978) 16 Osgoode Hall LJ 709 at 717-718.

102 *Mikisew Cree, supra* note 63 at para 51.

103 *Restoule v Canada (Attorney General)*, 2021 ONCA 779, var'g 2018 ONSC 7701, var'g 2020 ONSC 3932.

Crown had failed to meet its obligations set out in the clauses of the Robinson-Huron and Robinson-Superior Treaties that provided for annuities to be augmented should conditions precedent set out the relevant clauses were satisfied. The trial judge found in her first judgment that the Crown was required by both the Honour of the Crown and fiduciary duty to "engage with the process to determine if the Crown can increase the annuities without incurring loss."[104] She held in her second judgment that Crown immunity did not shield the Crown from claims arising out of that fiduciary duty.[105]

A unanimous Ontario Court of Appeal agreed with the trial judge that the Honour of the Crown was engaged by the case,[106] that annuities should have been indexed to mitigate the effect of inflation,[107] that the discretion of the Crown regarding the augmentation of annuities was justiciable and not unfettered,[108] and that provincial limitation of actions legislation is inapplicable to the claim.[109] However, the Court of Appeal also agreed unanimously that the trial judge had erred in finding that the Crown is under a fiduciary obligation with regard to the augmentation of annuities.[110] As a result, the Court of Appeal deleted references to fiduciary duty from the judgments in both of the decisions of the trial judge.[111]

In discussing fiduciary duty in more detail, the Court of Appeal held that the trial judge erred in holding that there was a "broad-based and substantive obligation of the Crown to implement the augmentation clauses."[112] Further, she erred in finding that in the Robinson Treaties the Crown agreed to act solely in the best interest of the Treaty beneficiaries since this would put the Crown in an inevitable conflict with its responsibilities to Canadian society as a

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104 *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 533, 538, var'd 2021 ONCA 779.
105 *Restoule v Canada (Attorney General),* 2020 ONSC 3932 at para 86, var'd 2021 ONCA 779.
106 *Restoule, supra* note 103 at para 87.
107 *Ibid* at para 92.
108 *Ibid* at para 88.
109 *Ibid* at para 91.
110 *Ibid* at para 89. Given the conclusion regarding the absence of a fiduciary duty, it is axiomatic that the trial judge erred when she concluded that Crown immunity did not shield the Crown from its breach of its fiduciary duty. *Ibid* at para 90.
111 *Ibid* at Appendix A.
112 *Ibid* at para 515, 583, Hourigan JA.

whole.[113] In the opinion of the Court of Appeal, the trial judge adopted a fiduciary approach because this "greatly expands the scope of available remedies," but the availability of remedies should not drive the analysis of determining whether a fiduciary duty exists.[114] Finally, the Court of Appeal concluded that while there is an element of private law duty in the treaty relationship, "that element is overwhelmed by the public law aspects of the relationship created by the Robinson Treaties.[115]

Notwithstanding the fact that Aboriginal title and fiduciary duty lack the significance suggested for them by commentators after the decisions in *Delgamuukw* and *Guerin* respectively, both continue to play roles in Canadian Aboriginal law. Given the predictions made about both of these concepts (and the potential combined effect of them) discussed in Chapter II, there is a certain irony that *Tsilhqot'in*, in which the Supreme Court found that the Tsilhqot'in Nation held lands by Aboriginal title and that the Crown owed a fiduciary duty in the management of these lands, was also the case that confirmed a substantial ongoing role for provincial governments in managing these lands.[116]

The Honour of the Crown governs the entire Indigenous-Crown relationship, and in much of Canadian law, including that governing the entire treaty relationship, it is the exclusive governing paradigm. The capacity of the Honour of the Crown to expand beyond acting as a shield to protect Indigenous harvesting and cultural rights through the duty to consult compelling the fulfilment of positive treaty obligations (primarily but not entirely through the operation of the Specific Claims Tribunal) is likely to continue.

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113 *Ibid* at paras 515, 584, 588, Hourigan JA.

114 *Ibid* at para 602, Hourigan JA.

115 *Ibid* at para 627.

116 Bruce McIvor and Kate Gunn, "Stepping into Canada's Shoes: *Tsilhqot'in*, *Grassy Narrows*, and the Division of Powers" (2016) 67 UNBLJ 146 at 160-166; Kenneth Coates and Dwight Newman, *The End is Not Nigh: Reason over alarmism in analysing the Tsilhqot'in decision*, Aboriginal Canada and the Natural Resources Economy Series, Number 5 (Ottawa: Macdonald-Laurier Institute, 2014) at 20.

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Recently the Honour of the Crown has emerged as a decisive consideration in a treaty implementation case involving private parties. *Herold Estate v Canada (Attorney General)* concerned the ownership of three islands located in Karchewanooka Lake, part of the Trent-Severn Waterway north of Peterborough, Ontario.[117] The area was included in the lands surrendered in Treaty 20, executed in 1818.[118] During the negotiation of Treaty 20, the Indigenous parties to it requested that all islands within the waterways within the surrendered lands be excluded from the surrender.[119] In 1818, the islands that were at issue in *Herold Estate* did not exist, but by 1855 they had been separated from the mainland by an increase in water levels resulting from dams constructed in the 1830s. In 1868 the Crown sold the lands adjacent to the islands to a third party[120]

The issue in the case was whether the islands were owned by the successors in title to the original patentee or the Curve Lake First Nation, Hiawatha First Nation, and the Mississaugas of Scugog Island, the successors of the signatories of Treaty 20.[121] In reversing a decision of the trial judge that the islands were the property of the former,[122] the Ontario Court of Appeal held that the Honour of the Crown required that the terms of Treaty 20 be construed liberally and that this required islands that did not exist at the time Treaty 20 was executed but did exist at the time the Crown disposed of the lands be excluded from the lands

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117 *Herold Estate v Canada (Attorney General)*, 2021 ONCA 579 at para 1, rev'g 2020 ONSC 1202.

118 *ARTICLES OF PROVISIONAL AGREEMENT entered into on Thursday, the fifth day of November, 1818, between the Honorable William Claus, Deputy Superintendent General of Indian Affairs on behalf of His Majesty, of the one part, and Buckquaquet, Chief of the Eagle Tribe; Pishikinse, Chief of the Rein Deer Tribe; Pahtosh, Chief of the Crane Tribe; Cahgogewin of the Snake Tribe; Cahgahkishinse, Chief of the Pike Tribe; Cahgagewin, of the Snake Tribe; and Pininse, of the White Oak Tribe, Principal Men of the Chippewa Nation of Indians inhabiting the back parts of the New Castle District, of the other part [Rice Lake Treaty No 20].* Treaty No 20 was also discussed in *R v Taylor and Williams* in Chapter 3.

119 *Herold Estate, supra* note 102 at para 8.

120 *Ibid* at para 3.

121 *Ibid* at footnote 3.

122 *Ibid* at para 2; *Herold Estate v Canada (Attorney General)*, 2020 ONSC, rev'd 2021 ONCA 579.

sold in Treaty 20[123] As such, the Court of Appeal held that the three first nations that were the successors of the Indigenous signatories to Treaty 20 were the owners of the islands.[124]

The one unknown for the future is the extent to which the exemption from limitation periods created by *Manitoba Métis Federation* will provide a remedy for those who have lacked one in the past (including but not limited to the descendants of former treaty bands). As discussed earlier in Chapter V, attempts by these groups to seek some redress for historic wrongs have not met with much success in Canadian courts, particularly with regard to procedural matters such as limitations, standing, or long delay as a result of lack of resources to pursue actions.[125] Nor are they able to take advantage of the Specific Claims Tribunal, because of the definition of "claimant" in its governing legislation.[126] In an analysis of *Manitoba Métis Federation*, Catherine Bell suggested that the Honour of the Crown "operates much like equity in some aspects and procedural fairness in others.[127] Equity originally emerged to knock some of the harder edges off the common law, which developed some of the characteristics of a *ius strictum*, law that functioned without any amelioration of its utmost rigour.[128] While the Honour of the Crown operates and will operate across the spectrum of Aboriginal law, its particular application in this one area would be welcome.

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123 *Ibid* at paras 82-83.

124 *Ibid* at para 86.

125 *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655, rev'd 2006 ABCA 392, aff'd 2008 SCC 14, [2008] 1 SCR 372; Indian Claims Commission Hearing, Friends of Michel Society: 1958 Enfranchisement Claim, March 1998; *Snake v the Queen*, 2001 FCT 858, aff'd *Kingfisher v Canada,* 2002 FCA 221; *Callihoo v Canada (Minister of Indian Affairs and Northern Development)*, 2006 ABQB 1, *Callihoo v Canada (Atorney General)*, 2015 ABQB 337; *Malcolm v Canada (Minister of Indian and Northern Affairs)*, 2006 ABQB 152.

126 *Specific Claims Tribunal Act,* SC 2008, c 22, s 2.

128 Catherine E Bell, "Developments in Aboriginal Law: The 2013-2014 Term – Honour, Equity, and Crown Process: Implications of *Manitoba Métis Federation* North of 60" [2015] 68 SCLR (2d) 1 at 3.

128 Edmund H T Snell, *The Principles of Equity*, 12th ed (London, Stevens & Haynes, 1898) at 5.

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of Indians inhabiting and claiming the territory or tract of land hereinafter described, of the one part, and Our Sovereign Lord George the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, of the other part. online <www.rcaanc-cirnac.gc.ca/eng/1370372152585/1581293792285#ucls21>.

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